
RUINS OF TIME

EXEMPLIFIED

IN

SIR MATTHEW HALE'S

HISTORY OF THE PLEAS OF THE CROWN

BY

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PREFACE.

A PRINCIPAL object of the present publication, is to contribute a few results of experience and reflection towards the adoption of a Code of Criminal Law, by which is herein meant, a consolidation conjointly of the Common Law, and of the Statute Law with its judicial constructions, according to a scientific arrangement, terminating all controverted questions, and expressed in a manner suitable to legislation of the present day; together with such amendments as are obviously dictated by justice and expediency.

As a consolidation of the entire Statute-Book is calculated to divert the attention of Parliament from the urgent occasion that, in the opinion of many, exists for a Code of Criminal Law, it may be pertinent, at the present juncture, to inquire, whether the two measures be not, for the most part, distinct from each other? and whether one must be nipped in the bud until the other be full blown?

With regard to Statutes alien to the subject of Criminal Law, it seems apparent that their consolidation can be of little or no use towards the structure of a Penal Code; whilst the previous Consolidation of the entire Statute-Book, containing from fifteen thousand to twenty thousand statutes, (either general, or including

general clauses,) though conducted on the meanest principles, must delay the Criminal Code to an inconvenient period, even if it may not be said of an undertaking to consolidate all the Statutes, in a fragmentary way, within two years, "the learned gentleman doth profess too much, methinks."¹

It is superfluous to inquire, whether a Consolidation of Criminal Statutes, apart from the rest of the Statute-Book, be a necessary or expedient preliminary to a Penal Code, because that consolidation has been already substantially executed by the Legislature. Acts passed purposely for consolidating and amending the Criminal Statutes concerning all the ordinary classes of offences, have left almost a sinecure for the Consolidator of the present day. For example, as regards a specimen of the operation in progress which has recently been exhibited, viz., "An Act for consolidating the Statutes concerning Offences against the Person," there was passed, in the reign of George IV. an Act in which all the Statutes then in force that had ever been passed on that subject down to its own date, were either repealed or consolidated. By that Consolidating Act of George IV., sixty-one Statutes were wholly or partially deprived of force : and, in consequence, when Lord St Leonards' Bill upon the same subject was framed and revised with painful circumspection, it was found that, after the alluvion of a quarter of a century, dating from the Consolidating

¹ "In my judgment, if we were to proceed on the principle advocated by the honourable and learned gentleman, so far from completing the work in two years, it would not be completed in *two centuries*."—*Speech of the Attorney General, Times, Feb. 15.* The first Bill is not yet in the Press, March 18.

Act, the number of Statutes, of which any repeal, though it were of a single section, was required in order to consolidate the law, was only *ten*.¹ Athos had been sailed through; there was no occasion for another legal Xerxes.

It has been represented by very high authority in Parliament, that the Consolidation of the Statute-Book, and nothing but the whole Statute-Book, was a *Novum Organum*, for want of a discovery of which all plans for Codifying the Criminal Law had hitherto failed. But it is to be remembered, that Sir R. Peel's Consolidating Acts, that were passed in 1827, were founded on the Report of Dr Lushington's Committee of the House of Commons, delivered in 1822. The *Organum Antiquum* and not *Novum* has been available for upwards of a quarter of a century. And now, when it is inquired, what has the Consolidation of the Criminal Statutes done in furtherance of *Codification*? we are answered; nothing, because the *Organum*, unless it comprise, not merely Criminal Law, but the *entire* Statute-Book, will not work.

In remodelling the Statute-Book, it is to be observed, that there are two very distinct operations to be performed: one, the consolidating of dispersed enactments in force, and making way for it by repealing what is to be more methodically re-enacted; the other, an eliminating of whatever has been or is repealed, or is

¹ These repeals were chiefly occasioned by the mitigation of the punishment of death, in various cases, at the commencement of the present reign; the statutes accomplishing which change, as well as the Consolidating Act of the 9th Geo. IV. required repeal with a view to their re-enactment collectively, but almost *totidem verbis*.

obsolete, or expired. The first process has already been substantially accomplished as regards the Criminal Statutes; the latter, that of expulsion, not consolidation, whilst it would appease the most popular complaints against the Statute-Book, is, as regards *Criminal Statutes*, the function of a legal scavenger, in performance of an Order of Removal. There are, perhaps, more statutes relating to crimes than to any other subjects that are well known to have no present force, but which contribute to make the Statute-Book heavy and dear. This nuisance, however, would be effectually removed by publishing a General or Criminal Statute-Book, which should not contain what nobody mistakes for law in force, or, for practical purposes, wants. When this is done, it will not materially facilitate the Codification of the Criminal Law, or the Consolidation of either of its component parts written or unwritten; measures which ought not to be made cast-aways, under the pretext of manufacturing a portable Statute-Book. To hold forth, that what is now doing will eventually be in furtherance of a Penal Code, is to imitate the stratagem of Macbeth's witches, in frustrating our hopes, whilst keeping the word of promise to our ears.

The Greek adage "A great book is a great evil," has been applied, with exaggeration, to the Statute-Book. Even as regards the Civil Statutes, Lord Campbell is reported to have said in the House of Lords, "All the Statutes which are usually required for reference, may be found in three octavo volumes compiled by Mr Chitty and Mr Welsby; when I am upon the bench, I

always have this work by me, and no Statutes are commonly referred to by the Bar which I cannot find in it." In like manner, there is a collection of all the Criminal Statutes of England apart from the rest of the Statute-Book, comprised in a pocket volume. There are, besides, tables of Criminal Statutes in force, expressly or indirectly repealed, obsolete or expired. And, principally, there are popular manuals of the classes of Criminal Statutes in ordinary use, with the invaluable accompaniment of judicial constructions, which it is not proposed to furnish, even in essence, in the *new little Book*. So that, as regards Criminal Law at least, the Statute-Book *in propria persona* is rarely consulted; nor would be, though it were attenuated from the size of a Falstaff to that of Justice Shallow, who, it was said, might have been "trussed, with all his apparel, into an eel-skin."

The indefinite and unnecessary delay of tarrying for a consolidation of the entire Statute-Book, is rendered more disheartening in prospect, by a reflection on the principles according to which it is intended that the work shall be executed. It is proposed to cut off all provocatives to controversy, by giving the Legislature back its own *ipsissima verba*; and leaving undetermined all questions that may have divided the legal world, and are stumbling-blocks to the community. But to republish Statutes, without incorporating the substance of the principal decisions of the Courts, whereby their obscurities have been cleared up, or may have been made the subjects of unsettled controversy, or whereby their texts may have been eaten out,

narrowed, enlarged, or distorted, is not to promulgate the Statute Law in force, but a delusive shadow.

Again, it has been justly stated by the Law Amendment Society, that "it would require greater knowledge of the Statute-Book than is possessed by any lawyer, however astute, to draw the precise line between the dead and the living law." Enactments may be repealed indirectly as well as expressly, and, after being expressly repealed, may, according to some opinions, have been resuscitated by the repeal of a repealing Act; besides which there are to be found what King James called "cross and *cuffing* statutes;"—knots which the Legislature has cut in the case of *Criminal Statutes*. What then becomes of the boast of any Consolidator, that he will present to Parliament something which may be assented to without discussion or delay, as being merely a faithful copy of its own enactments in a new order? He modestly declines to undertake the obvious duties of a jurist or statesman, whilst he fearlessly tenders his individual conclusions for the adoption of Parliament, upon legal quilllets touching the repeal of statutory enactments which have perplexed and set by the ears the astutest of mankind.

Further, if the Legislature, in the reign of Queen Victoria, enunciate clauses culled out of Statutes of all periods, without largely altering their diction or idioms, it will often not convey to modern ears their correct import, or conform to that interpretation which they have invariably received. It often matters much as to the sense in which Parliaments, as well as individuals,

are to be understood, according as they may have spoken in one or another century. To give the present Legislature tongues of so many reigns, is to attribute to it a mode of expression natural only in the Wandering Jew. Ancient Statutes were framed on different principles of draughting from those of modern date; and, accordingly, different rules of construction have been commonly applied to them; as for example, that of the *Equity of Statutes*, which Plowden calls their *kernel*, the law intended for the vulgar eye being only the *shell* of a *nut*. So the construction of enactments of every period is much influenced by other enactments of the same statute, or, as it is said, *ex visceribus Actus*, or of other contemporary Statutes on the same subject, or, what is called *in pari materia*; or by the antecedent state of the Common Law, or by Preambles, or other aids, which Lord Coke designates as *keys* to unlock the doors and *windows* to enlighten the chambers of Statutes. To huddle together, then, enactments of the Plantagenets, and Tudors, with those of later dynasties, and to divest them all of their natural appliances of elucidation, is like the practice of Napoleon I., who *consolidated* in the Louvre the altar-pieces and other *chef-d'œuvres* of eminent artists, which he had dissevered from the religious lights and shades, and holy associations with a view to which they had been imagined and contrived.

Moreover, there is great weight in the objection of the Attorney and Solicitor-General, that it is not by that desultory and fragmentary process of Consolidation

which is in operation, that any solid and permanent benefit can result to the jurisprudence of the country ; but that an analysis of the Statutes upon a philosophical basis, is to be desired by all who aspire to witness the jurisprudential fame of Justinian and Napoleon eclipsed or rivalled in England. The path which these Authorities point out, compared with the easy, noiseless and inglorious tenor of the path which has been preferred, may occasion regret that the *choice* which has been made, has not been that of *Hercules*.

Thus the Codification of the Criminal Law is postponed, in order to await the issue of an operation, not only tedious and irrelevant, and one which proposes to remedy, what, as regards the Criminal Law, is a chimerical grievance, but one, which, when executed, will, probably, be found to have much graver imperfections, even than excessive bulk.

The *Common Law* of crimes stands vastly more in need of consolidation than the Criminal Statutes. It is, at present, that *jus vagum et incognitum*, against which jurists and vindicators of freedom have strenuously protested. It is to be observed, that the definitions of crimes, the nature of punishments, and the forms of Criminal Procedure, originated, for the most part, in the principles of the most ancient Common Law ; but that most of the unwritten rules touching crimes have been modified by Statutes which assume the Common Law terms and definitions, as if their import were familiar to the community. The Common Law of crimes has, partly from humane, and partly from cor-

rupt motives, been pre-eminently the sport of judicial constructions. In theory, indeed, it was made for the state of things that prevailed in this Island, and the kind of people that inhabited it in the reign of Richard I. ; in reality, it is the patchwork of every judge in every reign, from Cœur de Lion to Victoria. Moreover, the Common Law of crimes has been already consolidated incidentally to the process of framing that Penal Code which has been prepared ; for, in four successive Commissions, the Commissioners were enjoined to consolidate the *unwritten* as much as the written law of crimes : the harvest is now ready for the sickle.¹

It is true, that any Consolidation of the Common Law of crimes, or of any other branch of Common Law, must give rise to diversities of opinion ; but such diversities will not be sensibly diminished by a previous Consolidation of the Statute Law, supposing that were not already *un fait accompli* in regard to Criminal Statutes. The stress which has been laid on the argument *quot homines tot sententiæ* as applied to the consolidation of the Common Law, is an admission, that few lawyers can agree upon what the Common Law is by which we are governed. No marvel, indeed, if disagreement should prevail concerning what is flexible and variable ; though requiring to be fixed the more in proportion as the difficulty of stereotyping it resembles

¹ "Did you ever consider the Consolidation of the Common Criminal Law independently of the Statutes? I would not wish to venture an opinion on Codification generally ; but, as far as Criminal Law goes, my own judgment is that it is practicable, and ought to be done."—*Dr Lushington's evidence before the Cr. L. Commissioners*. Such was the policy of Government for upwards of twenty years, but it has recently become crab-like and retrograde.

- that of which Pope complains in drawing the characters of Women.

Come, then, the colors and the ground prepare !
Dip in the rainbow, trick her off in air,
Choose a firm cloud before it fall, and, in it,
Catch, ere she change, the Cynthia of *this minute*.

It is not surprising, that the resolutions of many should be sicklied over with the pale cast of thought, at a contemplation of the heroic process of consolidating the entire Common Law, comprised, as it is, not in a book of some fifty volumes like the Statute-Book, but in a library of indefinite extent, or, as the Attorney General said, in a late debate, consisting of "hundreds upon hundreds of volumes." But the inference seems illogical, that even the most timorous should, on that account, suffer themselves to be diverted from an enterprise of such pith and universal concernment, and one so comparatively limited, and, after the lucubrations and toil already bestowed upon it, so comparatively easy, as the consolidation of the Criminal Common Law.

Independently of the questions which have been above canvassed concerning Consolidation, there remains to be considered the important subject of Codification. This is not the place to discuss its expediency, especially in Criminal Law, which is generally admitted; the point now controverted being, how to begin it? As to a Code of Civil Laws, the magnitude of any process involving a consolidation of the general Common Law may, perhaps, influence very cautious minds to begin with a separate experiment of a con-

solidation of the Statute Law, to be re-fashioned whenever the Common Law may be in a state fit to be blended with it in a composite form: a different policy from that pursued in building-leases, in which the ground landlord provides against the necessity of having to pull down and reconstruct at the end of ninety-nine years.

But, as regards the Law of Crimes, it may seem labour in vain, and loss of time, to build what there is an early prospect of rebuilding. Two Consolidations, one of Statute Law, and another of Common Law (which, thenceforward, must assume the denomination of Statute Law), would be preposterous, especially seeing how intimately united the Common Law and Statute Law of Crimes are, more than occurs in any other branch of Law. Accordingly the Criminal Law Commissioners were directed to report how far it might be expedient to combine consolidations of Common Law and Statute Law into "*one body* of Criminal Law," and, upon the receipt of their first report, they were enjoined by an order of a Secretary of State "to proceed in forming a digest of the Criminal Law, as well written as unwritten, into *one statute*." An amalgam of the two must, doubtless, be a great saving in point of bulk, besides being a safeguard of method, consistency, and uniformity; whilst it seems only the natural course, to prosecute simultaneously what is designed for mutual adaptation.

Alterius sic

Altera poscit opem res, et conjurat amicos.

The *Amendment* of the Law is a process not indissolubly connected with Codification more than Consolidation ; but it may be reckoned upon as the first-fruits of each. In computations, therefore, of time, the discussion of amendments incidentally and unavoidably occurring must be taken into account, even in the most unpretending Statutory Consolidation. It may be expected that the simple Consolidation of the Statutes upon the lowliest principle may exhibit the necessity of numerous amendments in enactments that by help of judicial constructions are made palatable to the present age, but which may often not bear Legislative repetition in their naked simplicity. When Sir R. Peel began to consolidate statutes, he perceived that the Legislature would be vilified by re-enacting statutory modifications of the Benefit of Clergy, Petty Treason, and Grand and Petit Larceny ; and accordingly their abolition was made the first step to his consolidations. Nor can the Legislature re-enact for the purpose of Consolidation, or any other purpose, various provisions in the Law concerning Offences against the Person upon which it is now pondering, without exposing itself to ridicule and contempt. Moreover, clauses, which, when separated by interstices of a thousand pages or more, and labelled with different titles, may not exhibit manifest inconsistency of principle, or diversity of language, may, when placed in juxta-position, realize Horace's misalliances in poetry—

Humano capiti cervicem pictor equinam
 Jungere si velit, et varias inducere plumas,
Undique collatis membris, ut turpiter atrum
 Desinat in pisces mulier formosa superne ;
 Spectatum admissi risum teneatis amici.¹

The Criminal Law Commissioners, in an early stage of their proceedings, assigned their reasons why it would have been a disgrace to the nation for the Legislature to have promulgated in the present day numerous anomalies, both in the Statute and Common Law of Crimes and Punishments, that were incompatible with the daylight of a code. The Commissioners were accordingly directed, in June, 1834, by a Secretary of State, to consider "what partial alterations may be necessary or expedient for more simply and completely defining Crimes and Punishments, and for the more effectual administration of Criminal Justice." This power of suggestive alteration and amendment, that was indispensable for the respectability of the Code, was expressly recognised, and again conferred by the Commission of Criminal Law issued in the eighth year of the Queen, under the advice of Lord Lyndhurst.

Some amendments, urgently recommended by the

¹ The full amount of the inconsistent *members* of the *Corpus Juris* will not be perceived until a consolidation of the Common Law is placed in juxtaposition with that of the Statute Law. Thus it may be said of many Common Law felonies, and modern Statutory misdemeanors in cognate subjects,

Non bene conveniunt, nec in una sede morantur.

So, a consolidation of Criminal Statutes will afford no adequate conception of the incongruities and imperfections of the General Statute Law, because they have, for the most part, been recently harmonised and modernised. The Bill concerning Offences against the Person, put foremost as a *sample* of the new plan, will, in this respect, not be found to correspond with the *bulk*.

Criminal Law Commissioners, as made apparent in the process of Codification, were deemed so eminently beneficial that they were adopted by the Legislature without waiting for the ratification of a Code, and, in the more important instances, the Commissioners prepared the statutes whereby their recommendations were converted into laws. Thus, among amendments originating with the Commissioners, or which were facilitated by their means, they paved the way to the modern Magna Charta of Religious Liberty for the removal of penalties and disabilities on the ground of conscientious belief;—to the allowance to prisoners of full defence by counsel;—to the substitution of secondary punishment for that of death, in most of the cases in which capital punishment had been previously inflicted;—to the more speedy trial and punishment of juvenile offenders;—to the removal of the incompetency of witnesses, with absurd restoratives of competency;—to the abolition of deodands;—to the allowance of a reasonable interval between sentence and execution after conviction for murder:—the noblest trophies of our age in the cause of Criminal Law Reform.¹

The Secretary of State for the Home Department recently eulogised the Acts passed in the twelfth year

¹ The Attorney General may find, or may have found, in the Reports of the Criminal Law Commissioners, urgent recommendations for the amendment of the Criminal Law concerning *trustees* and *bailees*. They have been unheeded for upwards of twenty years; but the recent transactions of Paul and Sadleir, seem likely, under the auspices of the Attorney General, to lead to a better law, though made, as Lord Bacon says laws ought not to be made, on the "spur of an occasion."

of her Majesty for facilitating the performance of the duties of Justices of the Peace out of Sessions, commonly called Jervis's Acts, as affording a most successful example of *Consolidation*: he should have said *Codification*, for the utility and practicability of which they furnish a cogent argument. They embrace a great deal more of what had been previously Common Law, than of what was statutory, besides containing sundry amendments; they are, in fact, a Code upon an isolated branch of Criminal Law. If these Acts had been confined merely to a Consolidation of Statutes, they would have perplexed, and misled by *ignes fatui*, instead of assisting the magistracy. Jervis's Acts were framed two years after the publication of a Report of the Criminal Law Commissioners, containing their first Code of Criminal Procedure, to a portion of which the Act concerning Indictable Offences will be found to exhibit an unmistakable family likeness: so much so, that we may think, how, in dubbing with a name, Americus occasioned an injustice to Columbus similar to that inflicted through Jervis on Starkie.

The East Indies, it may be expected, in the course of the present year, will have conferred upon them a *Code* of Criminal Law. A Code of Criminal Procedure for India, prepared by the Master of the Rolls, the Chief Justice of the Common Pleas, Sir E. Ryan, lately Chief Justice of Bengal, with very competent colleagues, is in a shape to be immediately passed by the English Legislature; but it is to be sent to India, probably owing to that Codiphobia for England with

which the Government is now afflicted. A Code of substantive Criminal Law is on the point of being promulgated by the Indian Legislature. This is, in fact, a Code, with modifications, that was framed twenty years ago. The principal cause that has hitherto delayed its promulgation, has been a reasonable expectation, from year to year, that a Code of Criminal Law would be made and published in England. For the Indian Code grappled, with more or less felicity, with the numerous anomalies in the English Common Law of Crimes; the substantive Criminal Law adapted to the two countries being not materially affected by local circumstances; and it was of manifest importance, especially to British subjects in India, that, where no local distinctions intervened, there should be an uniformity of Criminal Law between the Colony and the Mother Country. Such an uniformity must now be abandoned; for the Indian Legislature will, doubtless, not stultify itself by enacting *simpliciter* the crudities of the English Criminal Common Law; nor by proclaiming to the People of India, that their lives and liberties are governed by flexible rules. The English Legislature and Government authorise and enjoin *Codification* of the Criminal Law in India, whilst they repudiate it, or postpone it indefinitely under ingenious excuses, for England; as if they acted upon the maxim of the early physicians, "*fiat experimentum in corpore vili.*"

From the above considerations it may be inferred that the reason which has been sometimes assigned for postponing the Codification of the Criminal Law, viz.,

that it is expedient for the accomplishment of this object, as an indispensable preliminary, to consolidate, not only all the Criminal Statutes, but all other Statutes, is so frivolous as not to be the genuine reason. It is more probable, as regards some of the postponers at least, that they may have thought it indecorous to act in opposition to the Judges, though not converts to the opinions recently declared by them to the Lord Chancellor in favour of *flexible law*; opinions which have never found an echo in either House of Parliament. Other postponers have avowed, that any further approximation to a Code, whether of the Criminal Law or of the entire law, beyond a simple repetition of enactments *in ipsissimis verbis*, is, in their judgments, a degree of social progress and a state of felicity only to be attained under an absolute monarch. Another more disingenuous class of postponers may have felt, that the task of Codification is more thorny, heart-eating, and self-tormenting, than that of Consolidation; and that the former, even though it be confined to a Penal Code, may be dexterously averted by a talk of the latter however impertinent; the Consolidation of the Statute-Book they may have conjectured to be calculated for amusing the public, and distracting its attention from a Penal Code, like a *tub* thrown to a *whale*.

The design of a Criminal Code, and of important Amendments incident thereto, which was on the eve of enactment, has now stagnated for four years. In 1853, the Judges were consulted upon the policy of passing Lord St Leonards' Bill, for the Consolidation

and Amendment of the Criminal Law on various matters, and, particularly, the subject of Offences against the Person. The Judges consulted returned unfavourable, and, in many instances, angry or sarcastic answers, in which the chief gravamen was, that the flexibility of the Common Law was in danger: whereupon the projected Code of Criminal Law was postponed until after the entire Statute-Book should be consolidated. The proceedings bore some analogy to the custom of ancient Rome, where, as often as the People were assembled, before business was allowed to commence, there took place a consultation of the Auspices by the Augur; he was to discover whether the sacred chickens peevishly tossed aside with their beaks the food offered to them, or blandly and gratefully took it without its sticking in their gizzards. In the former event the Comitia were forthwith adjourned with the official words, *Alio Die*.

A Special Committee of Peers, who had sat eleven times, for four or five hours each, on the incubation of Lord St Leonards' Bill, were shortly afterwards constituted Commissioners for Consolidating the Statute-Book; from being *grubs* of Criminal Law, they were transmuted into *butterflies*, licensed to range over the wide expanse of legislative creation. After some years spent in unproductive fluttering¹, an eminent Lawyer

¹ In a Report published and circulated by the Law Amendment Society, of which Lord Brougham and Lord Campbell are members, the failure imputed to the Commissioners is palliated by a suggestion that "Most of the Members are lawyers, who hold high judicial or official positions, and whose time is fully occupied with arduous public duties; while the remainder are eminent men who cannot fairly be expected to bestow much thought on so repulsive a subject as the

has assumed the office of the Procrustes (who is fabled to have cut down giants to the size of his own little bed) of the Statute Book; thereby, as it may appear, setting caps on the heads of all the Commissioners (sette hir aller cappe *Chauc.*) The plan of Consolidation about to be followed is precisely that one of the three plans for consolidating the Statute-Book explained and canvassed by the Criminal Law Commissioners, which they reported to be the most pacific, but least efficacious.

It is believed that the learned draughtsmen who prepared Lord St Leonard's Bill, were instructed by the Lord Chancellor to detach from its mosaic-work so much as was composed of statutory consolidation; and it is probable that Sir F. Kelly's bill, which is acknowledged to be taken from the armoury of the Statute Law Commission, may be the result of this process of subtraction. The new Bill for consolidating Statutes concerning Offences against the Person has no higher aim; it will make the Statute-Book heavier for at least two years; and, whenever a more compendious Statute-Book shall be published, it will indicate what in the

Consolidation of the Law." The learned Society would appear to have regarded the Commission in the light of Horace's metaphorical *Ship*.

Quamvis Pontica pinus
Sylvæ filia nobilis
Jactes et genus et nomen inutile,
Nil pictis timidus navita puppibus
Fidit: tu, nisi ventis
Debes ludibrium, cave.

O, *quid* agis? fortiter occupa
Portum. Nonne vides, ut
Nudum *remigio* latus!

case of Criminal Statutes has been already indicated, the thousand pages or more of rubbish that may be carted away¹. This scavenger-like achievement may be regarded as similar to that of a certain Knight in the *Faery Queen*, both in point of condescension in the talented Operative, and its inadequacy for the purification of the Criminal Law. Spenser is describing the well-meant attempts to cleanse *Babe's bloody hands*.

Then soft himself inclining on his knee,
Down to that well did in the water weene,
(So love doth loathe disdainful nicetie,)
His guiltless hands from bloody gore to cleene.
He wash'd them oft and oft, yet not they beene
For all his washing cleaner; still he strove,
Yet still the little hands were bloody scene!

It may appear to those who have not lost their faith in the expediency and practicability of a Code of Criminal Law, and who deplore the delays to which it has been subjected, and which are looming in the future, a serviceable labour to diffuse among the community a knowledge of what our penal jurisprudence really is. As Mr Napier (a gentleman whom the Author is proud to number among his early disciples) intimates, that, for the purpose of law reform, it may be expedient to take a hint from the Eastern story of Aladdin's lamp, which was a very old lamp, but was found to have secret powers that were evoked when it was rubbed; so, in the present work, Sir M. Hale's old History of the

¹ According to a list published in 1828, the Criminal Statutes repealed amounted to two hundred and six, besides fragments.

Pleas of the Crown, has, with a view to a reform of the Criminal Law, been subjected to assiduous friction.

Besides the Reform of the Criminal Law, another object has been kept in sight in the present disquisition, viz., utility to students who have placed before them Sir Matthew Hale's treatise, the most famous book ever published on the subject of the English Criminal Law. To pursue a metaphor of Lord Bacon, it is a book which, in the present day, is rather to be tasted than devoured; in which respect a student may derive benefit from the suggestions of one who has eaten his way through all which is unpalatable, indigestible, or mouldered.

Sir Matthew Hale died in the year 1676; and the last edition of his treatise was published in the year 1800; there is not any institutional work of reputation upon Criminal Law which has been published or republished for upwards of twelve years. The attempts of our institutional writers to keep pace with the Law in its rapid vegetation, may be compared to the operations of that slow barber of antiquity, whose beards grew again before he had done shaving :—

*Entrapeles tonsor, dum circuit ora Luperci,
Expungitque genas, altera barba venit*¹.

¹ "It is not unknown to many of the legal profession, that, for nearly twenty years, I have been laboriously engaged, at every interval of leisure, in preparing an edition of Blackstone's Commentaries; but so vast have been the changes effected, increasing latterly in rapidity, number, and magnitude, that I have

Mr Justice Coleridge, in a letter to the Lord Chancellor recently published, writes, "At present, the student reads his Russell, or, it may be, East: he refers to Hale and Hawkins: he studies the Crown Cases Reserved which have been published since the last edition of Russell; and he easily keeps up, and notes in his Russell the two or three numbers which may come out in a year of the decisions of the Court of Criminal Appeal. This is no very laborious or expensive course. I agree that it is too narrow and superficial to make a great Crown Lawyer¹." The learned Judge would, probably, have included Sir Michael Foster's Discourses, and the State Trials, among other books, had he been forming a great Crown Lawyer, and not catering for a sciolist. But of the books so recommended by a Judge eminently endowed with law and literature, it is to be noticed, that the last republication of Russell is in 1843; of Hawkins in 1824; of Hale in 1800. East's book was published in 1803, and bore an exorbitant price until it was superseded by Russell's. The cost of Russell is £4; other institutional works of reputation upon Criminal Law are rarities and articles of bargain.

With regard to *republications* of old law books by modern editors, it may be observed, that they, usually,

been reluctantly compelled to give up the hopeless task, having toiled after the Legislature in vain."—*Preface to Warren's Abridgment of Blackstone.*

We write on sand, our language grows,

And, like the tide, our work o'erflows.

Waller.

¹ The learned Judge's object is to show how *easily* a *student* may acquire law without the aid of a *Code*. According to the same authority, the *Public* have an easier road to all the law they want, viz., *tradition*, still without occasion for a *Code*. The learned Judge has not imparted his opinion as to the fountain from which Country *Magistrates* are to fill their legal buckets.

exhibit a painful struggle to preserve the semblance of a famous Author's identity, (a *sine quâ non* with the Sosii) after the reality of it has been immolated to modern utility. This dilemma is encountered, either by means of notes appended at the bottoms of pages, which, like barnacles adhering to the bottoms of ships, eat out the text, and retard the reader's progress: or else, by engrafting new scions on the old roots. This latter process is attended with a result similar to that of pouring new wine into old bottles, the ending of a paragraph often destroying the effect of its commencement; or else consistency is maintained by throwing what the Author intended for dictation, not history, into the past tense. But, in spite of all contrivances, there is apparent a duality of mind as regards reflections, sentiments, and tastes, that emanates from a mystical union of the Author with his Editor. Moreover, the old materials, preserved for identity's sake, so encumber and overshadow the new, as to suggest the similitude of spectacles placed on the nose and a pouch on the side of an infant mewling and puking in the nurse's arms.

Another important object kept in view throughout this treatise, is that of drawing attention to the progress of the English Nation in social order, morality, and happiness, and the prospect thus afforded of the gradual and asymptotic approximation of the nature

and condition of man, under Providence, to perfection. This view, it is conceived, is perpetually suggested by a contemplation of the *ruins* of Sir M. Hale's History of the Pleas of the Crown, that tell the story of what, two centuries ago, was regarded as appropriate to the circumstances, and in harmony with the sentiments of society, and was extolled as the acme of juridical wisdom.

ST. IBBS, HITCHIN,
March 20, 1856.

A. A.

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CHAPTER I.

GENERAL OBSERVATIONS ON SIR MATTHEW HALE'S HISTORY OF THE PLEAS OF THE CROWN.

THE History of the Pleas of the Crown has had no rival among treatises on the Criminal Law of England for authority, influence, and reputation. As to pre-Hale authors from the reign of Henry II. when Glanville wrote, to that of Charles II. lawyers, in intricate cases, may sometimes be rewarded by conjuring up their venerable shades; but it has been found a general convenience, in criminal matters, to possess some writer of repute, not quite two centuries old, who might be resorted to as detailing what was chiefly valuable in the law-books of four previous centuries, or in the maze of oral traditions; besides establishing a standard of orthodoxy, by which ancient controversies might be silenced. Moreover, it was useful to have an accredited architect who might fill up chinks in the legal edifice that were gaping. As some persons have been converted to the Roman Catholic faith through anxiety to exonerate their minds from a multitude and diversity of opinions, or to supply the want of texts, so the community felt a desire for the installation of a Pope of Criminal Law.

Sir M. Hale was peculiarly qualified for the Papal Chair. By his more enthusiastic admirers, and especially those who, from a variety of motives, found it convenient to arm themselves with his authority, or who have sought to adorn a biographical tale, he has been extolled beyond any judge that ever lived. Had a remote age been blessed with him, he would, after death, have been fabled to have superseded Minos, Æacus, and Rhadamanthus, the Chief and Puisnes of a renowned court of last

instance. More unequivocal eulogies are supplied by a clever political opponent, Roger North, who relates that Sir M. Hale "had acquired an authority so transcendent, that his opinions were, by most lawyers and others, thought incontestable;" that North's brother, Lord Keeper Guildford, "revered him for his great learning in the history, law, and records of the English Constitution;" although the envious Lord Keeper was "much concerned to see the generality, both gentle and simple, lawyers and laymen, idolise him, as if there had never been such a miracle of justice since Adam;" that (what may appear a marvel in the reign of Charles II.) "his foible was a leaning towards the popular."

It will not be surprising, if writers subsequent to Sir M. Hale have stated absolutely many things which he has delivered under various degrees of assent and modifications of doubt. What, in their opinion, would be the use of Hale, if he gave us new queries for old ones? The same may be said of Hale, as Dr Burns, in the Preface to his well-known work concerning Justices of the Peace, complains of in regard to Dalton and Hawkins, that "subsequent writers have omitted such expressions as '*it seemeth,*' or '*it has been said by some,*' or '*it seems to be agreed,*' or '*it seemeth to be the better opinion;*' or the like," which, he says, are "by no means arbitrary words, without much meaning; but are inserted with the utmost deliberation and judgment."¹ These ancient writers advanced timidly over such slippery ways as those of the Common Law; but by suppressing their misgivings, and rushing in where they trod with alarm, an easy passage has been opened by their successors over the legal Alps.

Neither will it appear strange, if some decisions of mean or odious origin, and which are entitled to no weight of their own,

¹ Sir M. Hale uses most of these modes of hesitation, besides others, as, "but this is but hearsay," "it might be a question," or, in Latin, to the wise, "*sed tamen quære,*" and "*quære de hoc.*"

have acquired a factitious importance from being recorded simply as precedents in Sir M. Hale's treatise: like insects in amber, which are themselves neither rich nor rare, but which are made precious by the mausoleum wherein they are entombed.

Sic modo quæ fuerat vitâ contempta manente,
Funeribus facta est nunc pretiosa suis.

Nor is it to be expected that Sir M. Hale's treatise should not have been made the instrument of an abuse arising from that compendious statement of circumstances, which, in a general treatise, is the *operis lex*. A case is descanted upon, as mathematicians reason upon cannon-balls projected in vacuo, or physiologists upon skeletons; but the recurrence of the identical circumstances detailed by Hale, denuded of all others that may be material, is in the highest degree improbable, unless, perhaps, in a special verdict, or at that æra of recurring events, when the ancients thought that the Trojan war would be fought over again. Modern writers and judges, however, too frequently treat a decision to be found in Hale upon particular facts, as a presumption of law arising from those facts, and which no additive circumstances can qualify; as if the mathematician were not to alter his conclusions on the admission of air, or the physiologist his reasoning when dealing with creatures of flesh and blood.

Sir M. Hale has not extended his supremacy over the entire See of the Criminal Law; and therefore, when Lord Campbell writes of his History of the Pleas of the Crown, that it is a "*complete* digest of the Criminal Law as it existed in Sir M. Hale's day," he must be understood as expressing, in an equitable sense, that what was intended to be done was done. Sir M. Hale, however, says of his own work, "In the first book I will consider of capital offences, treasons, and felonies; which book will be divided into two parts. 1. The enumeration of the kinds of treasons and felonies, as well by Common Law, as by Acts of Parliament. 2. The whole method of proceeding in

or upon them. The second book will treat of matters criminal, that are not capital," (these included, in Hale's time, perjury, libel, conspiracy, nuisance, riot, *cum multis aliis*). "The third book will be touching franchises and liberties." Sir M. Hale did not execute more than the *first* book; the second was, as conveyancers have written, *in nubibus*, or *in gremio auctoris*. Hawkins apologises for writing his esteemed work on Criminal Law upon the ground that he did not presume to beautify Hale's fabric, or merely fill it with modern furniture, but added new compartments which Hale designed, and for which he was collecting materials till his dying day, but which he did not live to build. Like the Roman projector,

Tu secunda marmora
 Locas sub ipsum funus, et sepulchri
 Inmemor, struis domos.

The materials chiefly employed by Sir M. Hale are the treatise of Staundforde, a judge in the reign of Philip and Mary, who set the first example of writing expressly on the Pleas of the Crown, and who afforded a model for the arrangement of the subject, which has generally been followed by subsequent writers; Dalton, the coryphæus of a tribe of authors on the duties of Justices of the Peace; and Sir E. Coke's Third Institute, his MS. of which had been seized when he was on his death-bed, and was published after his decease by its liberators. To these text-writers are to be added the Statutes, which, in Hale's time, were portable by the hand, instead of requiring, as now, a horse and cart; the Reports, then a moderate thicket, instead of, as now, an overgrown forest; together with a few interesting cases, of which Hale himself *pars magna fuit*. He frequently quotes (with Latin references, as words to the wise) manuscript decisions, *ex libro Twisden*, *ex libro Hyde*, *ex lecturâ Cooke*, and more than all, "*ex libro domini Bridgman manu sua scripto*;" thus affording an early precedent for a subsequent abuse,

whereby the lives of men often hung on the contents of a judge's pocket.¹

Hale's resources in comparative jurisprudence were limited, and savouring of severity, being confined to the Laws of the Jews, Greeks, and Romans. In some branches of science connected with jurisprudence and law, Hale's mind was like that of an untutored Indian. It was not till just a century after his decease that Adam Smith founded political economy, a science which exhibits the fallacious basis of a large part of our ancient Criminal Law; and, about the same time, that Howard became the founder of Prison Discipline, which made our gaols a substitute for the gibbet, without inflicting sufferings within their walls revolting to humanity, and redounding to no public use. Medical jurisprudence, which, even at the present day, has not removed all discrepancy between the sciences which it connects, was not so far advanced in Hale's time as to preserve him from observations which now cannot be read without a titter. Classical literature was open to Hale; but he seems to have despised the foreign aids of illustration and ornament.²

¹ East, in his preface to his Pleas of the Crown, announces that he gives the world the contents of eleven sets of MSS., chiefly of deceased judges, or, what Foster calls "the rummage of dead men's libraries." Leach, in his preface to his edition of Hawkins, acknowledges with "pride and gratitude, the favor and friendship" which had enabled him to open new sluices of Criminal Law—Archbold plumes himself on promulgating the MSS. of Baron Vaughan. Russel and Ryan (the latter now a distinguished member of the Privy Council) imparted to the world a series of manuscript decisions on Criminal Law pervading a quarter of a century *uno flatu*.

² The classics illustrate and embellish the commentaries of Blackstone and of Kent. Lord Tenterden, in his treatise on shipping, does not disdain to borrow an apt illustration from Juvenal. Coke, in half a page, on the subject of the Court of Chivalry, quotes extracts from Lucan, Tacitus, Seneca, Cicero, Sallust, Aristotle, Vegetius, Lipsius. As a specimen of his quotations, in treating of the Court of the Forest, he writes, "And seeing we are to treat of game and hunting, let us (to the end we may proceed the more cheerfully) recreate ourselves with the excellent description of Dido; that Doe of the Forest, wounded with a deadly arrow stricken in her, and not impertinent to our purpose," He then quotes six lines beginning—

Uritur infelix Dido, totâque vagatus
Urbe furens, qualis coniectâ cervæ sagittâ, etc.

As to Sir M. Hale's use of his materials, he is said by a very high authority, to have "beautifully methodised the code he found in force;" nevertheless, his statutable felonies, the series of which is not carried lower than the reign of James I., are placed, as he writes, "in order of time, according to the series and order of the reigns and years of the several kings wherein they are enacted, only where I meet with any felony in the time of any king's reign, I shall, as near as I can, bring together those Acts of Parliament both before and after that concern the subject;" and this for a reason, as he tells us, that it is "hardly possible to reduce the titles of them under any dependent method, and difficult to digest them under heads." And so of the order of his cases he writes on one very important occasion, what may appear to have been his general practice, "Particular instances will best illustrate this whole learning, which I shall subjoin, though somewhat promiscuously, as they occur to my memory." The student may, perhaps, have reason to complain of a quasi-chronological method of felonies which is after the model of an almanac or parish register, and of the marshalling of cases by the rule of Sir M. Hale's memory. It may be found, also, that many of Hale's cases occur in chapters, where they appear like sheep that have lost their shepherd, and got into a wrong fold.¹

A judge's law-book will generally be subject to a disadvantage from the delicate situation under a sense of which he must write; for in publishing any criticism upon law, he may be

¹ Perhaps this defect may be, in some measure, owing to Sir M. Hale's practice of making additions to his MSS., in any place where he had room for them, without any note of reference, whereby, as observed in the Preface to the first edition of the Summary, transcribers were often misled. The chapters adverted to in the text, occur in the unrevised part of the *transcript*; as for example, the chapter on manslaughter, most of the rules and illustrations of which have gone astray, and are to be found in other folds. The matter concerning general exceptions to criminal responsibility at the commencement of the work is frequently repeated under the separate heads; thus the boy tried for arson before Hale, at Thetford, is, in his book, twice hanged by him.

condemning what, the next day, it may be his duty to uphold and enforce; like Waller's eagle killed by an arrow, on which he perceived a feather of his own, a judge must be apprehensive of being transfixed by his own book. Perhaps, for this reason, Sir M. Hale, though he does not, like Blackstone, lend the aid of genius to whiten those sepulchres of the law that within are full of uncleanness, yet, he usually details established doctrines, however revolting to common sense, or abhorrent to humanity, without making any sign that his judgment disapproved, or that his feelings were shocked. He can, for instance, with his pen, burn a woman, or a heretic, or disembowel a traitor, (*ipsis, ipso, or ipsa vivente,*) hang a witch, press a taciturn man or woman to death, corrupt blood, or cut off ears and slit nostrils, without hinting dislike at the disproportion, impolicy, or barbarity of such outrages on human nature. He can dismiss a man to his home, and a woman to the gallows for the same offence, without further remark than, that it is by the law of clergy.

With respect to Sir M. Hale's "leaning towards the popular," which is objected to him by Roger North; some passages of his treatise may appear to have a contrary leaning towards Indefeasible Right: they have afforded, as Sir M. Foster has pointed out, a triumph to the enemies of civil liberty, and of the revolution. "It cannot be denied," writes Sir M. Foster, "that Sir M. Hale hath, in his writings, paid no regard to the principles upon which our present happy establishment is founded." Nevertheless to Sir M. Hale is to be ascribed the merit of having stood alone against all his colleagues, and that under Charles II., in resisting the growth of the doctrine of constructive treason.

Victrix causa Deis placuit, sed victa Catoni.

In the reign of Charles II. convictions for felony were a matter of personal concern to the Sovereign, who profited largely by escheats and forfeitures, and often granted them to his courtiers in anticipation of convictions. Nevertheless, Sir M. Hale

yielded a benevolent concurrence with the irregular artifice, by which the Criminal Law has been disfigured, of evading capital punishment by constructions *in favorem vite*; nor can his sanguinary persecution of old women for witchcraft be attributed to inhumanity, but a puritanical education.

Tantum religio potuit suadere malorum.

The chief instances in which Sir M. Hale breaks through the trammels of an historian, by which he was too strictly fettered, are where he presses the weight of his authority to inculcate caution and mercy on the trials of prisoners, and records several grievous instances of the mistakes of justice. If he had written no more than his suggestions on this subject, he still would not have written in vain; for they have exercised a salutary influence on the administration of criminal justice in England, the prudence and humanity of which have been owing, in a considerable degree, to the precepts and the example of Sir M. Hale.

With regard to the Ruins of Time exemplified in the History of the Pleas of the Crown, (an appendix to Spenser's Ruins of Time) it is to be recollected that this treatise was written about two hundred years ago, and that there has been no edition of it published within half a century. It has not been patched like Blackstone's Commentaries, that will soon resemble Sir John Cutler's *silk* stockings, from which every particle of silk had been displaced by darnings of worsted. The chief causes of decay have been: *First*, statutes; by which parts of Sir M. Hale's edifice have been pulled down, and either left prostrate, or rebuilt after a different fashion: thus, the entire physiognomy of the Criminal Law has been metamorphosed by the statute abolishing Benefit of Clergy. *Secondly*, alterations of the Common Law; —for, although Sir M. Hale writes, that the Common Law cannot be changed, unless by Act of Parliament, yet, in reality, as will plainly appear from the following pages, much of Sir M. Hale's

Common Law has been washed away by subsequent currents of legal decisions.¹ *Lastly*, the progress of opinion—whereby principles and rules deduced or confirmed by Sir M. Hale are now tottering to their fall, and are only left standing by supineness; or as they are propped up by excessive dread of innovation, and worship of antiquity; or as they are maintained by the prejudice and inveterate habits too commonly remarkable in high places. In these respects, the History of the Pleas of the Crown, like the decayed oak of Lucan, has lost much of its pith, though but little of its fame and reverence.

Stat magni nominis umbra,
 Exuvias veteres populi, sacrataque gestans
 Dona ducum; nec jam validis radicibus hærens,
 Pondere fixa suo est; nudosque per aera ramos
 Effundens, trunco, non frondibus, efficit umbram.
 At quamvis primo nutet casura sub Euro,
 Tot circum silvæ firmo se robore tollent,
 Sola tamen colitur.

If Sir M. Hale were now to revisit Westminster Hall, which he adorned by his learning and virtue, he might feel like one of the Seven Sleepers in the legend of the church, who fell asleep in a cave whilst Rome was Heathen, and woke after it was

¹ Lord Campbell, in his life of Lord Erskine, gives a striking instance of *all* the judges agreeing upon a point of Common Law, which he himself thinks was no such thing, an opinion, than which there is none of higher living authority, and which, moreover, he shares with the Legislature; he writes, "I rejoice always to think that Fox's Libel Bill passed as a *Declaratory Act*, though all the judges unanimously gave an opinion, in the House of Lords, that it was inconsistent with the Common Law." Lord Bacon writes, "the cases of modern experience are fled from those which were adjudged in former time." In the time of Hale, the punishment of death kept the Common Law in a state of compression; when that became relaxed, there was no limit to its expansive power. Mr Baron Parke observes, "It cannot be doubted that if, at this day, the punishment of death was assigned to larceny, and usually carried into effect, the appropriation of lost goods would never have been *held* to constitute that offence." The Common Law may be divided, like the Comedy of ancient Greece, into the *old*, the *middle*, and the *new*.

Christianised. Confining his attention to the criminal courts, he would observe a fifth judge added to the Court of Queen's Bench, and, with his colleagues, not removable, as judges were in his own time, at the pleasure of the Sovereign; a new Court of Criminal Appeal, that frequently gave reasons, and always heard arguments;—he would hearken to indictments and pleadings all in his mother-tongue, curtailed of many idle averments, such as the length and breadth of wounds, or prices of instruments of death, and amendable;—he would marvel at the alterations which have occurred in substantive offences, with regard to which he would particularly miss forestallers, Egyptians, usurers, and, more than all, witches;—he would observe how felons had witnesses sworn, and how counsel made speeches for them;—he might find Roman Catholics and Quakers not quailing under trial, but in a jury-box; and interested or infamous witnesses delivering testimony for what it is worth, without those restoratives of competency, ridiculed by Bentham, a burning iron, a great seal, a little seal, and an attorney-general's tongue;—he would be struck by the exceeding rare use of the judge's *black cap*; by the cessation of all inquiry into the *flight* of prisoners, or into their capacity of reading to the judge's chaplain; by the absence of batons an ell long, and tipped with horn, to thrash out the *right* in appeals for murder, rape, or other felonies;—he would be surprised at the mollifying changes which punishments have undergone; observing no longer eviscerations of living men, a furnace in the middle of a court of justice to heat irons for branding thumbs, or amputated ears, slit noses, pillories for triumph or death at the will of a mob, ducking-stools for quenching the censoriousness, not perhaps groundless, of old women; bodies of criminals dissected, hanging in chains, or buried at cross-roads, stakes for burning heretics and women. A *press-yard*, indeed, remains, but no one pressed to death in it, and Tyburn without its processions, save that of the immortal Idle Apprentice of Hogarth.

Two causes, in particular, have operated, since Sir M. Hale's day, in obliterating or remodelling our ancient Criminal Laws. In the first place, as laws are the handmaids of national improvement, they have been accommodated to the habits and wants of a people quadrupled in population since the reign of Charles II.; enriched by the marvels of manufactures, whose great achievers were born a century after Hale; and by the inclosure of lighthouse-lighted wastes and feudal forests, in his time infested by outlaws; also by the growth, during two centuries, of a commerce unparalleled in the history of the world; and together with augmented wealth, possessing powers of action and intercourse multiplied by steam and electricity. Our Criminal Laws have, moreover, yielded to the genial influence of civil and religious liberty, which dawned with the setting of that dynasty under which Hale lived;—they have participated in the unremitted progress of every science, moral and natural;—their severity has been mitigated by the general diffusion of religious and humane sentiments, which have been manifested in sympathy with the poor and ignorant, aversion to needless suffering, horror at cruel and barbarous punishments, and an anxious solicitude for human life.

Secondly, our ancient Criminal Laws have, in many instances, mouldered away since Hale's time, owing to that enlarged experience in the science of jurisprudence itself, which has been gathered during an interval of two hundred years. The impolicy of capital punishments in almost all, if not all cases, of stigmatising punishments universally, has been recognised. The mischiefs arising from the Sovereign retaining a personal interest in confiscations have been inculcated by dear-bought lessons. The injustice has been felt of the Benefit of Clergy, making one law for priests, another for peers, another for commoners, and another, severer than the rest, for women. The freedom of the Subject has been found to demand stricter securities against secret or protracted imprisonment; for Hale did not live to

witness the passing of the Habeas Corpus Act. Improved provisions have been wanted to obviate the packing of juries, to ensure their immunity, and to define their legitimate powers; England, at Hale's decease, had yet to admire her second Hampden in a Bushell, and champions of her jury in Erskine, Camden, and Fox. The injustice and inconveniences have been felt of those makeshifts of infantile jurisprudence, Constructive Offences. The hurried execution of prisoners convicted of murder has been found to illustrate, by fatal experience, the policy of the rule—

Nulla unquam de morte hominis cunctatio longa.

The evasion of justice, arising from an over-technical procedure, has obtained a remedy,—for Hale tells us that half the prisoners indicted in his time escaped owing to *flaws*. It has been deemed unreasonable and impolitic that prosecutors and witnesses should, as Hale himself lamented, go without compensation, and thus be aggrieved for their services to criminal justice. Among numerous other abuses which have been judged to need correction, is that one which first lighted the flame of philanthropy in the bosom of Howard, the dragging back acquitted prisoners to their cells, in order to satisfy the fees of gaolers. The law of witnesses, whether incapacitated from interest or infamy, or unsworn for a prisoner, (for which Hale said that he could not perceive the reason,) and other usages of criminal trials, particularly the denial of full defence by counsel to prisoners accused of felony, have required amendment, where their obvious tendency has been, for centuries, to distort or exclude truth.

If Sir M. Hale's treatise, a production of the reign of Charles II., did not abound with Ruins in that of Victoria, it would be a solecism in the history of human sciences. Upon this subject may be quoted the remarks of Sir M. Hale himself, in his admirable tract on the Amendment of the Law, in which he evinces powers of reflection, and an ardour for prudent legal

reform, that could scarcely have been anticipated from a perusal of his History. "He that thinks that a State can be exactly steered by the same laws in every kind, as it was two or three hundred years since, may as well imagine that the clothes that fitted him when he was a child, should serve him when he was grown up as a man. The matter changeth the custom; the contracts the commerce; the dispositions, educations, and tempers of men and societies change in a long tract of time; and so must their laws in some measure be changed, or they will not be useful for their state and condition. And, besides all this, Time is the wisest thing under heaven."

CHAPTER II.

GENERAL MATTERS RELATING TO CRIMES.

IT is proposed, in the present chapter, to follow Sir Matthew Hale's method, in noticing matters which are applicable to all, or to a considerable number of crimes, before treating of them in detail. The order pursued will have reference to the subjects of—(1) Ignorance of Law. (2) Capital Punishments. (3) Idiocy and Insanity. (4) Infancy. (5) Marital Coercion.

SECTION I.

Ignorance of Law.

To punish a man for the infringement of a law committed before his knowing of it, and his ignorance of which is not imputable to any fault of his own, seems to conflict with Lord Bacon's aphorism, *Ut lex moneat, oportet, priusquam feriat*; and to verify Lord Strafford's memorable simile, of damaging a craft by running it against an anchor in the Thames, which has no buoy attached to it. On the other hand, a fathoming, in every criminal trial, of the depths of a prisoner's ignorance would be incompatible with any efficient administration of justice. Besides it would augment the number of voluntary or assumed know-nothings, if the notion became prevalent that ignorance was linked with impunity.¹ It may be thought, therefore, that the occasional punishment of the innocently ignorant is an evil

¹ It appears, from the Archives of Lambeth Palace, that Sir E. Coke, when Attorney-General, was discharged by Archbishop Whitgift, from the greater excommunication for a clandestine marriage, on the ground that he was "ignorant of Ecclesiastical Law."

inseparable from all systems of criminal law; but that it is one which admits of mitigation by the prerogative of pardon, and which it is the duty of the legislature to reduce within the narrowest attainable limits.

Sir M. Hale removes this dilemma of jurisprudence, as if with a magic wand, by transforming every culprit, however unlettered and Boeotian, into a presumptive lawyer. He writes "Ignorance of the law of the kingdom, or of the penalties thereby inflicted upon offenders, does not excuse any that is of the age of discretion and *compos mentis*, from the penalty for the breach of it; because every person of the age of discretion, and *compos mentis*, is bound to know the law, and *presumed* so to do: *Ignorantia eorum quæ quis scire tenetur, non excusat.*"

Hobbes, the philosopher of Malmesbury, Hale's contemporary, shews that this presumption of law was not universally approved of, even in the reign of Charles II. He asks, if every person is *bound* to buy the statute-book, or to search for records in Westminster Hall? He contends that it is the duty of the government to make the law generally accessible, as the Bible. And he meets Latin maxim by Latin maxim, in quoting *Lex neminem cogit ad impossibilia*.

Sir M. Hale's presumptive lawyer was supposed, as appears, from the Year-Book of Edward I., and from the treatise called Doctor and Student, composed in the reign of Henry VIII., to have amassed his stores of reputed learning in consequence of every man in the kingdom being, by the theory of the constitution, representatively present in parliament, and, therefore, a witness to the making of every new law through the means of constructive eyes and ears.

At the period when Hale wrote, whilst persons, to their destruction, were presumed to be learned in point of *law*, they were customarily hanged by reason of ignorance, in point of *fact*, depriving them of the benefit of clergy. As Jack Cade, in Shakspere notices, "Thou hast put men in prison, and, because they

could not read, thou hast hanged them, when, indeed, only for that cause, they have been most worthy to live." So persons were presumed to have known laws before they were made. In a case which occurred when Hale was on the bench, a man was held to be a murderer in killing a bailiff who sought to arrest him under an illegal warrant, upon the 29th of May, because the warrant was subsequently legalised by an act of parliament passed after the occurrence, but relating back to the first day of the session of parliament, viz. the previous 25th of April. So Hale's presumptive lawyer was supposed to be a good latinist, all matters of record being, in his day, like Roman Catholic prayers, in the Latin tongue, which Hale writes, was of "excellent use." And, as if to prevent a prisoner from benefiting by any knowledge of Latin acquired at a grammar-school, he was confounded by abbreviations. Hale tells us that *statut.* was good either for *statuti* or *statutorum*; a practice ridiculed in the celebrated play of Ignoramus. *Ignoramus* says to his clerk *Dulman*, (giving him a box on the ear) "Cape hoc, asine! semper scribis falsum latinum; si non potes scribere verum latinum, ut ego scribo, *abbrevia* verba per dimidium; scribe cum *dasho*, ut multi faciunt; sic nec facias errorem in latino, nec errorem in lege. *Dulman.* Est valde bona regula."

If in these respects, Hale's presumptive lawyer be not now such a *Iusus naturæ* as in his days, yet, on the other hand, statutes and reports have since been multiplied a myriad-fold; and the Common Law, from being a dwarf, has grown to the dimensions of a giant, stretching forth a hundred hands. The History of the Pleas of the Crown, which was once a polar-star to guide the ignorant through the mazes of the Criminal Law, now misleads with *ignes fatui*.

One of the present learned judges writes, in a published letter, to the Lord Chancellor: "Do we wish to make the public all lawyers, or only to give them such a knowledge of the Criminal Law under which they live, as shall suffice for the

guidance of their conduct in life? I apprehend that no sane person beyond the age of childhood can be found, who does not know sufficiently for this purpose the definition of all Common Law offences, what is murder, housebreaking, stealing, and so on. Such information is acquired not by reading, but it comes by tradition, passing from hand to hand."

This position, as might be supposed from the quarter from which it emanates, is, in a degree, indisputable; but it may not be conceded to be more than partially true even with regard to the peccant part of the community; and it may be thought very fallacious with respect to those articles of a Criminal Code which contain instructions for the victims of crime, which direct the manœuvres of self-defence and the etiquette of arrest, or which expound the legislatively confessed *subtle* distinctions between felonies and misdemeanors, that are pregnant with consequences affecting human life. Unprofessional magistrates, it may be thought, who administer the greater part of the criminal business of the country, must often miss their way, when enlightened only by the flickering taper of tradition.

Tradition is apt to be perverted in its passage from *hand to hand*. Lord Mansfield quoted Pulteney's ballad on the acquittal of the Craftsman, as shewing "the admission of a whole party," that a Jury had no right to determine the general question of libel or no libel? But he quoted the ballad wrongly, concluding

"For twelve honest men have decided the cause,
Who are Judges of fact, though not Judges of laws,"

whereas the concluding line, as noticed by Lord Erskine and Lord Campbell, and, as appears from a contemporaneous pamphlet, should have been quoted

"Who are judges alike of the facts and the laws."¹

¹ The last line of the ballad was (though it has not been noticed), in continuance of a *tradition* in favour of the right of a jury to give a *general verdict*, recorded

Vulgar errors are often handed down by tradition with greater success than unpalatable truths, as ill weeds grow up luxuriantly in places from which man has withheld his fostering culture. Sir W. Jones, in a charge to a Grand Jury, says, "A fatal error seems still to prevail, that an actual intention to kill is essential to the crime of murder;" an error into which, as may appear from the subsequent pages, the law itself leads the public by its own definition of the offence of murder. Publicly selling wives, which, it should seem is an indictable offence, was a common practice at the beginning of the century—Professor Christian wrote concerning it, "This practice now prevails to a degree, that the punishment of some convicted of this offence, by exposure in the *pillory*, would afford a salutary example. So the *modern* Criminal Common Law respecting property found, which has acquired austerity since the time of Hale, does not tally with vulgar tradition. The ring-dropping cases for instance, are founded on a supposed rule of the road, that a person witnessing a *finding*, has a right to participation by crying "halves!"¹

Ducking a pickpocket has usually been considered a Common Law right, though homicide thus occasioned has been held to be manslaughter. Here tradition runs strong in favour of the usage of the pump; Gay, in the reign of Queen Anne, in his "Trivia," or "Art of Walking the Street," after describing the artful dodger who steals a sword, being lured by its silver hilt, or who, being concealed in a basket borne on a shoulder, plucks off a periwig, at length represents him with unfelt fingers sub-

on a medal, in the Author's possession, struck upon the acquittal of Lilborne:—
"John Lilborne, saved by the power of the Lord and the integrity of his jury, who are judges of law as well as of fact. Oct. 26, 1649." Reverse, a rose, circumscribed with the names of the jury.

¹ A sham diamond ring in a purse is thrown in the dupe's way, generally with a fictitious receipt for a large price, as, in one case, 230 guineas. On the dupe picking it up, the rogue cries "*Halves!*" The two adjourn to divide the prize; the sham jewel is left with the finder, and a deposit of a watch and money is paid by him to the rogue, with which he absconds.

tracting a watch with (its usual accompaniments at that time) "all its trinkets." He is, however, detected, and a chase ensues.

"Dexterous he 'scapes the coach with nimble bounds,
Whilst every honest tongue 'stop thief' resounds."

We have not here to do with the adventures of the chase, but with the catastrophe.

"Seized by rough hands, he's dragged amid the rout,
And stretched beneath the pump's incessant spout ;
Or plunged in miry pond he gasping lies,
Mud choakes his mouth, and plaisters o'er his eyes."¹

An ingenuous confession concerning the capacity of the Criminal Law for being learnt or understood is made by another of the present judges in his letter to the Lord Chancellor. "Our existing Criminal Law, being partly written and partly unwritten, the former part being contained in a great many Statutes, and the unwritten part to be collected from a mass of authorities to be found in the Reports and Text-writers, is scarcely, if at all, accessible to the bulk of her Majesty's subjects." His lordship might, in the like candid vein, have added, that, in many cases, the Common Law of to-morrow is not to be found in any work of to-day, nor until some learned judge disembosoms it, and thereby mystically stamps it with immemoriality; that the Criminal Law is divided into two parts, which accident has separated, one of which is inflexible, but the other susceptible of indefinite flexure, whether by a Judge or Country Magistrate; and that the decisions by which the Criminal Law has been expounded, or expanded, were, till

¹ Sir M. Hale treats as a vulgar error, a notion to which Britton and Sir E. Coke contributed, that if an unlicensed surgeon occasioned mischance to his patient, it was felony, because, among better reasons, "physic and salves were before licensed physicians and surgeons;" but he thought the error "had its use to make people cautious." Such vulgar error, however, might have palliated the conduct of the Priest and Levite, whilst it exalted that of the good Samaritan.

within a very few years, pronounced without previous argument, and only procurable through a stretch of courtesy, to be repaid by public gratitude and eulogies. Sir E. Coke might justly say of the Common Law relating to crimes, "Quæ lex est quæsitâ ab omnibus, ignorata a multis, et cognita a paucis." Our Criminal Law herein may be thought to resemble the edicts of Caligula, of which Suetonius writes, "Cum per ignorantiam scripturæ multa commissa fierent, tandem, flagitante Populo Romano, proposuit quidem legem, sed et minutissimis literis, et angustissimo loco; uti ne cui describere liceret." The tyrant's edicts, however, were in writing, an hypocritical homage to sense and justice which cannot be imputed to our less shame-faced Common Law.

Mysticism can never be advantageous to any legal system. Neither is the presumption of knowledge a mere innocent figure of speech that glosses over an unavoidable imperfection in human institutions; for it tends to keep out of view the expediency of general ignorance concerning the Criminal Law of the country being dissipated, and the practicability of accomplishing this object to a considerable extent. Why, it may be urged, instruct people in what they are *presumed* to know, and upon which presumption men have been hanged time out of mind?

It is conceived that ignorance of Criminal Law may, in a degree, be remedied, as in most other civilized nations, by codification;¹ as to which, the Statute Law of Crimes has, for

¹ The advantages of a codification of the Criminal Law are abundantly exhibited, and the objections to it will, perhaps, be considered as answered satisfactorily to every unprejudiced mind in Mr Livingstone's Preface to the Louisianean Code. A controversy on the subject has arisen with reference to Lord St Leonard's Bill for the Amendment of the Criminal Law. See the letters of the judges to the Lord Chancellor, the answer to them by Mr Greaves and Mr Lonadale, and three letters by the Author on—1. Characteristics of the Common Law in reference to Crimes; 2. Phantasms of Criminal Law; 3. Assault and Battery. The Lord Chancellor, whether convinced of the benefit of a flexible and unknown law of crimes, or naturally, like Felix, willing to shew the judges a pleasure, left the Law bound in the swaddling-clothes of an infantile jurisprudence.

the most part, been successfully codified, under the auspices of Sir R. Peel and Lord Lansdowne, whereas the Common Law is still a *rudis indigestaque moles*, displaying

Non bene junctarum discordia semina rerum.

Secondly, by setting at peace a house divided against itself, or, as Lord Keeper Guildford expressed it, "Making a Pandect, by purging out all inconsistencies, contradictions, and dubitations, which, being done, the law may not be called *soft wax*." *Thirdly*, by the abolition of constructive offences, and the disuse of popular language in a technical sense, so that the legislature and the people may not misunderstand each other, like labourers of Babel. *Fourthly*, by legal education, the diffusion of which throughout all classes of the community has much engaged the attention of the Law Amendment Society, and which, in the University of Cambridge, has recently received encouragement from royal patronage. St Germain, in the reign of Henry VIII., admonished the youth of the aristocracy that a knowledge of the leading principles of the law would be "a great help, hereafter, to the administration of justice, a great security for the learners themselves, and a right great gladness to all people." But, during the space of three centuries, Cambridge scholars have been driven or allured away from the study of the law, to the exclusive cultivation of two favourite branches of knowledge, whilst many possessing more general information, are *knowing* only in the sense of Shakspeare's Earl of Warwick :

Between two dogs which hath the deeper mouth,
 Between two horses which doth bear him best,
 Between two girls which hath the merrier eye,
 I have, perhaps, some shallow spirit of judgment ;
 But, in these nice sharp quilllets of the law,
 Good faith, I am no wiser than a daw.

SECTION II.

Capital Punishments.

The History of the Pleas of the Crown may be said to be written, like the laws of Draco, not with ink, but in blood. The penalties for every offence stated in it, with a few insignificant exceptions, are the gibbet, the axe, the flaming stake, or the disembowelling knife. Sir M. Hale states, indeed, a sound principle of jurisprudence, that the "inflicting of punishments is more for example, and to prevent evils, than to punish;" but he mixes some leaven with this wholesome doctrine, adding, "only in the case of *murder* there seems to be a *justice of retaliation*, if not *ex lege naturali*, yet at least by a general divine law given to all mankind. Gen. ix. 6." And concerning theft, which he afterwards informs us was punishable with death if the property stolen exceeded in value twelve pence, he writes, "Although many of the schoolmen and canonists are of opinion that death ought not to be inflicted for theft, yet the necessity of the peace and well ordering of the kingdom hath in all ages and almost all countries prevailed against that opinion, and annexed death as the punishment of theft, when the offence hath grown very common, and been accompanied with enormous circumstances." To the schoolmen and canonists Sir M. Hale might have added Sir T. More, who, in his Utopia, thought that in the punishment of theft with death England and a great part of the world imitated some ill masters, who were readier to chastise their scholars than to teach them.

Retaliation, in the case of alleged murder, had been advocated, in language shocking to read, in Sir M. Hale's presence, when he sat as Commissioner for the Trials of the Regicides. Sir Orlando Bridgman, in his charge to the grand jury, said, "You are now to enquire of blood, of royal blood, of sacred blood, blood like that of the saints under the altar, crying,

Quousque Domine! This blood cries for vengeance, and will not be appeased without a bloody sacrifice." And, in the same vindictive spirit, the dead bodies of Cromwell, Bradshaw, and Ireton were taken out of their coffins, drawn on sledges to Tyburn, and there hanged till sunset; they were then beheaded, and their heads set upon poles at the top of Westminster Hall.

The supposed "justice of retaliation" in cases of murder was a principle of the Roman Law, according to which the bodies of murderers were permitted to remain on the gibbet, after execution, "*ut et conspectu deterreantur alii, et solatio sit cognatis interemptorum.*" In the reign of George II., and the year 1741, one Hall pleaded guilty to a charge of petty treason, for murdering his master, John Penney. The Rev. Dr Penney, Dean of Lichfield, brother of the deceased, applied to the Regency, the King being then at Hanover, that Hall might be hanged in chains. The Council at first demurred, on the ground of want of jurisdiction; but, upon Dr Penney sending for his friends, the Archbishop of Canterbury and the Duke of Newcastle, out of the Council-room, and satisfying them upon the point of jurisdiction, they obtained for him an order of the Regency for hanging Hall in chains, which recited that it had been granted "on the petition of the relations of the deceased." Anciently the relatives of a murdered person and the owners of stolen property were frequently solaced by this species of retaliation, as we may collect from Falstaff being ashamed of marching with his soldiers through Coventry, because a mad fellow told him that he had "unloaded all the gibbets, and pressed the dead bodies."

Each felony, when Sir M. Hale wrote, requires to be viewed with reference to distinctions, whether or not the *Benefit of Clergy* was taken away from the principal in the first degree? Whether from the principal in the second degree? Whether from an accessory before the fact? Whether from an accessory after the fact? These distinctions were perplexing, and often inconsistent,

and even ridiculous. The law of clergy is the exclusive subject of ten chapters in Sir M. Hale's work, besides meeting the eye in most of the other pages.

When it was ascertained that an offence was clergyable, a perversion of justice ensued, which nothing but long habituation could have restrained Sir M. Hale from reprobating. A clergyman was thereby exempt from capital punishment *toties quoties*, as often as from acquired habit, or otherwise, he repeated the same species of offence; the laity, provided they could read, were exempted only for a first offence; for a second, though of an entirely different nature, they were hanged. Among the laity, however, there was this distinction, peers and peeresses were discharged for their first fault, without reading, or any punishment at all; commoners, if of the male sex and readers, were branded in the hand. Women commoners had no benefit of clergy. It occasionally happened in offences committed jointly by a man and a woman, that the law of Gavelkind was parodied—

The woman to the bough,
The man to the plough.¹

¹ Kelyng reports:—"At the Lent Assizes for Winchester (18 Car. II.) the Clerk appointed by the Bishop to give clergy to the prisoners, being to give it to an old thief, I directed him to deal clearly with me, and not to say *legit* in case he could not read; and thereupon he delivered the book to him, and I perceived the prisoner never looked on the book at all; and yet the Bishop's Clerk, upon the demand of '*legit?* or *non legit?*' answered '*legit.*' And, thereupon, I told him I doubted he was mistaken, and had the question again put to him; whereupon he answered again, something angrily, '*legit.*' Then I bid the Clerk of Assize not to record it, and I told the parson that he was not the judge whether the culprit could read or no, but a ministerial officer to make a true report to the Court; and so I caused the prisoner to be brought near, and delivered him the book, when he confessed that he could not read. Whereupon I told the parson that he had unpreached more that day than he could preach up again in many days, and I fined him five marks." An instance of humanity is mentioned by Donne, of a culprit convicted of a non-clergyable offence prompting a convict for a clergyable one in reading his *neck-verse*. In the very curious collection of *prolegomena* to Coryat's *Crudities* are commendatory lines by Inigo Jones, whose fame was in building palaces and churches, and not the "lofty rhyme." The famous architect wrote,

Whoever on *this* book with scorn would look,
May he at sessions crave, and want *his* book.

Appeals in the time of Sir M. Hale, materially affected the practice of capital punishments. They were allowed in murder, larceny, rape, arson and mayhem, and were brought at the suit of the person supposed to be most aggrieved. A conviction upon them was attended with the like sanguinary consequences as a conviction upon indictment. Anciently the appellor had the burden or gratification of dragging the appellee to the scaffold; unless, however, the appellor were above the age of sixty, or had some other plea of exemption, the appellee might challenge him to fight with batons in the presence of the judges, which was called a Wager of Battle, a process of justice attended with much pageantry, and which is said, by Sir E. Coke, to be sanctioned by the precedent of David and Goliath;¹

Appeals long survived the time of Hale. After the remarkable trial, in the reign of William III., of Spencer Cowper (subsequently a judge) for drowning Mrs Stout, upon which he was acquitted, an *appeal* was brought, but was quashed for informality. In the reign of George II., a gaoler after being acquitted upon an indictment for murder, in exposing a prisoner to the small-pox, was tried again, and acquitted by a jury on an appeal. Late in the reign of George III., one Thornton had been acquitted of the murder of Mary Ashford; an appeal was brought, a plea of Wager of Battle was put in, and a life-guardsman's glove was, in the memory of many persons living, thrown into the centre of the Court of King's Bench, and the *wager* was adjudged by that court to be parcel of the law of England. However, the appellor being a stripling, declined risking a combat with an athletic antagonist.²

¹ Dyer mentions that, in Queen Elizabeth's time, about 4000 persons, which, it may be presumed, was then considered a large London mob, assembled to witness a trial by battle; and that they departed with a loud shout of "*Vivat Regina!*"

² An early example of appeal occurs in one of the Paston Letters of the date of Edward IV. Caistor Castle (the ruins of which are a curiosity near Yarmouth) had been besieged by the Duke of Norfolk, two of whose followers were killed by Paston and his servants, who defended the place. An indictment was brought, and objections taken to the verdict, wherefore the widows, by curious means, which are detailed, that were taken by the Duke of Norfolk's counsel, were induced to institute *appeals*. The widows appear to have been countermined by the Pastons.

It may appear surprising that Sir M. Hale did not impugn the law, whereby private prosecutors could insist on a second trial for life after an acquittal, and could exercise or withhold according to their caprice, or temper, or cupidity, the divine attribute and regal prerogative of mercy. But such is the force of judicial habit that we find the very distinguished chief justice Holt, in the reign of Queen Anne, declaring from the bench, "I wonder that any Englishman should brand an appeal with the name of an odious prosecution; I look at it as a true badge of English liberty."¹

A singular anomaly in our criminal jurisprudence arose out of the prevalence of capital punishments. The judges under the influence, it may be presumed, of the general sentiments of the community as well as their own feelings, evaded many sanguinary enactments by means of a rule of construction, termed *in favorem vite*; the law, or, in truth, the judges, being represented to have three predilections; viz. for *life, liberty, and dower*. In several parts of Sir M. Hale's treatise, the rule *in favorem vite* is applied as well where sound interpretation was doubtful as where it pointed a contrary way. Thus Sir M. Hale writes that "*In favour of life* great strictnesses have, at all times, been required in indictments," which he says had grown to be a "*blemish*" in the law, and a "*disease*," which he feared in time would "grow mortal." Notwithstanding, capital punishment is now almost entirely taken away, many rules of criminal law established *in favorem vite* hold their place, although founded, not in logic, but in mercy: and, thus, if that portion of the unwritten law, which consists of judicial constructions *in favorem vite*, were collected together, and the obsolete motive to which they were owing were unexplained, they would form a very unsightly monument of judicial dialectics.²

¹ Blackstone details the law of appeal without any strictures; but amply embellishes it by the laws of the Saxons, Irish, Goths, and Turks. He says that it is pointed out by the "finger of nature."

² A point respecting the breaking into a cupboard, whether it be burglary, was

The general aspect of the Law respecting capital punishments in Sir M. Hale's time being as here represented, it is to be noted as to this ancient structure's present *ruinous* condition, *First*, that not a dozen felonies are now punished with death, and none which are not characterised by personal violence, or danger to life;¹ *Secondly*, Benefit of Clergy, that standing violation of the maxim *lex omnibus una*,² was abolished in the reign of George IV. *Thirdly*, in the reign of George III. our jurisprudence ceased to be disgraced by Appeals and trials by Battle.

In reference to the "justice of retaliation" in cases of murder being pointed out by the Law of God, Sir M. Hale would appear to have entertained more enlightened views than in his History in his admirable tract on the Amendment of the Law— "It is most certain, the specific natural law which is given to birds is most wisely accommodated to them by the Divine Wisdom; but for a man to say, that because it is a most wise law, therefore it were fit to be used by beasts and fishes, were to distort and wrong the Divine Wisdom, by misapplying it to such a use and such animals, for whom it was never intended to be a rule or law. And though the specific nature of Jews and Gentiles be the same, yet there ever were, and ever will be, great variety in the states, dispositions, and concerns of several people; so that the same law which would be a most wise, apt, and suitable constitution to one people, would be utterly improper and

left undecided by the judges. Foster, in his treatise, gives his opinion on the principle *in favorem vite*: now that there is no *favor vite*, the ground of his opinion fails, but not, probably, his opinion itself with lawyers, or they might thus have to unlearn a large portion of the Criminal Law.

¹ Convictions for murder in England and Wales are, on an average, under twenty in the year. Capital punishment in these cases is sometimes commuted; and is seldom, if ever, inflicted for other felonies. Within a limited per centage the same number of murders is committed every year, though the crime is peculiarly one of accident and impulse.

² A peer was once branded by *mistake*. Sir M. Hale writes:—"A great lawyer hath been much blamed for burning a peer on the hand, that confessed an indictment for manslaughter; and it was the only error of note that that person erred in to my observation."

inconvenient to another." It may be observed also, that murder in the History of the Pleas of the Crown is in many respects a very technical and constructive crime, so that what the English Judges have made it can scarcely be considered the same thing as what was understood by Noah.¹

The infliction of death, that last melancholy resource of jurisprudence, a reluctance to sanction which is a sure indication of the progress of civilisation in a country, may be considered to have some peculiar advantages. It may be supposed more effectual than any secondary punishment in deterring from guilt, by reason of its appalling example. This is, doubtless, its operation on many minds; but it has been shewn by the evidence of persons peculiarly conversant with the habits and modes of thinking among the criminal classes of society, that the vicious part of the community are not materially influenced by the terrors of the scaffold. Mr Harmer, the celebrated gaol solicitor, stated, in his evidence before the Criminal Law Commissioners, that "In the course of my experience I have found that the punishment of death has no terror on a common thief. I have very often heard thieves express their great dislike of being sent to the House of Correction, or the Hulks, but I never heard one say that he was afraid of being hanged."

Again, Capital punishment is more effectual than all others, for preventing the repetition of offences by the same offenders, who, if discharged, might be prone to resume their former vicious habits. But ineffectual as secondary punishments may often be, and costly as they unavoidably are, much has been done since the time of Hale, especially in the case of juvenile offenders, by means of prison discipline and reformatory measures, for inducing criminals to sin no more. An analysis of the

¹ Mr Leone Levi, in his recent Essay on the "Law of Nature and Nations as affected by the Divine Law," has given numerous versions of the Noachic covenant. He thinks that the French version of the Hebrew is more correct than the English: "Qui aura répandu le sang de l'homme dans l'homme son sang sera répandre." Franklin regarded the passage as denoting more a *prediction* than a *law*.

motives to the different crimes for which persons have been convicted is annually published in the criminal statistics of France, an attention to which might enable the Legislature, by the removal or diminution of temptations, to render the apprehended repetition of offences, to some extent, an effect without a cause.

Whilst fallacies in human testimony are frequent and startling, nothing but the gravest and most urgent necessity can justify fallible tribunals in inflicting a punishment which is irremediable. Fortescue, in his treatise *De laudibus legum Anglicæ*, written in the reign of Henry VI., mentions a remarkable instance of an innocent woman being burnt, and the remorse of her Judge. "Vidi nempe quondam apud civitatem Sarum, coram judice quodam mulierem de morte mariti sui atinctam et combustam. Et vidi unum de servientibus interfecti illius coram eodem judice de morte ejusdem magistri sui convictum; qui tunc publice fatebatur ipsum solum magistrum suum occidisse, et magistram suam, uxorem ejus tunc combustam, innocentem omnino fuisse de morte ejus: quare ipse fractus et suspensus fuit; sed tamen omnino, etiam in ipso mortis articulo, mulierem combustam, immunem a crimine illo fuisse, ipse lugebat. Sæpius, proh dolor! ipse judex mihi fassus est, quod nunquam in vitâ suâ animam ejus de hoc facto ipse purgaret."¹

Public executions blunt the benevolent feelings of the public mind: and present an authoritative example of the "justice of retaliation" even to the shedding of blood; they have been said

¹ Alice Grey has lately startled society by her impositions in Courts of Justice. Elizabeth Canning obtained the capital conviction of two old women for robbery, for which she was herself convicted in a memorable trial for perjury. The *blood-money* gang in the reign of George II. had sworn away the lives of several victims, and were afterwards pilloried, one of them being killed in the pillory. Convictions at a period of phrenzy, as, for example, the Popish Plot, are exceptional, but numerous erroneous convictions have been occasioned by mistaken identity, or the imposing fallacies of presumptive evidence. Much curious evidence was delivered upon the subject of judicial mistakes discovered *after verdicts* before the Criminal Law Commissioners with regard to the reform, which they accomplished, of abolishing the limited period within which executions followed convictions in cases of murder.

to "teach homicide." Private executions, advocated by Fielding, are destitute of example, and may often create suspicion. A part of the objection to public executions in the time of Hale has been removed by the abolition of processions to Tyburn, such as that of Lord Ferrers, which lasted two hours and three quarters, or that of Tom Clinch in 1720, celebrated by Swift :

His waistcoat and stockings and breeches were white,
 His cap had a new cherry ribbon to tye 't ;
 The maids to the doors and the balconies ran,
 And said, "Lack-a-day ! he's a proper young man,"
 But, as from the windows the ladies he spied,
 Like a beau in the box, he bow'd low on each side,
 And when his last speech the loud hawkers did cry,
 He swore, from his cart, it was all a —— lie.

A very practical view of the subject of Capital Punishments is, that under a popular tribunal as a jury, they cannot be enforced, when, in public opinion, they are deemed unnecessary, or disproportioned to crimes ; thus verifying the reflection of Lord Bacon, that "any over-great penalty, besides the acerbity of it, deadens the execution of the law." In the time of Blackstone there were a hundred and sixty capital felonies, and this number was afterwards largely augmented. It is mentioned in the evidence of Townsend, the Bow-street officer, before the Police Committee, that about the year 1780, and few subsequent years, there were never less than twelve culprits executed together after every Old Baily Sessions ; he remembered a Sessions of 1783, when Sergeant Adair was Recorder, after which forty convicts were hanged at two executions.¹

¹ In the present day, Lord Bacon would, probably, not have inscribed among his apophthegms the following anecdote of his father :—"Sir Nicholas Bacon, being appointed a Judge for the Northern Circuit, and having brought his trials that came before him to such a pass, as the passing of sentence on malefactors, he was by one of the malefactors mightily importuned for to save his life ; which, when nothing he had said did avail, he at length desired his mercy on account of kindred. 'Prithee,' said my Lord Judge, 'how came that in ?' 'Why, if it please you, my

Chief Justice Eyre seems in this respect of hanging, to have merited the soubriquet given to a French Judge of *coupe-tête*; for, at Hertford, the first assize town upon the Home Circuit, he told the Grand Jury to be careful what bills they found, for it was his intention, during the Circuit, to leave for execution every person convicted of a capital offence. He kept his word, and spared no one; by one of his orders four men and three women were hanged opposite a house in Kent-street, in which they had committed a robbery. The Royal Prerogative of mercy was exchanged for the painful one of selecting victims for the scaffold.

Within the last century, however, it was found that, in most instances, capital punishments failed to produce the only effect that could justify their infliction. Our Criminal Laws lost their terror in the minds of the wicked, and their reverence in the minds of the virtuous. There came to be acknowledged two Criminal Codes, one in the Statute Book and another in Practice. Prosecutors preferred to abide without remedy, rather than seek one tainted with blood. The bleachers petitioned Parliament to *protect* them by withdrawing the capital punishment of stealing from bleaching grounds. Whether actuated by the dictates of humanity or a timid apprehension of responsibility in any matter of life and death, or from both motives, the perjury of witnesses and jurors in capital cases became so privileged and applauded, that Blackstone calls them "pious perjuries," thus, as Sir S. Romilly observes, "looking upon the evasion of our Criminal Laws with so much favour, as to regard the profanation of the name of God in the very act of administering justice to men, as that which is in some degree acceptable to the Almighty, and as partaking of the nature of a religious duty."

lord, your name is Bacon, and mine is Hog, and, in all ages, Hog and Bacon have been so near kindred, that they are not to be separated.' 'Ay; but,' replied Judge Bacon, 'you and I cannot be kindred, except you be hanged; for Hog is not Bacon until it be well hanged.'

Were the History of the Pleas of the Crown to be read in the present day, as detailing a true narrative of existing law, and being, what in the time of Charles II. it really was, a practical hand-book to the gibbet, its denunciations would, for the most part, meet with no jury to put them in force; and its sanguinary pages would be regarded by society as promulgating the abhorred edicts of a Legislature of Fiends.

SECTION III.

Idiocy and Insanity.

On the pathology of mind in connexion with judicial questions, the method will be followed of considering (1) Idiocy. (2) Insanity. (3) Lucid Intervals. (4) Insane Traitors. Sir M. Hale, besides these terms, makes use of fatuity, dementia, mania, phrenesis, rabies, furor, delirium, stupor, madness, lunacy: but we modern lawyers may say, *nobis non licet esse tam disertis.*

1. *Idiocy.*

Sir M. Hale informs us that Idiocy is a "*fatuity a natiuitate, vel dementia naturalis;*" that Fitzherbert writes of an idiot, as being one who cannot count twenty shillings, and does not know his father or mother, or his own age, but that "these, though they may be evidences, yet are too narrow, and conclude not always, for idiocy or not is a question of fact triable by a jury, and sometimes by inspection."

We are not here instructed as to what is to be tried or inspected, further than that it is *congenital fatuity*. It seems requisite for the further elucidation of this subject to consider that, in idiots, there is a defect of intellect, as, in the insane, a perversion of it; and, whether the test of penal responsibility be, in both cases, the same, viz. a capacity of comprehending

the criminal nature, according to some, and, according to others, the immoral nature, of an act perpetrated?

Defect of intellectual power may exist in the same or like degree as in idiots, where it is not congenital, and usually passing under the name of *imbecility*, which is occasioned, sometimes, by a sudden shock, and, at others, by the supervention of the last of the Seven Ages. There may seem to be an equal claim for criminal immunity in such cases as in fatuity *a nativitate*; though the instances of violence committed by persons so circumstanced be rare, and, it has been said by an eminent medical authority, it is "by no means easy to draw a distinction between the better classes of imbeciles and many who are reputed sane; and that by endeavouring to make a very close distinction of that kind, one half of the world might reason itself into the right of confining the other half."

Fitzherbert's evidences of idiocy have been materially enlarged and improved in the progress of Medical Jurisprudence, particularly as regards the local liabilities and physical indicia of idiocy; and the influence upon idiots of successive motives or states, engrossing them wholly for the time, and encountering no such antagonism, as frequently happens with the insane, from the struggles of affection or moral principle: the punishment of a real or pretended idiot may be supposed not to have the like effect in deterring other idiots, as the punishment of those for whom a plea of insanity has been advanced has on a great part of the insane world.

The supposition of harmlessness as characteristic of a state of idiocy has been negatived by many fatal occurrences. For example, Dr Mayo, in his Croonian Lectures, relates that "an idiot in the Hospital of Salzburg appearing to be singularly insusceptible of fear, an experiment of an appalling character, and of appalling consequences, was made upon him, as a means of putting his susceptibility to the test. It was proposed to produce in him the impression, that he saw a dead man come to

life. A person, accordingly, had himself laid out as a corpse and enveloped in a shroud; and the idiot was ordered to watch over the dead body. The idiot perceiving some motion in the corpse, desired it to lie still; but the pretended corpse raising itself in spite of this admonition, the idiot seized a hatchet, which, unluckily, was within his reach, and cut off first one of the feet of the unfortunate counterfeit, and then, unmoved by his cries, cut off his head. He then calmly resumed his station by the real corpse."

(2) *Insanity.*

Sir M. Hale makes two divisions of Insanity, (1) total insanity, (2) partial insanity.

Of *total* insanity all that Sir M. Hale informs us is, that it is "perfect madness," and that it is called, by Coke, "absolute madness and total deprivation of memory."

Partial insanity, is, according to Hale, either in respect of *things*, or in respect of *degrees*. First, as to *things*, "some persons," he writes, "that have a competent use of reason with regard to some subjects, are yet under a particular *dementia* with regard to some particular discourses, subjects, or applications; this is *quoad hoc vel illud insanire*." Secondly, as to *degrees*, "very many persons," Hale affirms, "have excessive griefs and fears, and yet are not wholly destitute of the use of reason."

With regard to a test of criminal responsibility, Hale writes, "It is very difficult to define the indivisible line which divides perfect and partial insanity; the best measure that I can think of is this:—such a person as labouring under melancholy distempers hath yet ordinarily as great understanding as usually a child of fourteen years hath, is such a person as may be guilty of treason or felony."

Sir M. Hale's criterion of criminal responsibility has now fallen into desuetude, though it may be doubted whether any one more satisfactory has been substituted. A great variety of

rules have been laid down by text-writers and judges for ascertaining when a person shall be exempted from punishment on the ground of insanity; and on a recent occasion of the trial of Macnaughten for shooting Mr Drummond, the opinions of the judges on the subject were taken by the House of Lords. Their answer was delivered by Chief Justice Tindal, who stated that the "usual course had been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was *wrong*? and this course we think correct."

As to this ethical test adopted by modern judges, it may be observed, that it blends casuistry with law. It seems to be founded on a notion that a person may understand that what he does is right or wrong, and, therefore, ought to be responsible for doing it, though he be not capable of comprehending, notwithstanding he may have had the means afforded him, that what he does is contrary to the law of the land; proof of actual legal knowledge being obviously not requisite. But it seems a sound principle of jurisprudence that punishment should commence with a capacity to comprehend a liability to its infliction: whereas, the terms *right* and *wrong* are indefinite; and, moreover, their applicability to a particular act may vary according to the education, habits of life, opinions, or creeds of different individuals. Dr Mayo, one of the highest medical authorities in this country upon the subject of insanity, observes, that "the miserable vagueness of the distinction between *right* and *wrong* ought to occasion its disuse by the Bar."¹

¹ Dr Mayo contrasts with the distinction of *right* and *wrong*, the less ambiguous terms used by Lord Lyndhurst in *R. v. Offord*, viz. "whether the prisoner knew when he committed the act, what its effect would be in reference to the crime of murder." Blackstone treats a particular construction of the Statute of Henry VII, concerning Kings *de facto*, as confounding all notions of *right* and *wrong*; whereas authorities at least equal to himself adopt that construction. Sir J. Mansfield, in Bellingham's case, goes further than the judges in Macnaughten's case, proposing to the jury "whether the prisoner knew that murder was a sin by the laws of God and nature:" an insane person may believe

Whether a legal test like that of Sir M. Hale, or the ethical test of the Judges be admitted, they are neither of them so easy of application as not to stand in need of ancillary rules. Upon this subject much remains to be accomplished for obtaining an agreement between judicial and medical authorities. It is to be considered whether insanity can be predicated of any cases in which there is not either a suspension of the power of the will over the succession of thoughts, as manifested by incoherency and inconsecutiveness; or else illusions, either those which are objective and simulate the perceptions of the senses, as if a mother hears continually, or at intervals, a voice commanding her to cut her child's throat; or notional illusions, as in the case of Hadfield, who shot at the king, under an impression that it was incumbent on him to cause his own life to be taken away by others, as a sacrifice for the salvation of mankind? Whether, in the case of illusions, an act which is the subject of inquiry in a criminal matter must not be the immediate and unqualified offspring of the illusion, or how far experience verifies the existence of *monomania*, in the sense, not of permanency or predominancy of illusion, but of a partial and circumscribed eclipse of the mind, or, as Hale expresses it, *quoad hoc vel illud insanire?*

A notion has recently been propagated of a *moral*, or *instinctive* insanity, *manie sans délire, manie sans lésion de l'entendement*, a state of mind in which there are no illusions, nor any affection of the intellect, but simply a perversion of the moral sentiments, the individual labouring under an impulse to commit certain outrageous and extravagant acts, such impulse being irresistible. As to which it is to be observed, that evil tendency may sometimes arise out of physical organisation, but it may be doubted whether, in the absence of any lesion of the intellect, the power of self-control is ever really lost, and punish-

thus much, but may be under an illusion, that the person he kills is the devil incarnate, whose destruction is not a sin.

ment can be attended with no salutary dread; or, at least, whether such supposed irresistible impulses can occur without a culpable neglect of self-restraint, before vicious habit had rendered it ineffectual?¹

(3) *Lucid Intervals.*

The moon is supposed by Sir M. Hale, to regulate lucid intervals, but which, nevertheless have continued to the present day to perplex the medical and legal worlds. He writes “*Dementia* is distinguished into that which is permanent or fixed, and that which is interpolated, and by certain periods and vicissitudes; the former is *phrenesis* or madness, the latter is that which is usually called *lunacy*; for the moon hath a great influence in all diseases of the brain, especially on this kind of dementia; such persons commonly in the full and change of the moon, especially about the equinoxes and summer solstice, are usually in the height of their distemper, and, therefore, crimes committed by them, in such their distempers, are judged according to the measure and degree of the distemper. But such persons as have their lucid intervals, (which ordinarily happens between the full and change of moon) in such intervals have, usually, at least, a *competent use of reason*, and crimes committed by them in these intervals are of the same nature, and subject to the same punishment, as if they had no deficiency.”

The term *lunacy* is no longer confined, in law, to insanity with lucid intervals; nor is this the import now, at least, attributed to the writ *de lunatico inquirendo*; nor are commissioners

¹ The subject of moral insanity, and many of the points adverted to in the text have received most valuable elucidation in Sir B. Brodie's *Physiological Inquiries*, and Dr Mayo's *Croonian Lectures*. These medical authorities approve of mitigated punishment, as in France, for many cases of insanity; they repudiate the existence of moral insanity without lesion of the intellect. Dr Mayo urges the expediency of examining prisoners for whom a plea of insanity is advanced, in the presence of the jury.

of lunacy restricted to inquiries into "interpolated *dementia*." It may be observed that, although insane persons are frequently agitated at the full of the moon, as at day-break every morning, in consequence of their being subject to excitement from light; yet the notion seems exploded of lucid intervals being governed by the phases of the moon.¹

Moreover, the state of mind represented by Sir M. Hale, is rather that of a remission of paroxysms, than of a temporary cure, or suspension of a morbid state, when the mind, having thrown off disease, has recovered its general habit, which is commonly understood by a *lucid interval*. If, indeed, as Hale says, there be left a *competent use of reason*, (an expression which has often been quoted) which, in less vague terms, may be presumed to mean a capacity for comprehending the criminal nature of an act, *cadit questio*, the prisoner is sane, independently of equinoxes and solstices.

(4) *Lunatic Traitors.*

Does the safety of the sovereign's person require and justify the hanging, quartering, and decapitation of a madman, if he compass the sovereign's life? On this point Sir M. Hale writes, "Lord Coke tells us, Mes in ascun cases *non compos mentis* poit committe hault treason, comme si il tua, ou offer a tuer le roy. *This is a safe exception, and I shall not question it, because it tends so much to the safety of the king's person*; but yet the same person in his Institutes tells us, that though this was anciently thought to be law, yet it is not so now." Sir M. Hale omits to mention that Sir E. Coke adds, "God forbid that in

¹ Lord Campbell mentions that Lord Erskine, when Lord Chancellor, in one of his judgments, observed, "Lord Coke considers the word *lunaticus* as by no means material, classing it with *amens* and *demens*, and there is no doubt that the moon has no influence over lunatics;" and he notices that Vesey, jun. the reporter, represents this as a point of law decided by Lord Erskine, and puts in the margin of his report "In cases of lunacy the notion that the moon has an influence is erroneous."

cases so penal the law should not be certain, and if it be certain in felony, *à fortiori* it ought to be certain in case of treason."

A determination not to *question* so monstrous a proposition as that of a *non compos* suffering condign punishment is at variance with the humane sentiments congenial to Hale,—and, it may be thought, that upon trials for attempting the life of a sovereign, juries stand more in need of a bridle than of a spur.¹ Such aversion to questioning a doctrine which Coke appears to have been ashamed of having countenanced, has happily not been felt in modern times, as on the occasion of the acquittal of Hadfield for firing a loaded pistol at the king when sitting in a box at the Theatre of Drury Lane. Lord Kenyon on that trial told the jury, that "if the scales hung anything like even, it was their duty to throw in a certain proportion of mercy."

SECTION IV.

Infancy.

Puberty varies materially as to the development both of body and mind according to the influence of climate;² but it does not differ to the like extent in many points of jurisprudence, owing to the circumstance that London has borrowed much of its law from Constantinople. As with the civilians, so, according to Hale, and present practice, puberty, in relation to crimes and punishments, is the age of fourteen years. He writes, "It is clear that an infant above fourteen years is equally subject to capital punishments as others of full age; for it is *presumptio juris*, that after fourteen years they are *doli capaces*, and can

¹ Erskine, in his speech for Hadfield, said that the wisdom of the law had imposed a fifteen days *quarantine* lest juries who were the *children* of the sovereign should judge too rashly of an attempt to murder their *parent*. This quarantine has been since abolished.

² See many various facts on this subject in Foderé's *Medicine Legale*, under the title, *Exceptions à la marche ordinaire de la nature dans le développement des facultés du corps, et de celles de l'esprit.*

discern between good and evil; and, if the law should not animadvert upon such offenders by reason of their nonage, the kingdom would come to confusion, and no man's life or estate could be safe."

Sir M. Hale draws a distinction with regard to criminal responsibility between youths older than seven and younger than twelve, as compared with such as are older than twelve and younger than fourteen, in imitation of a similar distinction in the Civil Law; but this doctrine has been obliterated among the casualties of the Common Law.

Between the ages of seven and fourteen, if it appear that a youth was *doli capax*, and could discern between good and evil, he may undergo the punishment of death. Hale instances Alice De Walborough, burnt at the age of thirteen years for killing her mistress; and a boy under fourteen, who was *presently* hanged for killing his companion, being believed to have been *doli capax*, because *se mucha* (he hid himself). In 1629, a boy between the ages of eight and nine was hanged for arson at the Abingdon Assizes. In 1748, a boy ten years old was convicted of murdering a child aged five years; the judges, after consultation, would have hanged him, but he was respited by an order of a secretary of state, and, after an imprisonment of nine years, was pardoned on condition of entering the sea-service. A boy of the age of twelve years was recently convicted of cunningly poisoning his grandfather.

An instance of close measurement in regard to the fatal quota of years occurred in a trial before Sir M. Hale himself. He states, "In respect the boy seemed *very little*, I took examination touching his age, when his father freely confessed that he was above fourteen, and near fifteen years of age, and he was convicted and executed."¹

¹ This statement is given by Hale, in his chapter on Arson. In his chapter on Infancy, he relates what is manifestly the same case, but makes the boy *sixteen*, and says that he burnt *three* instead of *two* dwelling-houses.

The policy and humanity may be questioned of executing an offender of *about* the age of fourteen upon a *presumptio juris*, or of a youth under that age, however *doli capax* and morally culpable. Such offenders have usually acted under the influence or example of guilty parents or elder associates. Reformation of the young ought not to be hastily despaired of, nor public sympathy disregarded. Consideration is also to be had of the character of offences, whether they be simple or complicated, natural or political. A murder is an offence of which the very name may inspire aversion almost from the cradle. But there are departments in the perpetration of frauds, a comprehension of the guilt of which may be more tardily conceived. Foderé, on this subject, writes, "Mais comment excuser une nation, aussi éclairée que les Anglais, d'avoir une loi qui suppose à un individu de quatorze ans assez de discernement pour pouvoir être déclaré coupable de trahison ou de félonie? En 1780, par exemple, on condamna en Angleterre au dernier supplice Richard Robert, âgé de quatorze ans et sept mois, pour avoir eu part à la sédition survenue cette année à Londres, à cause de Bill passée en faveur de Catholiques."

The Code Napoléon contains provisions respecting infancy in criminal matters which, perhaps, may be thought preferable to our own. It provides that if an accused party be under the age of *sixteen*, it shall be inquired of by the jury, whether he acted *sans discernement*, ou *avec discernement*? In the former case he shall be acquitted, but, according to circumstances, shall be remitted to his relatives, or be placed in a House of Correction. And if it be found that he acted *avec discernement*, his punishment shall be regulated proportionably to the full punishment of the offence, but be inferior to it. A youth, for example, under the age of sixteen, if convicted of a capital offence, is condemned to the *travaux forcés*. According to the Louisianian Code, *fifteen* is the age when criminal responsibility commences, subject to exceptional cases; and *nine* years is the earliest age

at which a child can, under any circumstances, be punishable by law; though it has been seen, a child under the age of nine has been executed at Abingdon. Our limits may be thought to have been better suited to the climate of their origin than to that of a country more remote from the Sun.¹

SECTION V.

Marital Coercion.

Sir E. Coke's wife is an example of marital coercion not being universally dominant. Lord Campbell writes that the quarrels of Sir E. Coke and his wife, who called that oracle of the law a "base and treacherous fellow," disturbed the public peace, were discussed in the Star Chamber, and agitated the Court of James I. as much as any question of foreign war which arose during the whole course of his reign.² Such conduct may have been pursued by a few wives in *fact*; but wives in *law* are generally presumed to run into the contrary extreme, and to commit crimes rather than incur the displeasure of their husbands.

The Law of Marital Coercion is thus stated by Sir M. Hale:—"If a wife commit larceny by the coercion of her husband she is not guilty. And, *according to some*, if it be by the *command* of her husband; which *seems* to be law, if her husband be present.

¹ Chatterton and Ireland committed their celebrated literary forgeries at the age of sixteen. A statement was made to the Police Committee concerning a boy of the name of Leary, who, during a career of five years, had robbed to the amount of £3000. Besides numerous minor punishments, he had been sentenced to death, but, from compassion, had been sent to the Philanthropic Asylum; whence he escaped, and was for another offence transported for life, all before the age of thirteen.

² For the credit of lawyers' wives, it may be noticed that Roger North in his history of Lord Keeper Guildford, relates the contrary behaviour of Sir G. Palmer's wife; she changed her religion for his, without a word of solicitation on his part, because as she said, "she would submit to his judgment rather than to any other human authority upon earth."

But this command or coercion doth not excuse in case of treason, nor of murder, on account of the *heinousness* of these crimes."

Sir M. Hale's list of exceptions in cases of treason and murder is enlarged, according to Hawkins and later authorities, by the addition of *robbery*. Blackstone's exceptions are "treason and *mala in se*, as murder and the *like*." According to *some*, the wife's excuse does not hold in any crime of *violence*, or in any *misdemeanor*; others are of opinion that it holds in every misdemeanor; and others, that it does not hold in misdemeanors relating to transactions usually conducted by women. Mr Justice Talfourd recently compared the authorities on this subject to "*currents*;" he thought that "*probably*" the excuse did not extend to any crime of violence; not to some misdemeanors "*certainly*;" and that the stronger *current* of decisions set in favour of its not extending to any misdemeanor.¹

The following passage concerning marital coercion in Sir M. Hale's treatise affords an example of the irregular formation of the Common Law relating to Crimes:—"If the husband and wife *together* commit larceny or robbery, by the opinion of Bracton, both are guilty; and so it hath been practised by some judges (Dalton), and *possibly in strictness of law*, unless the actual coercion of the husband appear, she may be guilty in such a case; but the *later practice* hath obtained, that if the husband and wife commit burglary or larceny together, the wife shall be acquitted, and the husband only convicted; and this being the *modern practice*, and, in *favorem vite*, is *fittest to be followed*; and the rather, because otherwise for the same felony the *husband* may be saved by the benefit of clergy, and the *wife hanged*, where the case is within clergy; though I confess this reason is

¹ In a learned note by Mr Greaves, in his edition of Russell on Crimes, all the authorities are reviewed; and a conclusion is drawn that there is no exception to the wife's excuse in *any case* of misdemeanor. The Common Law upon the subject has been tossed to and fro, and Mr Justice Talfourd and Mr Greaves are floated away by conflicting currents.

of small value, for, in manslaughter, committed jointly by husband and wife, the husband may have his clergy, yet the wife is not on that account to be privileged by her coverture."

Here we have, first, an extension of the rule originally laid down by Hale, which was confined to *coercion*, or according to *some, command*; for, agreeably to the law in the present day, he extends it in this passage to *mutual presence*. Next we have an ancient and modern *practice* upon a matter of life and death, the latter fittest to be followed, though *possibly* the former may be according to *strict law*; the reasons in favour of the modern practice, being a leaning *in favorem vite*, and, also, an argument drawn and withdrawn from the Benefit of Clergy. Both these reasons are inapplicable to the law in the present day, there being neither life in jeopardy, nor any benefit by reason of clergy; nevertheless, the maxim has not been applied of *cessante causâ, cessat effectus*.

Such arbitrary relaxations of the *strictness* of law are very apt to lead to inconsistencies. Thus, whilst the actual presence of a husband, without any evidence of command or menace, excuses, proof of the most imperative commands and strongest menaces of the husband, even though he be known by the wife to be close at hand, are no excuse. It is only if the husband be present, that the wife is encouraged to have the like sentiments with Milton's Eve:

God is thy law, thou mine, to know no more
Is woman's happiest knowledge, and her praise.

The exceptions to the rule concerning marital coercion have not been placed upon satisfactory foundations: Hale rests those of treason and murder on their *heinousness*, without any reference to the probability of coercion. Blackstone introduces the vague and mischievous distinction between *mala in se*, and *mala prohibita*, implying that simple theft, in which the wife's excuse is clearly admitted, is not, though a breach of an express commandment,

a *malum in se*. The exception of murder he places on a ground destructive of legal authority; writing of it, that "This privilege is denied, because the offence is repugnant to the laws of nature, which shall never be contravened by the refinements of civil society." He founds the exception in the case of treason on a basis, as though the rule was not justified out of tenderness to wives, and a moral duress, but from regard to the privileges of husbands; he writes, "no plea of coverture shall excuse a wife, no presumption of her husband's coercion shall extenuate her guilt, for he has no right to that obedience from a wife, which he, as a subject, has forgotten to pay." A wife, if she robs, is excepted, but she is safe in joining her husband to commit a burglary. The stronger current of authorities, is, according to Mr Justice Talfourd, setting in favour of an exception of all misdemeanors; and yet a wife is much more likely to commit them under coercion than offences more revolting to her moral feelings.

According to the judgment of most nations it has been presumed that a wife has such moral freedom of action as to be capable of resisting temptations to crime, unless under circumstances of physical duress, which exempt other persons from criminal responsibility; as by the law of Scotland and the codes of France, Austria, Bavaria, and Prussia. The Curtesy of England regards the pliability of wives, or, according to Blackstone, the privilege of husbands. By the Louisianian Code, the wife is subject to punishment, but to a minor punishment than that of her husband. The English rule may be thought to offer an inducement to criminals to employ their wives in assisting them in the execution of offences, and to prevent the exercise of feminine influence, which would, most probably, be used in *fact*, if it were material in *law* to the safety of criminally disposed English wives.

CHAPTER III.

CLASSIFICATION OF OFFENCES.

THE English classification of offences cannot challenge a comparison with that of the Animal Kingdom, or with other systems of modern science. It was, in the time of Hale, a rude contrivance, and it has been withering away ever since, until part of it has become a public nuisance. It is proposed in the present Chapter, to consider (I) Sir M. Hale's division of treasons, felonies, and misdemeanors; and (II) confiscation, which (strange to say) is the groundwork of classification in the English Criminal Law.

SECTION I.

Treasons, Felonies, and Misdemeanors.

Sir M. Hale classifies crimes under the heads of treasons, felonies, and misdemeanors. These heads do not include a multitude of offences over which magistrates have an exclusive summary jurisdiction, for a brief designation of which our legal nomenclature is at fault. All treasons, by reason of their involving forfeiture, are in law, felonies, though they are not commonly designated under that appellation; whereas the term *felony* is often used in a sense excluding the crime of treason. Attempting the life of the sovereign, or the dissolution of government, might reasonably be considered as constituting a peculiar phasis of delinquency: but treasons in Sir M. Hale's time, and, even in the present day, do not admit, in some instances, of

being characterised by any like significant features; inasmuch as treason has virtually included religious opinion, or expressly embraced coining, or counterfeiting of seals for private lucre, or the assassination of some, but not all, judges. These branches of treason are not entirely repealed; though, subsequent to the period when Hale wrote, much has been done towards confining the offence of treason within its appropriate limits, by decapitating several of its heads, and converting others into felony in its limited acceptation. Thus the distinction between treasons and felonies is neither precise nor consistent.

Felony signifies an offence to which the punishment of forfeiture is attached; such is its etymological, as well as its legal and practical import. Sir E. Coke, indeed, considered that felony signified an offence committed *felleo animo*, or with a gallish and bitter disposition; so Hale is of opinion that the reason why a lunatic cannot be guilty of a crime, is a want of *gall*. Felony is often spoken of by Sir M. Hale as a term synonymous with that of a *capital offence*, though he acknowledges a few exceptions, as that of petty larceny. He does not advert to the criterion of forfeiture, which Blackstone shews is the only one that can be relied upon. Very few of Hale's felonies are now capital, and, for the honour of national wisdom and humanity, many of them have been totally abolished. Misdemeanors are not defined by Hale; they consist of all indictable offences, or offences subject to jury-trial, below the degree of felony.

The distinction between felonies and misdemeanors might have been sensible so long as nearly all felonies were capital, and, therefore, presumably separated from misdemeanors by a marked disparity of mischief. Some misdemeanors, however, as for example, perjury, were worse crimes than some felonies, even in Hale's time. In the present day the legislature has declared the distinction between larceny (an extensive branch of felony) and fraud (an extensive branch of misdemeanor) to be "subtle," and

liable to be mistaken for each other, like the two Dromios. In many more instances than in Hale's time, also, the perpetrator of a misdemeanor is more mischievous to society, though less hateful in name, than a felon; especially, as in modern times, owing to the odium attaching to forfeitures, new offences, though more enormous than many felonies, have been expressly constituted *eo nomine*, misdemeanors, as by the statute under which the bankers Strahan, Paul, and Bates have been recently brought to justice for a misdemeanor.

A principal object of the classification of offences regards procedure. The chief landmarks, in this respect, between treasons, felonies, and misdemeanors have, since Sir M. Hale's time, been swept away; particularly since the allowance of full defence by counsel, and the swearing of a prisoner's witnesses on prosecutions for felony, and the abolition of the *peine forte et dure*. The Habeas Corpus Act, the Palladium, as it has been called, of English liberty, has, on this subject, become a little dilapidated. It assumes that all persons charged with misdemeanors are bailable of right; but, by a recent statute, the perpetrators of numerous specified misdemeanors, which, in fact, are not distinguishable from felonies on any sensible ground, are bailable only at the discretion of magistrates.

Gall or bitterness is an inconvenient criterion for classification; (Hobbes, in Hale's day, observes, that gall was not particularly perceptible in coiners, pickpockets and other felons;) and although capital punishment might formerly have been found useful for this purpose, it has now become a category almost without examples. Forfeiture may appear altogether objectionable as a punishment; and, considered as a mode of classification, its propriety must depend on the point, whether it be a correct measure of enormity in crime? which, according to the present law, is far from being the case. In any new classification founded on proportionate guilt, many existing felonies and misdemeanors must change places.

One of the present learned judges, in writing to the Lord Chancellor, recommends the abolition of the distinction between felonies and misdemeanors. But it does not follow, because the present classification is a worthless or pernicious one, that practical convenience might not be consulted by drawing a better line. The subjects, particularly, of arrest, of bail, and of trial, may seem to require different rules of procedure according to the magnitude of an imputed offence, or, as in treason, according to the difficulties under which the accused may labour. It may be expedient that peers should, for charges of heinous crimes, be tried *per gentes de leur condition*, though it be objectionable that the form of their trials should depend, as it does, upon a name. Neither need ancient terminology be necessarily sacrificed, if the terms felony and misdemeanor be pleasing to the legal ear. Felon and felony, though redolent of feudalism, may, nevertheless, continue to be used as household-words indicative of the higher degrees of criminality. Jack Cade, in Shakspeare, may still be understood as uttering a word of fear, when he announces, that, upon his becoming king, "he will make it *felony* to drink small beer."

SECTION II.

Confiscation.

Confiscation is the corner stone of the classification of our Criminal Laws. Moreover, by close attention to it may be perceived the drift of many statutes and rules, which, otherwise, might appear established expressly for the mockery of reason, and the stifling of humanity. As a punishment it has been impugned for impolicy and injustice.

Confiscation is, first, of *lands*, whether by forfeiture to the crown, or, according to the feudal doctrine of *escheat*, for breach of a condition of tenure, *quamdiu se bene gesserit*. Sir M. Hale

writes on this subject, "Generally the lands of all persons attainted of treason belong to the king. But an attainder for treason or felony of a copyholder gives the king no forfeiture; as it regularly belongs to the lord. If a tenant hold lands of a common person, and commit treason, and be attaint, yet the forfeiture belongs to the king of common right, as a royal escheat; but if such person commit felony or petty treason, and be attaint, the lands escheat to the lord of whom they were immediately held, only the king shall have the year, day, and waste, of the tenement so escheated. The relation of the forfeiture or escheat of lands, for treason or felony, for avoiding all mesne incumbrances, is to the time of the offence committed."

Since Sir M. Hale wrote, by a statute of George III. there is no longer any forfeiture to the king of a year, day, and waste, or escheat to the king or other *mesne* lord (if such a *rara avis* be found), or lord of a manor, of lands, save during the life of the offender, for any felony not including treason, except for murder.¹ A holding of *mesne* lords, by a tenure which must have subsisted from the time of Edward I., who might claim escheats, has become more obscure and difficult of proof than in the days of Hale; and thus *mesne* lords were totally disregarded in the reign of William and Mary, when the crown was authorised to grant licences in mortmain. Copyholds have been greatly diminished in number, and are verging towards extinction. By a statute of Victoria it is provided that no land, stock, or chose in action, shall escheat or be forfeited by reason of the attainder or conviction of a trustee or a mortgagee. It is a glaring defect of jurisprudence, that *mesne* lords, or lords of manors, should, in the way of escheats, be entitled to confiscations for crime; for their personal interests militate with all remissions, and they are not amenable to public responsibility.

¹ The exception of murder was carried in the House of Commons by a majority of two, the numbers being 41 and 39; a small total and majority on such an important matter of criminal jurisprudence.

It stands as a constitutional article in the Bill of Rights, that "all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void." An illustration of the usage in this respect that had prevailed occurs in Reresby's memoirs:—On the rumour of a frivolous charge of felony preferred against Sir T. Reresby, which was never prosecuted, he found that several of his intimate friends at court had been striving against each other in petitions to the king, that, in the event of his attainder, they might have a grant of his estate. Sir M. Hale informs us that Vane's rents were stopt in the hands of his tenants before he was indicted.

With respect to the relation back of escheat or forfeiture of lands to avoid mesne incumbrances, Sir S. Romilly mentioned in the House of Commons a remarkable case then depending. "In the reign of George II. a woman was convicted at Oxford of a murder. An estate which devolved upon her has been held from that time to the present by different purchasers, who have paid the full value of it; and now, at the distance of about half a century, the crown has set up a claim to the estate, as having escheated to it by the attainder of the murderer. But the most singular circumstance is, that the person who has given to the crown the information on which it is proceeding is the very woman who was attainted, and who, having received a pardon, is now, at a very advanced age, still living." Sir S. Romilly asks, "What in this proceeding can be found calculated, as all punishments should be, to prevent the commission of crimes? As a penal law this cannot be justified; on no other principle does any one attempt to justify it, and I therefore confidently hope that it will be abolished." Blackstone's view of this subject is sheer *Blackstonian*. "This may seem hard upon such as have unwarily engaged with the offender; but the cruelty and reproach must lie on the part, not of the law, but of the criminal, who has thus knowingly and dishonestly involved others in his own calamities."

The "year, day, and waste," (now confined to escheats for murder, where there is a mesne or a copyhold tenure,) which consists in pulling down houses, extirpating gardens, ploughing meadows, and cutting down woods, is a vestige of extreme barbarism, notwithstanding Blackstone tells us that it was usually compounded for, and had a precedent in the decrees of Cyrus and Nebuchadnezzar.

A *succedaneum* to the law of escheat existed in the time of Hale, in the horrible punishment of the *peine forte et dure*,¹ whereby prisoners were deterred from standing *mute*; seeing that, unless they pleaded there could be no attainder, and, consequently, no escheat. An interesting case is mentioned by Mr Christian, of a member of an ancient family in Yorkshire, who, in a fit of jealousy, had killed three of his children, his youngest child being from home at nurse; proceeding to destroy that child also, he was intercepted by a storm, which awakened remorse; and, in order to preserve his estate to his surviving child, he expired under the *peine forte et dure*.

The Escheat Rolls and Attainder Rolls preserved among our public records since the time of Henry III., together with earlier evidences,² shew that there are few families of much antiquity in this country that cannot point to their ancient attainders, though many of the attainted, owing to political revolutions, reappear in the Pardon Rolls. Chief Justice Crewe, in the time of Charles I., in delivering the opinions of the Judges on the succession to the Oxford Peerage, adverts to the pedigree of the De Veres, extending through five centuries, in which space of time he states as very remarkable that the family had sustained only

¹ Kelyng, in the time of Hale, reports another mode of dealing with *mutes*, by tying their two thumbs together with whipcord. He says that this was the "constant practice at Newgate." In the particular case reported, the whipcord, with the aid of a parson, produced the desired effect in an hour.

² The *Bagae de Secretis* of the King's Bench, which used to be preserved in a very mysterious way, contains much information upon ancient forfeitures. Schedules of its contents, from the reign of Richard II., have been recently published. Grimaldi's *Origines Genealogicæ*.

two attainders. A learned judge, who was examined before the Real Property Commissioners, adduces as a reason for adhering to the fiction of tenures, that their abolition would "cut away the foundation" of escheats and forfeitures, which now stand as the natural result of long established principle, and "set before our eyes a faint, but interesting picture of feudal relations."

Secondly, confiscation is also of personal property, by forfeiture to the crown of *goods* and *chattels*. Sir M. Hale writes, "The goods of a person *convict* of felony or treason, or put in *exigent* for the same, or that *fled* for these offences, or that stands *mute*, are forfeit to the king."

Owing to the circumstance of lands being recently exempted from escheat, except for treason or murder, there has arisen a manifest inequality since Hale wrote, that illustrates the anomalies which usually follow from partial reforms; inasmuch as, of two felons convicted of an offence less than murder, the family of one or of the other may now be ruined, according as the delinquent is *dives agris*, or *dives positus in fœnore nummīs*. Goods and chattels, moreover, have, in the course of two centuries, varied materially in their amount, intrinsic value, and their value comparatively with land; their forfeiture, in more ancient times, probably approximated to the loss of Codrus, "*perdidit infelix totum nūl.*"

The forfeiture for *flight* when a person was indicted for felony and acquitted,¹ (if found guilty, the forfeiture was clutched in another way,) has been abolished by a statute of George IV. Some characteristic apologies are offered by Blackstone for this

¹ Anciently, when a jury acquitted for a murder, they were bound to find *who* committed it? Hale tells us that, in his time, juries imputed all the murders for which they acquitted to *John a-Nokes*. At present, in outlawries, goods and chattels are forfeited by a man, when first put in the *exigent*, without staying till he is *quinto exactus*, for which Blackstone gives a reason that the "secreting himself so long from justice is considered a *flight* in law;" so a person charged with felony may be killed to prevent his *flight*, and secure his *forfeiture*.

species of forfeiture, which is pronounced by Hobbes, at the time when Hale wrote, to be "unchristian and abominable."

Although forfeitures of chattels belonged to the crown, yet, by a very objectionable rule of ancient jurisprudence, our sovereigns could grant most of their lucrative prerogatives to subjects, which, in their hands, were called *franchises*; and thus many lords of manors held the franchise of *bona et catalla felonum*. In the year 1751, one William Delhio was convicted, at the Quarter Sessions for Salisbury, of petty larceny, for stealing *one penny*, whereby his effects, consisting of bank notes to the amount of 180*l.* and twenty guineas in money, were forfeited to the bishop as lord of the manor. This bishop, to the honour of the mitre, discriminately ordered 100*l.* to be put to interest for the benefit of the felon's daughter, 100*l.* to be given to his aged father, and 20*s.* to be returned to the petty larciner.

A distinction between the confiscation of lands and of goods and chattels is, that the latter accrues upon *conviction*, and does not await, like the escheat or forfeiture of lands, an attainder. This may be regarded as an inconsistency; the explanation afforded by Blackstone is infelicitous. It is "because in many cases where goods are forfeited there never is any attainder, which happens only where judgment of death or outlawry is given, therefore, in those cases, the forfeiture must be on conviction, or not at all; and being necessarily upon conviction in those, it is so ordered in all other cases, *for the law loves uniformity*." Thus, because, in a few excepted cases, as suicide, or death in flying from justice, assumed to be fit occasions of forfeiture, there can be no attainder, therefore, in all the ordinary cases of convictions for crimes, forfeiture is made to accrue before there is any opportunity for legally impeaching a wrong conviction. With this may be contrasted Blackstone's eulogy on the practice of waiting for an attainder upon escheats. "There is still, in contemplation of law, a possibility of the innocence of a

convicted prisoner; something may be offered in arrest of judgment, the indictment may be erroneous, and thereupon the conviction may be quashed, he may obtain a pardon or be allowed the benefit of clergy, *both* which suppose some *latent sparks of merit*, which plead in extenuation of his fault." It must be admitted that it required an ingenious and inveterate optimist to extol the policy of the law, both in waiting for judgment, and in not waiting for it.

Corruption of blood and deodands are copiously illustrated in Sir M. Hale's treatise, where they occupy a considerable space. It may be sufficient, here, to notice that these devices for accumulating forfeitures are now examples of the devastation which time has made in a portion of Hale's famous work. It may be noticed that Hale makes no remark on the harshness of the doctrine of corruption of blood, but compares it, in a facetious vein, to the case of a *broken bridge*. As to deodands, in the law of which Hale specifies several distinctions of diverting subtlety, he mentions that the king usually made a grant of them to his almoner; a benevolent trait in the character of Charles II. that has escaped observation by historians. Hale ought, perhaps, in candour, to have added, that deodands were usually held as franchises, under ancient royal grants, by lords of manors who had no almoners.

A letter of Sir W. Cecil (in Sadler's State Letters), respecting the northern rebellion in 1670, states, "It were a pity but some of those *rascals* were hanged by martial law; but for the *richer*, they must be taken and attainted; for, otherwise, it is doubtful how the Queen's Majesty shall have any forfeiture of their lands or goods." The answer of James I. to the widow of Sir W. Raleigh, who petitioned for the restitution of Sherborne Castle, that he "mun have it for Ker," meets now with universal detestation; nor would it be consistent with the popular conduct of our present Queen, if, like Elizabeth, she were to wear in public a jewel that had been forfeited by her

physician who had been executed upon a charge of having received it as a bribe for poisoning herself.¹

A different spirit has prevailed since the Revolution. The Derwentwater estates granted to Greenwich Hospital (subject to a rent charge of 2510*l.* to a branch of the family, the Earl having had no direct heirs) are almost the only unrestored forfeitures of the Jacobites. Nor was consternation excited at the Treasury by a recent act for abolishing forfeitures in the case of summary convictions for simple larceny of property not exceeding in value five shillings; a puny reform, but, nevertheless, disjunctive of ideas which had been associated ever since the Conquest.

The mitigations of the law of confiscation since Hale's time which have been noticed, together with others, as in the instances of homicide by misadventure or in self-defence, might probably not have been achieved, nor remissions have been so liberally conceded as of late, unless the sovereign had ceased to have any personal interest in confiscation; a most desirable object, attained by means of an exchange, at the commencement of the reign of George III. of the hereditary revenues of the crown for a provision by the Civil List. By a substitution of the public for the royal purse, the sovereign is exposed to no personal inconvenience, whilst her majesty's clemency is extolled, and her own humane feelings and those of the public are gratified, and the

¹ The books abound with harsh decisions on the subject of forfeiture; of Lady Hale's case, which will be noticed under the head of suicide, Blackstone writes, "Though it must be owned that the letter of the law herein *borders a little upon severity*, yet it is some alleviation that the power of mitigation is left in the breast of the Sovereign, who, upon this, as on all other occasions, is reminded by the oath of his office to execute judgment in mercy." No decision can be more scandalous than that concerning the tender of a gold ring by Queen Elizabeth in Englefield's case, which Lord St Leonards says, in his *Treatise on Powers*, "savours of despotic times." Sir E. Coke, who was counsel for the heir of the traitor, advised a writ of error; to frustrate which an Act of Parliament was passed, to confirm the estate in the Queen, which, as Lord St Leonards observes, "plainly evinces that the court party was resolved to obtain the estate, whatever might be the law on the question."

denunciation of forfeiture is rendered, in a great measure, a *brutum fulmen*. A power is reserved to the queen's successor of resuming the hereditary revenues; but it is to be prayed that such a deplorable opportunity for treading in the steps of the Tudors and Stuarts may be long deferred, and that before the time (as Shakspeare says of his own queen),

When heaven shall call her from this cloud of darkness,

confiscation will be eradicated from the criminal code of England.

On the general principle of confiscation, it may be observed, that it is open to the gravest objections. Sir M. Hale, indeed, does not offer any opinion concerning its impolicy or inhumanity, and Blackstone labours to prove what he terms "the natural justice" of confiscation for treason. The first pattern for confiscation is supposed to have been given to the world by Sylla the Dictator.

Among the principal objections to confiscation may be reckoned that the penalty is, in many cases, excessive and disproportioned to the nature and extent of offences; that it is unequal in its application to different offenders, being graduated not according to the gravity of an offence, but the magnitude and description of the offender's estate; that it usually involves the misery and utter ruin of the innocent families of offenders. Livingstone, Dumont, and Bentham, have written cogently against forfeitures, but nowhere, perhaps, are they more eloquently reprobated than in the following extract from a speech of Sir S. Romilly. He says,—“All confiscations forming part of a sentence by which death is inflicted, are founded, in my opinion, upon the greatest injustice. To confiscate the property of the criminal whose life is left untouched, is to take from him the means by which the enjoyments and comforts of life are supplied; but if the law deprives him of life also, the forfeiture can only affect those whom he leaves behind him.

Upon them alone the punishment falls, and, if the offender be at all affected by it, it is only as he may feel and be afflicted for them. Almost all punishments, indeed, extend beyond the criminal against whom they are directed. The greatest criminals have often deserving relations and connexions, who sympathise in their sufferings, and who, though perfectly innocent, thus endure a part of the punishment; but this arises from the necessary imperfections in all human institutions. In the law, however, of forfeiture, this which is an unavoidable evil, but which all wise legislatures would, if it were possible, avoid, is the very principle upon which the law proceeds. The direct punishment is inflicted on the innocent, and it is by sympathy alone that the guilty is affected, if he be at all affected by it. To the most obdurate and hardened it is no punishment at all; to the less criminal,--to those whose minds are not callous to all sense of virtue and of humanity, if to any, it can operate as a punishment. You choose for the instrument of your moral tortures the best feelings of the human heart, and aggravate and enhance your punishment, in proportion as the subject of it is less an object of detestation.

“ M. de Tourreil, a French lawyer, who lived under Louis IV., and who was greatly distinguished as a man of letters, as well as a lawyer, in an elaborate defence of forfeiture, says, ‘ Il faut percer le cœur du Père dans le sein du Fils.’ A more horrible sentiment can hardly be imagined, and yet this is, without disguise, the law of forfeiture.”

CHAPTER IV.

TREASON.

TREASON, in its popular acceptation, is the highest and most atrocious crime that a member of a civil community can perpetrate; for it is not merely an injury to society from the breach of some of its reciprocal relations, but is an attempt to dissolve society altogether. This crime, however, according to our ancient laws, is tinged with feudality; and whilst it did not include various attempts at the subversion of government, apart from personal violence to the sovereign, it has been extended to abuses of the royal prerogative, and other offences in which the safety of the state has been exposed to no peril. It has too often been made a pretext for wreaking vengeance on political or personal enemies; or for pampering cupidity by forfeitures.

A statute for defining treason was passed in the reign of Edward III., after fearful experience of evils that were inflicted on the nation owing to vague laws and dependent judges in turbulent times. This statute imparted much greater certainty to the crime of treason than theretofore had belonged to it, and for that reason it has ever since been regarded like another Magna Charta. The subject of treason occupies twenty chapters in Sir M. Hale's treatise, the consideration of which for our present purposes may be advantageously confined to the following heads:—(1) The Coronation Oath; (2) The Oath of Allegiance; (3) Kings *de jure et de facto*; (4) Constructive war; (5) Constructive compassing and imagining of the King's death; (6) Treasonable words and writings; (7) Treasons relating to the coinage; (8) Repealed treasons; (9) The punishment of high treason.

SECTION I.

Coronation Oath.

Of the Coronation Oath, or the sovereign's part of a solemn compact made with his people, Sir M. Hale writes, "The heir of a king is a king, within the Statute of Treasons, the moment after the death of his ancestor; and, therefore, the compassing his death before coronation, yea, before proclamation of him, is a compassing of the king's death, and the proclamation and coronation are but honourable ceremonies for the further notification thereof."

The expression of the "heir of a king," especially since the Revolution and the accession of the house of Hanover, may seem less constitutional than that proposed by Sir M. Foster, viz.: "A king succeeding to the crown by descent, *or* by a previous designation of parliament."

The coronation of Charles II. having occurred thirteen years after the nominal commencement of his reign, Sir M. Hale may have been the more inclined, from that circumstance, to dwell on the *notarial* character of a coronation. His opinions on this subject have received a salutary corrective from Sir M. Foster, who writes, "I am very far from thinking that the solemnity of a coronation is to be considered among us as a bare notification of the descent of the crown, as authors of high distinction have been pleased to express themselves. I admit that it is, on the part of the nation, a public solemn recognition that the regal authority, and all the prerogatives of the crown are vested in the king antecedent to that ceremony. But the solemnity of a coronation with us goeth a great deal further. The Coronation Oath importeth on the part of the king a public solemn recognition of the fundamental rights of the people; and concludeth with an engagement, under the highest of all sanctions, that he will defend and maintain those rights; and to

the utmost of his power make the laws of the realm the rule and measure of his conduct." Fortescue, who composed his treatise *De laudibus legum Angliæ* in the reign of Henry VI., wrote to the same constitutional effect. "Nedum regaliter sed politicè rex dominatur in populum suum, quo ipse in *coronatione* suâ ad legis suæ observantiam astringitur *sacramento*, quod reges quidam Angliæ ægre ferentes, putantes proinde se non liberè dominari in subditos, nova condunt. Quare moliti sunt ipsi progenitores tui" (he is writing to the Prince of Wales) "hoc jugum politicum objicere, ut ipsi in subjectum populum regaliter tantùm dominari, sed potius debacchari queant."

The Coronation Oath had before the time of Hale been the subject of bitter controversy.—It was one of the charges in the impeachment of Archbishop Laud, that he altered the Coronation Oath, when Charles I. was crowned, and Milton thus inveighs against Charles, as having had a share in that transaction. "Quid aliud potuit sperari, nisi injustissimè, versutissimè atque infelicissimè regnaturum esse eum, qui ab injuriâ tam detestandâ auspicatus regnum est, jusque illud primum adulterare auderet, quod solum impedimento sibi fore, ne jura omnia perverteret, putabat. Hanc clausulam '*quas vulgus elegerit*,' Carolus, antequam coronam acciperet, eâ formulâ juramenti regii eradendam curavit." The arguments on the subject are impartially summed up in Harris's Lives; and although many may be of opinion, that Charles broke his Coronation Oath, it will, generally, be now allowed, that neither he nor the Archbishop Laud adulterated it.¹

Sir M. Hale would not, in all probability, have expressed himself as he had done with regard to the Coronation Oath,

¹ See also Heylin's *Cyprianus Anglicanus*, p. 141; Prynne's *Canterbury's Doom*, p. 69; Whitelock's *Memorials*, p. 846. The construction of the Coronation Oath was much canvassed in the time of William III. with regard to the *veto*, and in that of George III. concerning his scruples on the subject of Catholic emancipation. Some curious proceedings will be found in 3 *Institute*, p. 223, against Ch. I. Thorpe, "Qui sacramentum Domini Regis quod erga populum habuit fregit."

had he lived to read the act upon the subject passed at the Revolution, and the Act of Settlement. By the act of William and Mary it is recited, that, "Whereas by the law and ancient usage of this realm, the Kings and Queens thereof have taken a solemn oath upon the Evangelists, at their respective coronations, to maintain the statutes, laws, and customs of the said realm; and all the people and inhabitants thereof, in their spiritual and civil rights and properties. But, forasmuch as the oath itself on such occasions administered hath hitherto been framed in doubtful words and expressions with relation to ancient laws and institutions at this time unknown, to the end, therefore, that one uniform oath may be, in all times to come, taken by the Kings and Queens of this realm and to them respectively administered at the times of their and every their coronations."

By the Act of Settlement, it is enacted, "Provided always, and it is hereby enacted, that every King and Queen of this Realm, who shall come to, and succeed in the imperial Crown of this Kingdom, by virtue of this Act, shall have the Coronation Oath administered to him, her, or them, at their respective Coronations, according to the Act of Parliament made in the first year of His Majesty and the late Queen Mary, intituled 'An Act for establishing the Coronation Oath,' and shall make, and subscribe, and repeat the declaration in the Act first above recited, mentioned, or referred to in the manner and form thereby prescribed."

SECTION II.

Oath of Allegiance.

Allegiance is the tie that binds the subject to the state, in return for the protection he receives. The Oath of Allegiance according to the form used in Sir M. Hale's day, is set forth by him in old French, "ceo oyes vous N. bailife, que Ieo A de ceo

jour en avault serray feal et leal a nostre seignour E. roy d'Angleterre, et a ses heires, et foy et lealte lui porteray de vie et de membre, et de terrein honour, et que Ieo leur mal ne leur damage ne saveray, ne orray, que Ieo ne le defendray a mon poyer: si moy eyde Dieu et les Seyntz." This oath was to be taken by all persons above the age of twelve years, women excepted, who were, for this reason, called by our barbarous ancestors, *waifs*, or cast-aways. The Oath of Allegiance was founded on the military oath, taken under the Roman Empire, and which was administered at the accession of every new emperor; and the kings of the Franks when they obtained a cession of their rights in Gaul, were not long in reviving and establishing a practice so favourable to the increase and stability of their power. With the oath of *fidelity* borrowed from ancient Rome was conjoined a form of obligation derived from the German tribes, with reference to the tenure of lands, that of *homage*. The most ancient oath of allegiance that occurs in any English historian is among the laws attributed to King Edmund, who reigned from 940 to 946 A.D.

Touching the interpretation of this oath, Sir M. Hale says, that "it is not only applicable to the politic capacity of the king, but to the person of the king, as well as his crown." This notion is adopted by Blackstone, who writes enthusiastically, and in the spirit of a Jacobite toast or song, that from "hence arose that principle of personal attachment and affectionate loyalty which induced our forefathers (and if occasion required would doubtless induce their sons) to hazard all that was dear to them, life, fortune, and family, in defence and in support of their liege lord and sovereign."

The Oath of Allegiance detailed by Sir M. Hale has crumbled away. At the time of the Revolution, the old oath was thought to savour too much the doctrine of non-resistance, and there was substituted a simple promise on the part of the subject, "that he will be faithful and bear true Allegiance to

the King," without any mention, as in the old oath, of *ses heires*.

As to the taking of the Oath of Allegiance, it is no longer actually administered, as in Hale's time, at the age of twelve, by a Bailiff at a Court Leet, or in the Sheriff's Tourn. The taking of it is now a requisite qualification for parliament, and certain public employments; and, with a view, originally, of discovering the adherents of the Pretender, it may be tendered by Justices of the Peace, when the refusal to take it subjects the offender, notwithstanding he be a Protestant, or Jew, illogically to be "taken, esteemed, and adjudged a Popish Recusant Convict."

With regard to allegiance being due to the *person* of the king independently of his politic capacity, the doctrine of Hale and Blackstone ought not to be implicitly adopted;¹ it seems, indeed, inconsistent with another doctrine of Blackstone, that "Resistance to the king is justifiable when the well being of the state is endangered and the public voice proclaims such resistance necessary." The deposals of Edward II. and Richard II., which, notwithstanding Hale calls the former "a kind of pretended deposal,"² were pursuant to the most solemn forms a nation could adopt, and were consistent with the ancient practice of *Diffidation*, or renunciation of fealty, and are cogent precedents against personal allegiance. In the reign, indeed, under which Sir M. Hale wrote, by the Corporation Act, the Militia Act, and the Act of Uniformity, the doctrine of political as distinguished from personal allegiance

¹ See this subject learnedly canvassed in Allen's treatise on the "Royal Prerogative in England," and in Sir M. Foster's Fourth Discourse. The principal authorities in favour of personal allegiance are the proceedings against the Despensers tem. Edward III.; a precedent made by the very persons who had deposed Edward II.; and the case of the Postnati, in which the question was whether King James's subjects born in Scotland after his accession to the throne of England were entitled to the privileges of natural born Englishmen?

² In the unpublished part of Hale to be found in the Appendix, he writes that these deposals are "not to be mentioned without detestation."

was emphatically renounced; but the slavish oaths imposed by these statutes were abolished at the Revolution.

The history of State Oaths does not shew that they have had much obligatory force on the consciences of mankind. Hampden's inscription round the cornelian heart which he wore when he was killed, and which is preserved at Oxford, is

Against my king I never fight,
But for my king and country's right.

Thus giving colour to the satire in Hudibras :

Did they not swear, at first, to fight
For the king's safety and his right,
And, after, marched to find him out,
And charg'd him home with horse and foot?
But, yet, still had the confidence
To swear it was in his defence.

Many distinguished persons, as Hale, took the Oath of Allegiance to Charles I., then the *Engagement* to the Commonwealth, and, thirdly, the Oath of Allegiance to Charles II. The Whigs and Tories who swore the Oath of Allegiance to William and Mary and the Oath of Abjuration, had, most of them, taken oaths professing non-resistance, and allegiance to the king in his personal capacity. If Mr. Hallam's sentiments may appear to savour of laxity, "I must confess, that of all sophistry that weakens moral obligation, that is the most pardonable which men employ to escape from this species of tyranny;" his position may be thought sound, that "the state may reasonably make an entire and heartfelt attachment to its authority the condition of civil trust; but nothing more than a promise of peaceable obedience can justly be exacted from those who ask only to obey in peace."

Burnet represents that Sir M. Hale refused to take what was called the *Engagement* for supporting, as Sir M. Foster observes,

in the sense of those who imposed it, the abolition of kingly government; in terms "to be true and faithful to the Commonwealth of England, without a King or House of Lords." We know, however, as Lord Campbell notices, that Burnet's statement is untrue, from Hale's own mouth. Appearing before the High Court of Justice, as counsel for Christopher Love, he was asked by Lord President Bradshaw, "whether he had taken the Engagement?" to which he answered, "My Lord, I have done it." Could a person have conscientiously taken the *Engagement*, who believed that his allegiance was due to Charles I. and his *heirs* otherwise than in their politic capacity?

SECTION III.

Kings de Jure and de Facto.

The distinction between kings *de jure* and *de facto* was of deep concern to the community in times when, as Fuller writes, "The cards were so shuffled that two kings were sometimes turned up trump at once, which amazed men how to play their games." It was, also, a subject of practical importance during the lives of the line of Stuart.¹ Sir M. Hale was quoted for a powerful authority on their side by the adherents of the exiled royal family. The subject is still matter of interest, as explaining the theory of our constitution, whereby hereditary succession has always been recognised as a most salutary expedient of government, and the general rule to be followed, subject to the condition of religious faith, but not as conferring any indefeasible right.

Kings *de jure* and *de facto* were first distinguished in the wars of the *Roses*, when the claim of a king *de jure* founded on

¹ The tombs of the Stuart family in St Peter's bear the inscriptions of James III., Charles III., Henry IX. A medal of the last of the race, who died in 1808, bears an inscription, Henricus IX. Rex Angliæ voluntate Dei sed non desiderii hominum. The nation still continues to *abjure* the extinct family for the sake of excluding Jews from Parliament.

proximity of blood was set up by the House of York, in opposition to the Parliamentary Settlement actually vesting the throne in the House of Lancaster. In an act passed at the accession of Edward IV., the Lancastrian princes are termed "En fait, et nient en droit successivement Roies."

On this subject Sir M. Hale states, that those who have assisted an usurper, though in the actual possession of the crown, have, on the regress to the crown of the king *de jure*, been punished as traitors. He writes further, "If the right heir of the crown had once the possession of the crown as king, though an usurper had gotten the possession thereof, a compassing the death of the rightful heir during that interval is a compassing the king's death within the Statute of Treasons; for he continued a king still, *quasi* in possession of his kingdom."¹

The famous statute of Henry VII. established the constitutional maxim, that possession of the throne gives a sufficient title to the subject's allegiance, and, it is conceived, justifies his resistance to those who may pretend to a better right. Sir M. Hale observes a significant silence with regard to the import of this statute, particularly as it was construed on the infamous trials of Sir H. Vane and of the Regicides; Sir M. Hale himself sat as a commissioner for the trials of the regicides, who were told by Sir O. Bridgman, the presiding judge, that "if a man serve a *king* in war, he shall not be punished, let the fact be what it will. King Henry VII. took care of him that was *king de facto*, that his subjects might be encouraged to follow him, and to preserve him, whatever the event of the struggle for the crown was. Mr Cook, you say, in order to

¹ Hale supports the opinions in the text by Sir R. Gray's case, which he cites as from the Year-Book of Edward IV. "En tiel manner, pur cause de son perjury et doubleness que il avait fait al roy Henry VI. jades roy," but he omits what follows, "et auxi al roy Edward le Quart que ore est." He was, in fact, *degraded* for *perjury* to both kings, and executed for *treason* to the king *de facto*. This subject is pursued at some length in the unpublished MSS. to be found in the Appendix.

have the equity of that act, that here was an authority *de facto*; these persons had gotten the supreme power, and, therefore, for what you did under them you desire the equity of that act. As to which clearly the intent and meaning of that act is against you. That which Henry VII. did was to take care of a *king de facto* against the *king de jure*; it was for a *king* and a *kingly* government; it was not for an antimonarchical government:" So it was one of the resolutions of the judges in the case of Vane (whom Milton has immortalised) that "King Charles II. was *de facto* kept out of the exercise of the kingly office by traitors and rebels; yet he was all the time a king both *de facto* and *de jure*." It may, perhaps, be thought that both the regicides, especially those who obeyed, and did not exercise the powers of a government, which, under various modifications, subsisted for twelve years, and Vane,¹ who had no concern with the king's death, ought to have been protected by the statute; and that, according to Sir O. Bridgman's construction of it, some most worthy and eminent characters might have been doomed to butchery, including the greatest ornament of England's judgment-seat, Sir M. Hale.

Sir M. Hale's statements and opinions on the subject of kings *de jure* and *de facto* are impugned by Sir Michael Foster, who observes, in the preface to his Discourses, that "the learned judge, in his writings, hath paid no regard to the principles on which the Revolution, and the present happy establishment are founded." He further writes, that he encounters Sir

¹ The letter of Charles II. to Clarendon concerning the necessity of "putting Vane out of the way," is one of the most infamous ever written; it is extant in the British Museum. With regard to the regicides, Lord Campbell writes, "Had Hale sat on the trial of Vane, he would have been liable to severe censure; but he never was called judicially to decide the question on which his own guilt or innocence depended, whether a person who obeys a republican government during the exile of the lawful sovereign" (was Charles II. a lawful sovereign during his exile?) "is thereby guilty of treason?" He further says that "Hale attended regularly on the trials of the regicides, and concurred in the sentences." Was not the very point mentioned by Lord Campbell decided upon the trials of Cook, and Axtel, if not also all the other regicides?

M. Hale's views on the subject by "shewing that certain historical facts which the learned judge hath appealed to in support of his views, either have no foundation in truth, or were they true, do not warrant the conclusions he has drawn from them." And he adds, "The passages I animadvert upon have been cited with an uncommon degree of triumph by those who have treated the Revolution and present establishment as founded in usurpation and rebellion, and they are in every student's hand. Why, therefore, may not a good subject caution the younger part of the profession against the prejudices which the name of Lord Chief Justice Hale, a name ever honoured and esteemed, may otherwise beget in them?" Sir M. Foster has appropriated his Fourth Discourse to the refutation of Sir M. Hale's opinions concerning kings *de jure* and *de facto*.

The statute of Henry VII. declares that "it is not reasonable, but against all laws, reason, and good conscience, that persons attending on their sovereign lord for the time being should suffer for doing their true duty and service of allegiance." Blackstone finds fault with Hawkins for an opinion that the statute *commands* opposition to a king *de jure*. Mr Hallam thinks that Blackstone's reasoning is perplexed, and that he is wrong upon this point. Lord Bacon, in his History of Henry VII., discusses the policy of this memorable statute, to which, if hereditary right be the test of a king *de jure*, we owe the safeguard of all our heads; he represents that Henry VII., whose title was not founded on proximity of blood, adopted this means of strengthening one derived from "parchment and steel."

SECTION IV.

Constructive War.

Simon de Montford, Bolinbroke, Hotspur, Charles Stuart may be said to have in *fact* as well as in *law* opened in this country

The purple testament of bleeding war.

The statute of Edward III., which declared the *levying of war* to be high treason, had, most probably, reference to the like contemporary arrays of military force, and was framed on the supposition that a war when waged in the kingdom was not of a different nature from a war waged out of the kingdom. Many insurrectionary risings, however, for imposing force on the authority of government, and requiring to be repressed with equal severity as if banners were unfurled against the sovereign, were not specifically guarded against in the Statute of Treasons; this defect was supplied by the judges through the means of *constructive warfare*.

Sir M. Hale thus explains the diversified meaning, in law, of the simple words "levy war." "A war levied against the king is of two sorts: I. Expressly and directly, as raising war against the king, or his general and forces, or to surprise or injure the king's person, or to imprison him, or to go to his presence to enforce him to remove any of his ministers or counsellors, and the like. II. *Interpretatively* and *constructively*, as when a war is levied to throw down inclosures generally, or to enhance servants' wages, or to alter religion established by law, and many instances of the like nature might be given. This has been resolved to be a war against the king." It may appear that here are not two, but three wars; war, according to its popular acceptation, against the king or his forces; war, by construction in the first degree, as by intrusion on the king's presence to compel a change of ministers, and the like; war by construction in the second degree, as risings for generality of purpose.

Sir M. Hale has bequeathed an important legacy with regard to interpretative treasons of every kind, which if it indicate too passive an obedience to judicial precedents when at conflict with the golden *meteward*, as Coke calls it, of a statute, it cannot be too highly extolled for the concern therein evinced for the safety of the subject. He writes, "These resolutions being made and settled, we must *acquiesce* in them: but, in my opinion, if new

cases happen for the future that have not an express resolution in point, nor are expressly within the words of the statute of Edward III., though they may seem to have a parity of reason, it is the safest way, and most agreeable to the wisdom of that great Act, first to consult the Parliament and have their declaration thereon; and to be very wary in multiplying constructive and interpretative treasons; for we know not where it will end."

It may be observed, that although a statute exhibit an obvious defect, yet the remedying of that defect by judicial construction is highly objectionable on various grounds, as, particularly, that it is productive of a *jus vagum et incognitum*. And, with regard to the *resolutions* which Sir M. Hale says must be *acquiesced* in, his *acquiescence* has done far more harm than otherwise could have resulted from them; as, but for *that*, there was not, when Hale wrote, any decided case upon the subject of constructive war entitled to weight in the present day, even if we waive our challenges to judges in matters of treason during the reigns of the Tudors and Stuarts.

The decisions on which the doctrine of constructive warfare rests are detailed by Sir M. Hale (as he writes) "somewhat promiscuously, and as they occur to my memory." It is important, however, to observe that the earliest of these cases occurred in the reign of the tyrant Henry VIII., and related to riots among the poor for enhancing the price of labour;¹ and that the most notorious example of constructive warfare to be found in the books occurred in Hale's own time, that known by a name not of a bellicose import, the case of the *Apprentices*.

¹ Hale cites this case from Coke's *Institutes*, where it is mentioned without any reference to book, date, or names; the doctrine contained in it is, that an insurrection against any of the *king's laws* was equivalent to levying war against the *king*; the only other decision related by Hale, before he yields his unfortunate *acquiescence*, is that of Barton for pulling down inclosures, which he tells us himself did not arise under the statute of Edward III. but under a special act of Elizabeth.

It is thus stated by Sir M. Hale: "It was found by a special verdict, that, A, B, and C with divers persons, to the number of a hundred, assembled themselves *more guerrino* to pull down bawdy houses, and that they marched with a flag on a staff, and weapons, and pulled down certain houses in prosecution of their conspiracies; this, by all the judges *except one*, was ruled to be *levying of war*, and so high treason within the statute of Edward III.; and, accordingly, they were executed." This special verdict upon a question emphatically within the province of a jury (as noticed by Lord Denman in his eloquent address for Brandreth) does not state according to the facts, that A, B, and C were *London apprentices*, who had been accustomed to pull down brothels in the Easter holydays, and that the "*mos guerrinus*" consisted of a "piece of green apron on a staff," and presented, in all its details, an *anti-masque* to Shakspeare's picture of the

Neighing steed, and the shrill trump,
The spirit-stirring drum, the ear-piercing fife,
Pride, pomp, and circumstance.

Sir M. Hale adds the reasons which "made the doubt of him who doubted the decision." He was himself the memorable sceptic, resembling therein an ancient *splendid* exceptionist who, for her exclusive merit, was designated as *in omne nobilis ævum*. Chief Justice Kelyng, one of the majority, said, in his summing up to the jury, "We must make this for a public example, for we are but newly delivered from rebellion, and we know how that rebellion first began under pretence of religion and the law; for the devil hath always this vizer." The judgments of the eleven may be thought to have prevailed *numero*, but not *pondere*.¹

¹ In the travels of Cosmo the Third in England in 1669, he mentions that the London apprentices exceeded 10,000 in number, and that in their Easter and Whitsuntide holydays, to keep them in order, it was necessary to station persons armed with spears at the end of every street.

Another case related by Sir M. Hale illustrates the uncertainty which has been invariably found to follow from far-strained constructions of law. An insurrection of *weavers*, to the number of fifteen hundred, had occurred, the sole object of which was the destruction of machinery.¹ The attorney-general consulted the judges, among whom was Hale, whether they would hold the offence to be treason? Sir E. Coke would have objected to such an *auricular* taking of opinions in *camera*; Hale was, on this point, *paulo infirmior*. The consultation was not objected to, and the judges were of opinion, *half* that it was treason, and

The case of the apprentices is reported by Kelyng (his MS. was printed long after his death by his grandson). Ch. J. Kelyng reports that he told the jury that it would be mischievous if a "rude rabble tore the government out of the king's hands and took upon themselves to reform that which belonged to the king and his justices to correct and reform, and to destroy the great *privilege of the people*, which is not to be proceeded against, unless upon indictment" (the last point was probably intended as a *sop* to the jury, and that "we ourselves have seen a rebellion raised by gathering people together upon fairer pretences than this was." He then details *four* special verdicts applied, respectively, to different apprentices. None of these special verdicts correspond in all particulars with the *one* given by Hale in the text. Each of them include many more circumstances, but none of them contain the expression *more guerrino*. They state that the assembly was on *pretence* of pulling down brothels. One verdict loosely mentions that "others did kill the guards;" another, that they broke open prison-doors, and set free four prisoners. All the appearance of a "*mos guerrinus*" in any of the verdicts is "a piece of green apron on a staff," and something in the hand of one of the prisoners who was called the captain; in one verdict this is a naked sword, in another, a half-pike, in a third, a club, and in a fourth, nothing at all. These special verdicts were, in all probability, concocted by the judge who tried the prisoners.

Kelyng, in reporting the resolution of the judges, states that Hale was dissentient, but assigns for his dissent only *one* of the *three* reasons which Hale alleges in his treatise; and that reason which Kelyng assigns is the most technical and least suited to popular apprehension of the three. The part of Hale's MS. from which Mr Emlyn has printed what relates to the case of the apprentices is not now extant; it appears to have been torn out of the transcript in the British Museum. Some further observations upon the case are extant in Hale's handwriting, which will be noticed in the Appendix.

¹ The weavers were not far behind Sir E. Coke and the judges in their notions of political economy. We find in Coke's 3rd Institute, "There was a new invention found out, that bonnets and caps might be thickened in a fulling mill, by which means more might be thickened and fulled in one day than by the labours of fourscore men, who got their livings by it. It was ordained that bonnets and caps should be thickened and fulled by the strength of men, and not in a fulling mill; for it was *holden* inconvenient to turn so many labouring men to idleness."

half that it was no such thing; the result was that the attorney-general prosecuted for a riot.

The doctrine of constructive warfare has been more fully developed by later authorities than by Sir M. Hale.¹ Blackstone adduces as examples of constructively levying war, "an insurrection with an armed design to pull down *all* inclosures, all *brothels*, and the like; the *universality* of the design making it a rebellion against the State, an usurpation of the powers of Government, and an insolent invasion of the King's authority." On some trials, a *general* design, or going about any "public reformation," as for effecting an object so vague as that of wiping off the national debt, and even an *indefinite* design, provided it were not shewn to have an object in which the parties had some special private interest, have been held treasonable; howbeit, in the cases upon this subject, such universality of purpose, as Mr Hallam justly observes, has rarely, if ever, been established in evidence, or made probable by circumstances. The trials of the Sacheverell mobs for pulling down *all* meeting-houses are discussed by Sir M. Foster with a temper at variance with his usual candour and humanity: he suggests that "the insurrection was to be considered a declaration against the Toleration Act." The captain of this band of constructive warriors was one of the queen's watermen, who wore his coat and badge during the riot. Sir M. Foster savagely remarks,

¹ It is curious to notice the lingering looks which Coke and Hale cast on the plain terms of the statute of Edward III., and with what inconsistency and ill grace they yield to the current of constructive decisions. Coke writes that levying war is treason, "*because* no subject can levy war without authority from the king, to whom alone it belongeth;" and Hale says it is treason, "*because* the *ius gladii*, both military and civil, is one of the *jura majestatis*, and, therefore, no man can levy war within this kingdom without the king's commission," and he shelters himself under the ambiguity of Latin phrases, as *species belli, more guerrino arraiati, vexillis explicatis, multitudo gentium armatorum, cum tympanis et tubis*. Foster, in his indecent zeal against the Sacheverell rioters, finds these martial terms in his way, and lent his great name to nullify the stress laid by Hale on the ordinary show and apparatus of war. He opposes Hale's Latin by that of *furor armamentorum*.

“He was pardoned, and soon afterwards restored to his badge and livery, which he wore till the queen’s death. Her majesty’s new advisers did not choose to have the dawn of their administration stained with the blood of one of Doctor Sacheverell’s *ablest* advocates.” Chief Justice Parker, in the same case, in passing judgment on this constructive army, says, “It is taking upon themselves royal authority, nay *more*, for the Queen cannot pull down meeting-houses. Therefore he has here taken upon him, not only the royal authority, but a power that no person in England possesses.” Mr Luders, who has reviewed the cases on constructive treason, not, as Hale, *promiscuously*, but in historical order, and with great acumen, observes of Chief Justice Parker’s expressions, that they are in the style of Lucan’s exordium :

Bella plusquam civilia.

The most memorable case in our judicial annals relating to constructive warfare, is the trial of Lord George Gordon for levying war with the object of enforcing the repeal of a law passed for the relief of Roman Catholics. Concerning Erskine’s speech for the defence, Lord Campbell writes, “Here I find not only wonderful acuteness, powerful reasoning, enthusiastic zeal, and burning eloquence, but the most masterly review ever given of the English law of high treason,—the foundation of all our liberties.” Even Dr Johnson said of the acquittal, “he was glad Lord George Gordon had escaped, rather than that a precedent should be established for hanging a man for *constructive treason*.” Erskine stated, in his speech, that, though as a citizen he might disapprove, as an advocate, he did not find it necessary to impeach the doctrine of constructive warfare, which he contended had not been carried further than according to the following plausible view of it: “That war may be levied against the king, not only by an insurrection to change or to destroy the fundamental constitution of the government itself,

by rebellious war; but, by the same war to endeavour to suppress the execution of the laws it has enacted, or to violate and overbear the protection they afford, not to individuals, (which is a private wrong) but to any general class or description of the community, by premeditated open acts of violence, hostility and force." The purport of Erskine's speech was to disunite an illegal assemblage of upwards of forty thousand persons, led by Lord G. Gordon, whose ostensible object was that of *petitioning* the House of Commons, but who, really, meant to overawe it by numbers, though not, apparently, by any acts of violence, from a simultaneous rising of a mob professing similar sentiments with the petitioners, and which was a consequence, (probable or not as the reader may think,) of Lord G. Gordon's tumultuary meeting;—a mob which broke open prisons, attacked the Bank, and set London in a conflagration. It is a common opinion that this trial was a signal victory gained over the doctrine of constructive warfare; but it may appear from the above extract of Erskine's speech, as from his laborious distinction between the Sacheverell and Gordon *warriors*, that he does not *traverse* this obnoxious doctrine, but, as lawyers say, *confesses* and *avoids* it; admitting that there may be constructive war, he argues that Lord G. Gordon was not a belligerent.

Universality, generality, or indefiniteness of design do not appear to be reasonable or sufficiently precise criterions of treason; and in order to remedy the defect before adverted to in the Statute of Treasons with regard to insurrections lacking martial array in a more sensible explicit and constitutional manner, a statute was passed in the reign of George III. That statute, however, still retained the term *war*, in defiance of popular language, to designate risings of a character dangerous to the state, such as Virgil describes :

Ac veluti magno in populo, cum sæpe coorta est
Seditio, sævitque animis ignobile vulgus,
Jamque faces et saxa volant, furor arma ministrat.

The statute of George III. enacted that it should be high treason to "compass, imagine, invent, devise or intend to *levy war* against his majesty, in order by force or constraint to compel him to change his measures or counsels, or in order to put any force or constraint upon, or to intimidate or overawe both houses or either house of Parliament." It might have been hoped that this statute would have extinguished all constructive warfare founded on universality, generality or indefiniteness of design. This, however, was not the result; as appears from the cases of Brandreth, Watson, Thistlewood, and several others occurring after the statute of George III., in which the judges expatiate on the precedents of treason for pulling down *all* meeting-houses, and *all* brothels.

At length by a statute of 11 and 12 Victoria, the above provisions of the statute of George III. are repealed, and are re-enacted in the identical words as *felonies*, punishable, at most, with transportation for life. It is provided, indeed, that the act shall not in any matter affect the statute of Edward III., and the term *war* is still unfortunately perpetuated in a technical sense. But the legislature's merciful intentions are so plain in confining the objects of so-called *war*, (whether they be treated as treasonable under the statute of Edward III., or as felonies under that of Victoria,) within narrow and definite limits, as virtually to preclude prosecutions for constructive war levied for any purpose unspecified in the latest statute, which may thus be regarded as having proclaimed a *constructive peace*.

It will have been observed that the statutes of George III. and Victoria punish the "compassing, imagining, inventing, devising or intending to levy war," provided the so-called *war* be so said to be *levied* for the definite objects specified in the Act. The Statute of Treasons may, perhaps, appear to have been incomplete in this respect, inasmuch as whilst it punished designs on the king's life, it left unrestrained inchoate designs

to levy war; for treason would seem to be an exception to all other offences in requiring to be repressed in its embryo, and not admitting of a *locus pœnitentiæ*; seeing that, if matured, traitors might bid defiance to the law itself. This defect in the statute of Edward III., as we shall find under the next head, was obviated, previously to the late statutes, by a separate process of *construction*, that panacea for all legislative ailments.

SECTION V.

Constructive compassing and imagining of the king's death.

Sir M. Hale thus lays down the law respecting constructive compassing and imagining:¹ "If men conspire to imprison the king by force, till he hath yielded to certain demands, and for that purpose gather company or write letters, this is an overt act to prove the compassing of the king's death." Again, "A conspiring to depose the king, and manifesting the same by some overt act, is an overt act to prove the compassing the death of the king." Coke, Hale, Foster, Blackstone, Lord Ellenborough, and Lord Tenterden vindicate the doctrine of constructive treason as inferred from a deposal of the king, by an adage attributed to Machiavel, which is not justified by history, and, in the present age, is an improbability, viz. that

¹ Mr Justice Barrington, in his Observations on the Ancient Statutes, asks, "Is it not extraordinary that the life of an Englishman prosecuted by the crown should continue to depend on the critical construction of two obsolete French words?" He says that the word "imagine" is used in the Psalms in the sense of *plot*: "Why do the people imagine a vain thing?" Luders collects numerous ancient records, in which the words compass and imagine are used synonymously with *attempt* or *contrive*. Sir E. Coke was of opinion that these terms were a relic preserved from the ancient universal principle of Criminal Law, *voluntas reputabitur pro facto*. Chaucer, a contemporary of the Statute of Treasons, in describing the paintings of his Temple of Mars, writes:

There saw I all the dark *imagining*
Of felony, and all the *compassing*,
The spoiler with the knife under cloke, &c.

there is but a "short distance between the prisons and graves of princes." Lord Ellenborough says it is "the general experience of all ages." Lord Tenterden, that "we *know* it by experience."

Constructive compassings and imaginings appear to have originated in the time of Queen Elizabeth. One of the earliest cases was that of the Duke of Norfolk. It was adjudged, that as he sought to marry the Queen of Scots, (which appeared by the *overt act of love letters*,) and as she claimed the crown of England, and as upon marrying her, he would naturally assert her right, and as, therefore, he must seek to depose Queen Elizabeth, and as it must be presumed that on deposing her he would kill her; *argal*, the duke compassed and imagined the death of the Queen. Sir M. Hale observes on this case, not that it was a torture of the statute of Edward III., but that the "extending of treason, as to this point of marriage, by illation and consequence, was *hard*."

It is stated by Sir M. Hale that the charge against the Earl of Essex was for compassing Queen Elizabeth's death; yet it was one of the resolutions in that case, that the offence was high treason, "because it tended to a force to be done upon the queen, and a restraint of her in her house, though the earl *intended no hurt to the person of the queen*." Though he intended no hurt, in point of *fact*, yet, in presumption of *law*, he intended to kill. It is improbable that Elizabeth herself would have shaken the Countess of Nottingham on her deathbed for not presenting Essex's ring, saying, that "God might pardon her, but she never would," if she had believed that her favourite had, in *fact*, compassed and imagined her death.

Hale states some cases, and, principally, one of a rising at Farley Wood in Yorkshire, in 1663, which extend the doctrine of constructive compassing even to assemblies, by whom, although a resistance to government may have been contemplated, there has been no pretence afforded of any hostile intention towards

the King's safety. Hale does not draw our attention to this new step in the progress of construction; but Mr Hallam, in speaking of this case of Farley Wood, writes, that the doctrine contained in it has acquired all the weight of judicial precedent; "yet, I question whether another instance can be found in our jurisprudence of giving so large a construction not only to a penal, but to any other statute."

With reference to like remote inferences of compassing the king's death, where the king's person has not been in the contemplation of the compassers, Sir M. Foster writes, "Offences which are not so personal as imprisoning or deposing the king have with great propriety been brought within the same rule, as having a tendency, though not so immediate, to the same fatal end;" and he instances taking steps to incite foreigners to invade the kingdom; as to which he argues, that, seeing this is not a levying of war if the foreigners be not actually at war with us, it would not be treason unless it were held to be compassing of the king's death, that, *therefore*, it ought to be so held, "especially as it has a manifest tendency to endanger the person of the king, *ne quid detrimenti capiat Respublica*." The endangering the person of the king has the appearance of being thrown in as a makeweight; whilst the quotation is an unfortunate one, inasmuch as it was the formula for authorising the Roman consuls to act *beyond* the law, as to kill Gracchus or any one else whose conduct, in their *opinions*, had a tendency to endanger the Republic.

With regard to *conspiracies* for levying war as furnishing an inference of compassing the king's death, Sir E. Coke writes, "A *conspiracy* is had to levy war: this, it has been resolved, is no treason until war be levied; therefore it is no *overt act*, or manifest proof of compassing the king's death; for this were to confound the several classes, or *membra dividenda*." Sir M. Hale, however, impugns Sir E. Coke's position by citing subsequent authorities, which, he says, "ought to outweigh" that of Sir E.

Coke;¹ as to which authorities Mr Hallam is of opinion that they are "utterly irreconcilable with any fair interpretation of the statute." It is remarkable that Hale writes this stricture upon Coke's opinion in consequence of the decision in the case of Farley Wood, notwithstanding that, in his next preceding sentence, he had, upon another point, expressly condemned that decision. Hale, afterwards, states a most rarefied distinction, which, he writes, "reconciles, in some measure, both resolutions;" this distinction is, that a conspiracy to levy one kind of war is a good *overt act* of compassing, but not, he says, "it seems" a conspiracy to levy another kind of war, viz. that which is above called constructive in the second degree. This distinction is confirmed by Sir M. Foster without the qualification of an "it seems." The subject gave rise to a learned controversy respecting the trial of Lord Russell, against whom it was alleged, by way of an overt act of compassing the king's death, that he had engaged in consultations about the feasibility of surprising the king's guards.

The "*jealousy* of the law for the king's safety," (in the language of Sir M. Foster's apology for constructive treason,) or rather, the subtlety and subservience of judges, has farther stretched the provision of compassing the king's death, by confounding *overt acts* with *presumptions of law*. On this subject Sir M. Hale maintains his revered character for wariness as to the propagation of constructive treasons. Erskine thus places before us the passages on the subject in the History of the Pleas of the Crown; he mentions that "Hale lays the law down that although a conspiracy does not immediately point to the king's death, yet it is a sufficient overt act of compassing, if it have so direct a tendency to that end, as to be competent rational evidence of the intention to accomplish it: he does not say this is

¹ Hale, also, objects that one of Coke's authorities, the Earl of Essex's case, is inconsistent with Coke's own position; but Mr Emlyn and Mr Hallam have shewn that this objection is untenable.

high treason, nor an overt act of high treason, but, in order to avoid confounding treason with matter relevant to the proof of it, he says, 'this is an *overt act* to prove the compassing of the king's death.' And, as if, by this mode of expression, he had not done enough to keep the ideas asunder, and from abundant regard for the rights and liberties of the subject, he immediately adds, 'but then there must be an overt act to prove that conspiracy, and then that overt act to prove such design is an overt act of compassing.' The language of this sentence labours in the ear from the excessive caution of the writer. Afraid that his reader should jump too fast to his conclusion upon a subject of such awful moment, he pulls him back, after he has read that a conspiracy to imprison the king is an overt act to prove the compassing of his death, and says to him, 'but, recollect, there must be an overt act to prove, in the first place, that conspiracy to imprison the king, and even then that intention to imprison him, so manifested by an overt act, is but, in its turn, an overt act to prove the conspiracy, or intention to destroy the king.' Nor does the great and benevolent Hale even rest here, but, after this almost tedious perspicuity, he begins the next sentence with this fresh caution and limitation, 'but then this must be intended a conspiracy *forcibly* to detain and imprison the king.'

Ch. J. Eyre, upon Hardy's trial delivered an opinion which stands in strong contrast with the passage just cited from Hale. He said, "The conspiracy to depose the king is evidence of compassing and imagining his death *conclusive* in its nature, so conclusive that it has become a *presumption of law*,¹ which is, in fact, nothing more than a *necessary* and violent presumption of

¹ It is inconceivable how Lord Campbell, in his life of Erskine, should have expressed an opinion that Ch. J. Eyre's summing up in Hardy's case was "unexceptionable;" especially, as, from his own constitutional remarks upon that trial, it is manifest, that the mantle of Hale, and not of Eyre, must have fallen upon his lordship. Eyre further talks of "a conspiracy to subvert the monarchy," as a "treason which no lawgiver in this country had ever ventured to contemplate." He then says that it will fall within one or other of the specific treasons in the

fact, *admitting of no contradiction*. It is impossible to maintain that an honest man can doubt, whether he who conspires to depose the king has compassed his death." He had previously observed to the grand jury, "that in a design to subvert the constitution, the compassing and imagining the death of the king is involved, and is, in truth, of its very essence." Ch. J. Eyre emphatically repeats these dogmas upon the trial of Horne Tooke. These remarks were made from the bench with reference to an alleged conspiracy for deposing the king, to be evidenced by an overt act of a design, on the part of the members of certain public societies, to call a convention for the imputed object of bringing about a revolution, (in fact, a reform in parliament,) but without the suggestion of any plot against the king's life, or any preparation for force; an application of the doctrine of constructive treason, which, if it had been successful, would have resulted in the extinction of freedom in England.

Incontrovertibility has been, thus, arrogated for an inference of reason, depending on ever-varying circumstances of fact. Nevertheless, in the infant days of constructive treason, Chief Justice Brooke, who compiled his celebrated Abridgment in the reigns of Henry VIII. Edward VI. and Mary, had not learnt to *construe* so intrepidly as modern judges. He writes, "One may deprive the king of his crown, without designing his death," and he corroborates his opinion, by referring to the several temporary statutes which had been passed to supply this omission in the statute of Edward III. His simple mind had not learnt to distinguish between the *person*, and the *majesty* of the king; or to treat the sovereign, in the construction of the most penal of laws, as a mystical personification of the state.

In like manner as in the instance of constructive warfare, the legislature interposed to convert the most conspicuous statute of Edward, but he is unable to determine whether it belongs to the first or second clause of that statute; and, at last, he concludes with saying that it is "a case of no difficulty, and the clearest high treason."

constructive compassings into substantive treasons. By a statute of George III. it was provided that it should be treason for any person "to compass, imagine, invent, devise or intend death or destruction, or any bodily harm tending to death or destruction, maim or wounding, *imprisonment* or *restraint* of the person of the king, or to deprive or *depose* him from the style, honor or the kingly name of the imperial crown of this realm, or to move or stir any foreigner or stranger, with force, to invade this realm."

As in the case of constructive warfare, so constructive compassings continued, after the statute of George III. to hold their place in indictments, and in the charges of judges. By a statute of Victoria the statute of George III. was repealed as to all offences not against the person of the sovereign, and sundry treasons indirectly so tending were mitigated, *totidem verbis*, into felonies; but with a professed abstinence from a repeal, in any respect, of the statute of Edward III. Cogent inference is to be drawn, notwithstanding this *salvo*, from the statutes of George and Victoria, that constructive treasons of whatsoever kind that have no foundation but the pretended basis of the statute of Edward III. will become practically obsolete. May Pope's simile of a sagacious and bloodthirsty insect never be realised in the future annals of our judicature!

Destroy his fib, and sophistry in vain,
The creature's at his dirty work again.

It may, however, seem the most prudent course to abolish constructive treasons absolutely; lest, in bad times, these sleeping lions may be awakened for the destruction of the People of England. Fabricated in the eclipse of liberty, or in the hurricanes of party violence or civil panic, they would not, in point of authority, any more than in reason, be entitled to any respect, but that they had been engrafted into such eminent treatises as that of the History of the Pleas of the Crown, not in approbation of them, but because, as Hale says, being established by judicial precedents, they "must be *acquiesced* in." The founders of those

precedents are forgotten, or remembered only with execration; their handiwork is not buried in oblivion, because it partakes of the immortality of Hale. Thus, that great lawyer has contributed unconsciously to the mystification and acerbity of English jurisprudence. To follow a good example instanced by Lord Strafford in regard to constructive treasons, of the early converts to Christianity burning their cunning and unholy books; it would be a public benefit, if, whilst such precious remains of Sir M. Hale as are repugnant to constructive treason, might be inscribed on the walls of every court of criminal justice, all that he has written in *acquiescence* with it were cast into the fire.

SECTION VI.

*Treasonable Words and Writings.*¹

Treasonable *words* are thus treated of by Sir M. Hale: "Regularly words, unless they are committed to writing are not an overt act within this statute (Co. P. C.), and the reason given is, because they are easily subject to be mistaken, or misapplied, or misrepeated, or misunderstood by the hearers." To the passage of the Institutes cited, Sir E. Coke adds, that "words may make a heretic, but not a traitor."

The reason here given for repudiating *words* as overt acts of treason, may be useful by way of salutary caution, justified by daily experience, as to the degree of probative force that is due to oral testimony: but it is not a satisfactory ground for excluding words as overt acts by a rule of law. According to other passages in Sir M. Hale, and all writers of eminence on criminal law, not only is testimony regarding words, with all its imperfections, clearly admissible when they are used for the

¹ Hale treats of oral and written treason in the middle of his dissertation on compassing the king's death. Some curious unpublished matter relative to this subject will be found in the Appendix.

purpose of explaining ambiguous actions, but words may, in some cases, be laid as substantive *overt acts*, as, for example, if they be words of advice, persuasion, or consultation.

A more correct rule than that laid down by Sir M. Hale seems to be the one given by Sir M. Foster, that words that may be laid as *overt acts* must have been spoken "in contemplation of some traiterous purpose actually on foot or intended, and in prosecution of it." It may be here observed, that Sir M. Foster regards *overt acts* as not merely evidentiary, but as importing a "means made use of to effectuate the intentions of the heart." Whether words be used as *evidence*, or laid as *overt acts*, it is a useful caution by Sir M. Foster, that, even if the hearers be implicitly believed, great indulgence is to be allowed in their interpretation, whatever may be their strict import; for that they are often attributable to momentary ebullition, as from heat of disputation, or warmth of temper. Thus Burdet, in the reign of Edward IV., may be thought to have been more choleric than traiterous, when he wished that his white buck that the king had killed, horns and all, were in the belly of the man who had counselled the king to kill it, whereas it appeared that the king had counselled himself.

Treasonable *writings* are thus considered by Sir M. Hale: "Those words, which, being spoken will not make an overt act to make good an indictment of compassing the king's death; yet if they are reduced into writing by the delinquent, either in letters or books, and published, they will make an overt act in the writer, to make good such an indictment, if the matter contained in them import such a compassing." (Co. P. C.)

This passage has been relied upon by Sir M. Foster as shewing that the mere fact of writing without a *publication*, and, *moreover*, without the *import* of a treasonable design, is not high treason. But this doctrine stands in need of some qualification. Writings may amount to overt acts, though not *published*, provided they are means used, as when plainly

connected with treasonable purposes, and written in prosecution of them, like the papers found on the person of Lord Preston, when embarking for France, or Dr Hensey's intercepted letters. To the same effect Sir M. Foster writes concerning the paper found in Algernon Sidney's study, which was laid as an overt act in his indictment, "I freely admit, that had the papers found in Algernon Sidney's closet been plainly relative to the treasonable practices charged in the indictment, they might have been read in evidence against him, *though not published.*" It may be observed, however, that the publication of a writing is usually a means adopted to influence mankind, and shews that the writing published was not composed merely (as King James says of his book dedicated to Prince Henry) for the exercise of the author's own *ingenie.*

Words, it is said in the passage under consideration, which cannot be overt acts when merely *spoken*, may become such if *written* and *published*, and *importing a compassing*. But if words import a compassing, as words of persuasion, or consultations, they may be laid as overt acts, without being written or published. Hence the sentence comes, in effect, to this: "Words importing a compassing are treasonable, if they be written and published;" whereas, if so importing, they are not the less treasonable, though they be not written and published. In fact, Hale miscites the whole passage, as if taken from Coke, but perplexes it by the words about "importing a compassing," which are from his own quiver. This important passage is further involved by the manner in which Sir M. Hale follows it up. He writes, in the succeeding paragraph, "Instances of this kind are many, but I shall instance particularly only in Williams's case 17 Jac. Williams wrote a book, entitled Balaam's Ass, in which there were many things reproachful and dangerous to the king, and, among others, that the king should die A.D. 1621, and that the realm should be destroyed,

because it was anti-christian, and the abomination of desolation: this book he inclosed and sealed up in a box, and sent it to the king; and for this he was indicted and executed for high treason, vide Coke's Institutes concerning words, where it is said thus: But if the same be set down in writing by the delinquent himself, this is a sufficient overt act within this Statute of Treasons." It may be thought that, in this case, the publication of the book could not be deemed a *means* of effectuating a traiterous design, as its perusal was confined to the king, and was not likely to induce him to commit suicide; and, moreover, that, although Williams's ass was a very fanatical ass, yet it was not represented by the author to have articulated anything that *imported a compassing*. Sir M. Hale concludes the statement of Williams's case and his review of the whole subject, as above, with a repetition of Sir E. Coke's doctrine in its most questionable shape, viz. that the difference, in point of treason, between words and writings depends not on their "importing a compassing," but on the use of a pen.

Blackstone, indeed, writes, "If words be set down in writing, it argues more deliberate intention, and, it has been held, that writing is an overt act of treason; for *scribere est agere*. But, even in this case, the bare words are not the treason, but the *deliberate act of writing* them." Writings, undoubtedly, indicate, in general, more deliberation than words; and perhaps they scatter their poison further and wider, and hence, in a great measure, has arisen the legal distinction between libel and slander. But it is conceived that the question of treason does not so much depend on these grounds or upon the additional one of publication, as upon the words or writings being used as a means for the prosecution of a traiterous design; for, in such cases, *loqui* not less than *scribere, est agere*.

Sir E. Coke states that Cardinal Pole's book was an overt act of treason; but this may be questioned as far as concerns the passage which he cites from it, and in which Henry VIII. is

compared to the great Turk. "Ut vix a Turcico internosci queat." Three printers were tried for publishing the dying speeches and prayers of the regicides; they were pilloried, and Chief Justice Hyde told them that they were dealt very mercifully with, not to have been indicted for treason.¹ Algernon Sidney was executed for high treason in the reign of Charles II., chiefly on the evidence of an unpublished paper found in his closet, which was a speculative disquisition upon political subjects, apparently written many years before—and not relating to treasonable designs, still less capable of being deemed a means of effectuating them. Jeffries, of lasting infamy, who presided at the trial, said, "The case does not rest upon *two* witnesses (*one* only could be provided), but upon greater evidence than *twenty-two* if you believe this book was written by him." And he relies on the adage, which is followed by Blackstone, but is qualified by Foster, *scribere est agere*.² No lawyer, in the present day, would quote Jeffries as an authority upon the law of treason; nor would the case of Balaam's Ass be listened to with patience, but that it is quoted, as an adjudged precedent, with respectful deference by Sir M. Hale.

SECTION VII.

Treasons relating to Coinage.

In most monarchies unauthorised coinage by a subject, notwithstanding it be with a view only to private gain, has been treated as an usurpation of sovereignty, and a profanation of the

¹ They were not liberated until they had given sureties "not to publish any books, but such as were allowed by authority." Such a prosecution shews *inter alia*, with what suspicion we ought to read the reports of our ancient state trials.

² This ruling may appear, and is stated by Sir M. Foster, to be the real *legal* objection to Sidney's attainder; it is not, however, mentioned in the Bill for its *reversal*, which is founded on questionable grounds, concerning the comparison of handwriting, and the jurors not having been freeholders.

royal image.¹ Thus, in the time of Hale, the same degree of guilt was attached to the person who assassinated his sovereign, or who clipped a sixpence; whereby the crime of treason became vulgarly familiarised; and, in the end, severity of punishment produced impunity to coiners.

According to Sir M. Hale, a variety of offences connected with the coinage, were, in his time, deemed high treason. He states, indeed, his opinion, that a person convicted of this species of high treason was to be drawn and hanged, contrary to that of Sir E. Coke, who lays it down that he is also to be disembowelled. Hale, upon this point arrives at a very latitudinarian conclusion, viz. "Perchance it is not error whether the one judgment or the other be given;" in other words, whether a person be sentenced to have his entrails plucked out *ipso vivente*, or be spared that barbarity. By a statute of William IV. all treasons relating to the coin are reduced to felonies, with an extreme punishment of transportation for life.² Wolsey's groats coined at York, and stamped with a cardinal's cap, (some of which are still extant) were the subject of an article in his impeachment, that has been versified by Shakspeare, and evinces the sentiments of a former age on the royal prerogative of coinage:

That out of mere ambition you have caused
Your holy hat to be stamp'd on the king's coin.

SHAKSPEARE'S *Henry VIII.*

Sir M. Hale dilates, at considerable extent, on the history of the coinage, observing that "these curiosities are fit to be known for

¹ The same royal head, without any regard to individual likeness, was preserved on English coins during eight successive reigns.

² Treasons for counterfeiting the king's seals still linger in the Statute Book. Voltaire puts the case of a person importing ingots and making coins as good as those current. After arguing this case *pro* and *con*, he concludes that the coiner ought to be condemned to work at the king's mint. Coinage treasons are the subject of four chapters in Sir M. Hale's treatise.—Another chapter concerns high treason in killing the lord chancellor and certain judges, not including the barons of the exchequer or vice-chancellor.—This last head of treason, and that concerning seals, are tottering parts of Hale's fabric of Criminal Law.

understanding the old rolls." Among his curiosities, Sir M. Hale mentions that "King Henry VIII. embased the coin of this kingdom in point of allay, and so it continued during the residue of his reign, and during the reigns of Edward VI. and Queen Mary, insomuch that the penny had not above a half-penny of intrinsic value; but Queen Elizabeth, among the rest of her excellent methods of government, did, by little and little, rectify this detestable embasement of coin: (1) By prohibiting exportation and melting down of good silver. (2) By reducing the base money to its intrinsic value. (3) By making a good allowance (*to her own loss*) of the base money brought into the mint. (4) By stamping of new money of just allay of sterling."

According to Queen Elizabeth's proclamation (which Sir M. Hale does not cite,) it is provided "for the relief of such persons as should possess base testoons, her majesty was pleased to *sustain the burden*, and cause to be delivered at her mint in London, at any time within the space of four months, for every *testoon*¹ so basely marked two pence farthing of good new sterling monies of fine silver, or so much more as of the same should be proved to contain in good silver, and also for every pound of the same being brought to the mint, three pence of sterling silver over and above."

"So her majesty, who since she came to this crown never gained any thing by any coinage, nor yet ever coined any manner of base monies for this realm, will not now determine to lese the honor and fame that she shall with small loss or gain recover by this noble act to benefit her realm and people."

It may be observed that Sir M. Hale does not do justice to the reforms in the coinage made by Edward VI. at the instigation of Latimer in his quaint sermons on the text, "Your silver is turned into dross." In estimating Queen Elizabeth's

¹ The *testoon*, or coin bearing a *head*, was the name of a shilling, in the reign of Henry VIII. and a few succeeding reigns: shillings were first coined in the reign of Henry VII.

claims to munificence for the improvements in the coinage, they appear to be founded on the circumstance of her calling in shillings which had been issued in a bad state by her father, brother, and sister, for a consideration received by them of twelve pence each, and reissuing coin of the value of two pence farthing for every shilling called in. The Queen paid the debts of her family, like those of insolvents, by a dividend of two pence farthing in the shilling.

After the principles of liberty and just government had become established in the reign of William III. the coinage, which had become greatly deteriorated by means of clipping hammered money, was again restored by calling in all the clipt coin; but this was done at the expence of the public, the people receiving a good shilling of the value of twelve pence for clipt shillings, and yet the government had never issued clipt money. Some master-minds were engaged on the subject of the amelioration of the coinage in King William's time, as Locke, Lowndes, and Bishop Fleetwood. The bishop preached a sermon on the subject, at Guildhall, on the text of Gen. xxiii. 16: "And Abraham weighed to Ephron the silver which he had named in the audience of the sons of Heth, four hundred shekels of silver, current money with the merchant." In the course of this sermon the bishop adverts to the calamities which might ensue, if the most prudent and deliberate steps were not taken in applying a remedy to the evil. He says, "Who can tell whether every single person must not bear his own burden, and stand to the loss of all that is wanting in due weight, of all the money he is master of? And if he must, the cry must be, like that of Egypt, loud and universal, for every family will be a loser: but it will fall severest on the poor, who from a little can spare none."¹

¹ Medals were struck in honour of Queen Elizabeth, bearing, on the reverse, a figure of Justice with her scales, and an inscription *Bene constituta re nummaria*. It appears from the Gresham papers, that Sir T. Gresham was the queen's adviser.

SECTION VIII.

Repealed Treasons.

Sir M. Hale gives a catalogue of treasons subsequent to the statute of Edward III. which occupies two chapters, besides a chapter on petit treason: the first contains a list of treasons preceding the reign of Queen Mary; and the second, of treasons between that period and the reign of Charles II. As to the first list, he writes, in conclusion, that all treasons made since the Act of Edward III. were by the first statute passed in the first year of the reign of Queen Mary "at one blow *laid flat*." The second list relates chiefly to treasons of Queen Elizabeth, which were, in fact, treasons for the profession of the Catholic religion, assumed in that reign to afford an unquestionable inference of harbouring a design against the queen's life, or for the overthrow of her government. Some treasons in this second list relate to coinage. All these treasons since Sir M. Hale's day have also been "laid flat;" but by several "blows," as by the coinage Act of William IV., the Catholic Relief Bill, and by statutes for abolishing penalties on the ground of religion passed in the reign of Victoria.

It is remarkable that Henry VIII.'s new treasons and felonies should have been reflected on by his children, Edward VI. and Mary, at the commencement of their reigns; it indicates in what detestation his tyrannical statutes were held. The preambles of these acts in mitigation of Henry VIII.'s cruel laws are curious and edifying; that of Edward VI. is thus: "Subjects should rather obey from the love of their prince, than from dread of severe laws; that as in *tempest* or *winter* one course or garment is convenient, and in *calm* or *more warm weather*, a more liberal case, or lighter garments both may and ought to be followed and used, so it is likewise necessary to alter laws according to the times." That of Queen Mary would do honour to a modern

parliament: "Forasmuch as the state of every king and ruler standeth more assured by the love of the subject towards their sovereigns, than in the dread and fear of laws made with rigorous pains; and laws also justly made for the preservation of the commonweal, without extreme punishment or rigour, are more often obeyed and kept than those laws made with extreme punishments."

The history of these treasons which have been happily prostrated may be instructive as exhibiting the length to which arbitrary princes and subservient parliaments have carried the licence of despotic power and greediness for forfeitures. For example, we find, in Hale's lists, that poisoning was made high treason; so it was to publish of the king by express writing, *or words*, that the king is an heretic, schismatic, tyrant, infidel, or usurper; so the marrying any of the king's *reputed* children without licence; so "if any by writing, printing, or exterior act, *word*, or deed, accept, take, judge, or *believe* the marriage of the king with Anne of Cleves to be good." One of the treasons most recently abolished was that of importing or concealing papal bulls, a species of writing by the so-called, in statutory language, Bishop of Rome, which Swift ridicules in his *Tale of a Tub*, where he speaks of Peter's *bulls* that "roared terribly and breathed fire out of their nostrils, and were sent out upon errands of great importance, and at last grew so troublesome, that some gentlemen of the north-west got a parcel of English bull-dogs which baited them so terribly that they felt it ever after."

Petit treason, or the killing by a wife of her husband or *baron*, by a servant of his or her master or mistress, by a clergyman of his diocesan, or, as Sir M. Hale writes, *it seems*, his metropolitan, is another species of repealed treasons to which Sir M. Hale devotes a separate chapter. Among the curiosities contained in this chapter it is stated that if a wife throws a poker at her maid's head, which, by accident, lights on her husband's

head and kills him, this is petit treason. This species of offence was abolished by a statute of George IV., and it is not now distinguished from murder. The ancient law was founded on feudal and fiscal reasons and relations in society which have undergone much change. In the time of Hale and down to the reign of George III., petit treason was attended with the scandalous punishment of burning women. Neither Hale nor Blackstone make any remark on this legal barbarity, except what Blackstone observes, that women were burnt by the Druids. Though petit treason is abolished, the term *high* treason at first used for the sake of distinction, is still retained as importing the *ne plus ultra* of criminality.

Parricide was, according to Hale, treason at common law; but he says that, after the statute of treasons, it was the *better opinion* that parricide was not petit treason, unless the son or daughter received wages or meat from the parent. Blackstone is more complimentary to his countrymen than candour might seem to warrant, when he suggests that parricide has not received any peculiar punishment in England, because it was an unnatural barbarity, which, it was presumed, no one would be found wicked enough to commit in England.

SECTION IX.

Punishment of Treason.

Humanity has received no more flagrant outrage in the institutions of any nation than by the punishment of high treason as detailed by Sir M. Hale. Nevertheless, no remonstrance against it is raised either by him or by Blackstone, and Sir E. Coke is its zealous eulogist. In the presence of seven persons under trial for the gunpowder plot, Coke, as attorney-general, expatiated on the singular propriety of each item of the horrible punishment of high treason. In his Institutes he justifies its barbarous items

respectively by examples drawn from Scripture. In Hobbes's Dialogue between a Lawyer and a Philosopher, composed in the time of Sir M. Hale, the *philosopher* notices that the scriptural punishments adduced by Coke were not in point, for that they were not all heaped on *one* traitor. To which the *lawyer* replies, "Lord Coke meant none of this, but intended (his hand being in) to shew his reading, or his chaplain's, in the Bible."¹

Owing to the exertions of Sir S. Romilly, in the reign of George III., which were, for a long time, baffled by the crown-officers, who protested that he was breaking down the "bulwarks of the constitution," the sentence for high treason has been humanised from that stated by Hale. It now requires the criminal to be hanged till he is dead, instead of being cut down alive; and it omits that his entrails are to be cut out and burnt while he is still alive.

Women were burnt for treason in Hale's time; which Blackstone attributes to the regard of our ancestors "for decency due to the sex." The burning of women was abolished in the reign of George III. The sympathy felt for Mrs Gaunt, as composedly she collected the straw round her stake to accelerate the flames by which she was consumed alive for the feminine fault of harboring traitors, contributed to swell the public indignation which finally extinguished the dynasty of the Stuarts.

During the Commonwealth the sentence for treason had been restricted to the severing the head; but after the Restoration, its horrors were revived, with the concurrence of Hale, in the first instance against the Regicides, and were too literally enforced. The regicide Harrison, when the executioner was in the act of disembowelling him, rose, and gave that functionary a blow on the face. Hugh Peters, after being carried on a sledge to the scaffold, was made to sit thereon within the rails, to behold the

¹ Sir M. Hale, in his precedent for the sentence on traitors, omits an item which had been inflicted, with his concurrence, on the regicides, and is extolled by Coke as indicating that the traitor was "unworthily begotten, and unfit to leave any race after him."

execution of Cook, who had been attorney of the commonwealth, and we are told that "when Cook was cut down alive, and brought to be quartered, Col. Turner ordered the sheriff's men to bring Peters near, that he might see it; and bye and bye the hangman came to him all besmeared in blood, and rubbing his bloody hands together, he tauntingly asked, 'Come, how do you like this work, Mr Peters? how do you like it?' He replied, 'Friend, you do not well to trample on a dying man.'"

In the reign of Charles II. Walcot was executed for the Rye House Plot; and twelve years after his execution, a writ of error was brought, and his attainder reversed, because in the record of his sentence it had not been stated that his entrails should be burnt *while he was alive*, or in legal language "*ipso vivente comburentur*."

David, Prince of Wales, and Wallace, whose offences were a patriotic resistance to the "chains and slavery of proud Edward's power," were the first victims of a punishment which disgraced this nation from that period till late in the reign of George III. Chatterton in his poem of high promise, Bristowe's tragedy, graphically describes the particulars of the sentence executed on Sir Bowdin. And Shenstone, in his ballad of Jemmy Dawson executed for the Scotch Rebellion, relates what appears to be a true history of his sweetheart following him to his execution at Kensington common. The cruelties practised on that occasion are thus noticed.

And severed was that beauteous neck,
Round which her arms had fondly closed;
And mangled was that faithful breast
On which her love-sick head reposed.
And ravished was that constant heart,
She did to every heart prefer;
For though it could its King forget,
'Twas true and loyal still to her.
Amid those unrelenting flames,
She bore his constant heart to see.

Aggravations of the punishment of death are still included in the sentence of high treason ; they are, in addition to hanging, the being drawn on a hurdle to the place of execution, severing the head from the body, dividing the body into four quarters, placing the head and quarters at the disposal of her Majesty.

The hurdle was a humane substitution for dragging from the place of trial to the place of execution at a horse's tail. Prince David was *drawn* through Shrewsbury, and Wallace through London, by the tails of horses. The monks would appear to have been the authors of the once humane hurdle ; in the reign of Edward III., a judge, in condemning a criminal, is reported to have given especial order, that *neither friars nor others* should dare to help the culprit with any thing to rest upon in the *drawing* to the gallows.

As to the disposal of the head and quarters of traitors ; it is related, that on the execution of David, Prince of Wales, it was conceded that London was entitled to his head ; whilst to Winchester, after an angry dispute with York, was adjudged his right shoulder. The old Chronicler Grafton, with more wit than humanity, relates the beheading and quartering of Collynbore in the reign of Richard II., for "making a small ryme."

The Rat, the Cat, and Lovell our dog,
Rule all England under the hog ;

"meaning by the Hog the dreadful wild Bore which was the King's cognisance, and because the first line ended in dog, the metrician could not, observing the regiment of meeter, ende the second verse in Bore, but called the Bore an hogge. This poetical school-maister, collector of breeves and longes, caused *himself* to be *abbreviat* shorter by the head, and to be *divided*¹ into four quarters." Sir J. More's head, after

¹ Shakspeare puns on the arithmetical and musical senses of the word *division*. Juliet observes :

Some say, the lark makes sweet *division*,
This doth not so, for she *divideth* us.

being exposed on London Bridge, and thence withdrawn by a pious, and by her piety famous daughter, is still preserved at Canterbury; a relic more calculated than the famous shrine of Thomas-à-Becket, to awaken pity and reverence for the oppressed, and indignation at our ancient criminal law. The barbarous exposure of the heads and bodies of the followers of Monmouth throughout the towns and highways of the West of England, laid a foundation for the success of William III. a few years afterwards, in the very same localities. A medal struck upon the occasion of the beheading of Monmouth, represents his head spouting blood, with an inscription, "*Hunc sanguinem libo Jovi liberatori.*"

The heads of the persons convicted of the Scotch Rebellion in 1745, were affixed on Temple-Bar, until the place was so full, that the remaining heads were sent to Carlisle for a like exhibition. In the newspaper called the *Post-Boy*, is the following notice for May 18, 1723, respecting Laver's head— "His head was carried to Newgate in order to be parboiled, and affixed upon Temple-Bar this day."

Sir E. Coke in his harangue, before mentioned, to the Gunpowder Conspirators, says of those items of the punishment of treason which *now* continue in force, "The traitor shall be *drawn* to the place of execution, as not being worthy any more to *tread* on the face of the earth; he shall be hanged between heaven and earth, as being unworthy of *either*. His *head* shall be cut off which *imagined* the mischief. His *quarters* shall be set up to the view and detestation of men, and to become a prey to the fowls of the air.¹ In the passage of

¹ The horrors practised at the execution of the gunpowder traitors contributed to inflame the zeal of the catholics through their admiration of the sufferers. This appears, among other proofs, from the miraculous *straw*, of which pictures were vended throughout England: it was said to exhibit the face of Garnet, Principal of the Jesuits, and was picked up at his execution stained with his blood. It is alluded to in the play of Ignoramus, acted before king James, at Cambridge.—A character, who represents an itinerant vendor of books and curiosities, cries, "*En lepidum*

the Institutes before referred to, Joab is Coke's authority for *drawing*, Sheba for *beheading*, Rechab for *quartering*. According to the present law, we do not stand in need of Absalom's precedent for the *heart*, or that of Judas for the *entrails*.

Vindictive justice is inconsistent with an age of reason and humanity; and example is without efficacy, when the horror of a crime is lost in sympathy with the ~~superfluous~~ sufferings of the criminal. Even the hurdle and the denunciations of posthumous indignities and exposure make juries timorous, and degrade the moral sensibilities of a people. If it may be said, therefore, of the ancient punishment of high treason as detailed by Sir M. Hale with truth, as the player says to Hamlet, "I hope, we have reformed that indifferently with us," it may be answered, "O, reform it altogether!"

stramen! stramenta sanctos faciunt, vin' apologiam pro Garneto." On which a by-stander observes, "*Possit et nos sanctos esse spes est. Quamnam? Quod sumus scelestissimè.*"