CHAPTER V.

HOMICIDE.

HOMICIDE is the most important object of criminal justice next to treason, on account of the magnitude of the injury which may be thereby inflicted on society. The private loss sustained in consequence of an act of homicide is often painfully afflicting, whilst the general alarm it occasions is frequently destructive of the peace of the community. Homicide, however, is capable of a great variety of gradations, from absolute innocence to the most aggravated guilt. It is proposed to consider the subject under the following heads.

I. Murder. II. Malice in Law, as parcel of the definition of murder. III. Justifiable homicide. IV. Accidental homicide. V. Manslaughter. VI. Child-murder. VII. Suicide.

SECTION I.

Murder.

Murder is one of our household words. When loudly vociferated, it has a remarkable power in awakening the sympathy of neighbours; the very imagination of its sound is fancied by Shakspere to have daunted Macbeth.

> There's one did laugh in his sleep,
> And one cried, *murder!*

Sir M. Hale's definition of murder, is "the killing of a man of malice prepense," a definition ostensibly short, simple, and complete. That of Coke, which Blackstone adopts, is not substantially different, except in mentioning, that death must

occur within a year and a day; a qualification which is afterwards stated by Hale, who observes, that after a year and a day, it "*cannot* be discerned, as the law *presumes*," whether death was violent or natural. It has been opined by some Judges of the present day, to be a surpassing beauty in these definitions, that they do not refer to any other definitions specifying what is *not* murder.[1]

Covertly, Sir M. Hale's definition is subject to more perplexity than meets the eye. For the term *malice* signifies not one, but two things, "malice in fact," and "malice in law." Of "malice in law," Coke and Hale have three, and Hawkins six categories. This kind of malice will be conveniently considered in a separate section, but it may here be remarked, that it so far differs from malice in fact, or the malice of common sense and popular language, as to resemble in its etymology that of *lucus a non lucendo*.[2]

[1] With reference to a proposed definition of murder which contained an express reference to chapters of a code touching justifiable homicide and manslaughter, Mr Baron Alderson writes, "Those who live to administer this law, ought at once to be able to find, in the definition of a crime, all its qualifications expressed plainly and completely in the definition itself. But, this Bill does all this by relation to various other clauses in the Act." Mr Justice Coleridge writes, "It is desirable not to define so important a matter as murder merely by inference." Mr Livingstone, after examining Coke's definition in detail, and shewing that there is scarcely a word in it that will not raise a doubt in the mind of a man of common understanding, writes that "it would be difficult, perhaps, to assign any definition of the crime which would sufficiently give us to understand its precise meaning, without a reference to the definitions of those homicides which are not included in it." He accordingly adopts that method in the Louisianian code. Foster, Hawkins and Blackstone, though they adhere to Coke's definition, find it expedient to treat of murder, *after* they have exhausted the subjects of justifiable homicide and manslaughter. Mr Greaves, in a note to Russell on crimes, cites the holdings of several modern judges that, *malice* denotes "a wrongful act done intentionally without just cause or excuse." What is a just cause? what is an excuse? Until these points are answered, the definition is *incomplete*, according to Baron Alderson, and *inferential*, according to Mr Justice Coleridge. Other definitions of the term *malice* imply still more what is unsaid, very much like the inuendos to be *inferred* from Lord Burghley's famous shake of his head.

[2] The import of the term *malice* is further mystified by the constructions it has received in statutes relating to personal injuries, and injuries to property. Thus *maliciously* wounding under the statute of 1 Vict., was held, by Alderson B,

Concerning the person killed, or *corpus delicti* in murder, a case noticed by Sir M. Hale, regarding injuries to children in the womb of which they die after they have been born alive, exhibits the vicissitudes of the Common Law: he writes, "If a woman be quick[1] or great with child, and she take, or another give her any potion to make an abortion, whereby the child is killed, it is not murder nor manslaughter by the law of England, because it is not yet *in rerum natura*, nor can it be legally known, whether it were killed or not. So it is, if, after such child be born alive, and *baptized*, and after die of the stroke given to the mother, this is not homicide. 1. E. 3. 23 b."

Sir E. Coke mentions this same case, quoted from the same Year-Book of Edward III., and says, "that it was never holden for law." The tide of modern decisions in cases where a child is completely born, and dies (whether *baptized* or not) from an injury inflicted *in utero*, after some fluctuations, may be deemed to have flowed back into the ancient channel of Sir E. Coke, and to have ebbed away from that of Sir M. Hale. It has, for instance, been recently held that it is murder, if a person by administering a potion cause a child to be prematurely born, whereby it dies in consequence of untimely exposure to the external world. The subject has become less important since it has been made felony to administer drugs or use other means for procuring abortion.[2] But it is conceived that, in the present day, Medical Jurisprudence may afford

not to mean, with *malice aforethought*. Livingstone asks, if there be any malice *afterthought?*

[1] The legal distinction of being *quick* or *not quick* with child, is not sanctioned by modern writers on medical jurisprudence.

[2] If a woman capitally convicted, be reprieved on the ground of being *enceinte* and be delivered of a child, and become *enceinte* before the next assizes, Hale tells us that she shall not be reprieved again; because, as Blackstone says, "she shall not take advantage of her own incontinency." These writers take no account of the second infant in *ventre sa mère*, whom the law puts to death, notwithstanding it has many legal capacities, and might be *vouched*.

material light on the point, which Hale says "cannot be *legally* known."

Poisoning had become homicide in Hale's time, but by the older Common Law of Bracton it was not felony, because not *manu* hominum perpetrata. With regard to other ways of occasioning homicide, Sir M. Hale writes, "If a man, either by working upon the fancy of another, or, possibly, by harsh and unkind usage, put another into such a passion of grief or fear, that the party either die suddenly or contract some disease, of which he dies; though, as the circumstances of the case may be, this may be murder or manslaughter in the *sight of God*, yet, *in foro humano*, it cannot come under the judgment of felony, because no external act of violence was offered whereof the common law can take notice, and secret things belong to God."

The Indian Law Commissioners say, upon this subject, "Suppose it to be proved to the entire satisfaction of a criminal court, that *Z*, the deceased, was in a very critical state of health, that *A*, the heir to *Z*'s property, had been informed by *Z*'s physicians that *Z*'s recovery absolutely depended on his being kept quiet in mind, and that the smallest mental excitement would endanger his life: that *A* immediately broke into *Z*'s sick-room and told him a dreadful piece of intelligence which was a pure invention, that *Z* went into fits, and died on the spot; that *A* had afterwards boasted of having cleared the way for himself to a good property by this artifice. These things being clearly proved, no judge could doubt that *A* had voluntarily caused the death of *Z*; nor do we perceive any reason for not punishing *A* in the same manner for which he should have been punished, if he had mixed arsenic in medicine."

It may, perhaps, be considered that Sir M. Hale's reason of "secret things belonging to God," is unsatisfactory. Cases, however, must be very rare in which a Court of Justice can obtain satisfactory proof that a person has been killed *vi et*

mind, or that such an effect has been designed; whilst the punishment of this species of homicide might give rise to a number of frivolous and malicious prosecutions. Deaths, indeed, from mental causes are by no means always "secret things:" besides authentic cases, within the experience of most individuals, of broken hearts that have, with probability, been attributed to love or law, many sudden deaths are related to have followed the beheading of King Charles, and we should be unwilling to question the causes of the deaths of the Earl of Pembroke and of Isocrates, as related by Milton:

> The breaking of that Parliament
> Broke him, as that dishonest victory
> At Chæronea, fatal to liberty,
> Killed, with report, that old man eloquent.

There are several species of homicide that present interesting questions of jurisprudence, concerning which scarcely any light is to be derived from the treatise of Sir M. Hale. As, for example, where a person is capitally convicted and executed upon the perjured testimony of another; classical homicide, by desire of the individual killed; romantic homicide, by mutual resolutions to die together, but only fulfilled upon one side; duelling; homicide occasioned by omissions of parties under obligations of contract, or public duty; infanticide.

As to these offences, the first, which is capital by the Civil Law and according to several modern codes, does not, by the Law of England, according to the stronger current of opinions, (for Blackstone regards the point as undecided, and Lord Mansfield was of the opposite opinion) amount to murder. It has been so considered with us from an apprehension of intimidating witnesses in capital cases; although there have been fearful examples of the perpetration of death by means of perjury in this country, as in the notorious instances of Titus Oates, and of the *blood money* gang in the reign of George II. By the old

Common Law this was a capital offence, whereupon Coke remarks, that "David killed Uriah with his pen, so do these men with their tongue."

A *fair* duellist has, in modern times, been generally acquitted upon the flimsiest pretexts, or pardoned; and duelling has thereby been left unpunished. Duelling creates no general alarm in society; few but the higher classes run a risk of death thereby, and none without their own consent. A recent change of public opinion on the subject of duelling, may, however, render juries more strict, and the prerogative of mercy less relaxed.

Infanticide is not punished as murder by the Louisianian Code, on the ground that it does not, generally, proceed from a malignant motive. Judges and juries have often a compassionate leaning in favour of a mother charged with killing an infant child from the instigations, commonly, of shame or destitution. The uncertainties of medical evidence on this subject, and the liberty of returning a verdict for a minor offence of concealing the birth, come in aid of sympathy, and of that general aversion to capital punishments which has grown up since the time of Sir M. Hale. An ancient painter succeeded in exhibiting the force of natural feelings even in a picture of Medea in the act of murdering her children.

> Quod natos peritura ferox Medea moratur,
> Præstitit hoc magni dextera Timomachi.
> Tardat amor facinus, strictum dolor incitat ensem,
> Vult, non vult, natos perdere et ipsa suos.

SECTION II.

Malice in Law.

The legislative interpretations of judges, especially in the olden time, may be compared to the hands of the Giant Briareus,

who is fabled to have a hundred of them. Our judges have made the simple term *malice* to stretch itself and grasp a great variety of offences differing in their nature from each other, and which, to common understandings, may none of them appear to be malicious. The import of the term *malice* began to be very material, when a statute of Henry VIII. first took away the Benefit of Clergy from the offence of "murder with malice prepense." It had, indeed, been usual, in general pardons, to except homicides *per excogitatam malitiam;* but, in other respects, crimes which are now distinguished as manslaughters and murders bore the same legal character. After the statute of Henry VIII. the judges began to erect that elaborate superstructure of capital homicides which has been built on the two words "malice prepense."

Sir M. Hale, who therein copies from Sir E. Coke's third institute, distinguished malice in *law* into three kinds. "In respect to the manner of the homicide, as when it is voluntarily committed without provocation. 2. In respect of the person killed, when done upon an officer, or minister of justice. 3. In respect of the person *killing*, when done by a person that intends a theft, burglary, &c." He afterwards adds a case which may appear to require a *fourth* category, viz., "Where *A* by malice strikes at *B*, and missing him, strikes *C*; whereof he dies; this is murder, although he never bore any malice to *C*, and the law *transfers* the malice to the party slain." And in another chapter Sir M. Hale quotes a case which may seem to fall under a *fifth* category. "If a man have a beast that is used to hurt people, and the owner know of his quality, but purposely lets him loose or wander abroad with design to do mischief, *nay, though it were with design only to fright people and make sport*, and it kill a man, it is murder in the owner, and I have *heard* that long since at the Assizes held at St Albans, it was so ruled, and the owner hanged for it; *but this is but a hearsay.*"

To vindicate the propriety and intelligibility of the expression, "malice in law," is a prominent object in Sir M. Foster's

Discourses on Homicide. He writes, "I believe most, if not all the cases which, in our books, are ranged under the head of *implied malice*, will, if carefully adverted to, be found to turn on this single point, that the fact hath been attended with such circumstances as carry in them the plain indications of an heart regardless of social duty, and fatally bent upon mischief." He further observes, that "*malitia* is not used in the narrow and restrained sense to which the modern use of the term is apt to lead one," but in the same as in the *best Roman* authors, and in the Civil Law. According to this view, which has been adopted and often repeated from the Bench, the expression *malice in law* is supposed to be made intelligible by interpreting it in a Roman and not English sense, in the diction not of the Strand, but of the Suburra.

It may elucidate the subject to examine, in order, Sir M. Hale's classes of "malice in law." The *first* head, it has been seen, is "the manner of the homicide," which title might indicate burking, garotting, and thugging, but that, he tells us, he means "voluntary homicide without provocation." Nearly all his examples, however, are of homicides committed *with* provocation, as those occasioned by chidings between husband and wife, aggravating words and gestures, and, what our ancestors considered a point of honour, the *taking the wall* of another. Hence, in order to reconcile Hale to himself, we must assume that he meant by homicide *without* provocation, 1. Homicide *with* provocation in *fact*, but such as is inadequate to reduce the offence to manslaughter, and, therefore, *without* provocation in *law*. 2. Homicide where the slain has said or done nothing to provoke the slayer, either in law or in fact. In such cases, Hale styles the offender not *hostis* John-a-Nokes, but *hostis humani generis*.

When there is no kind of provocation, the term malice may, commonly, appear to be altogether misapplied. The most inexcusable homicides have frequently been committed without

provocation, and without malice; as that of Mr Bright by Patch, to avoid the payment of 1000*l.* and of Sir T. Boughton by Donellan, in order to possess himself of an estate. Of this class are murders to obtain the allowance of burial clubs, the price of bodies, or the benefit of life policies. In many cases a murderer's inducement is a matter of vague conjecture; Felton's is, perhaps, an unparalleled instance of an assassin carrying the exposition of his motives in his hat.

As to Sir M. Hale's *second* head of "malice in law," viz. "the party killed," explained by him to mean the murder of an "officer or minister of justice;"—it is plain that if the State make it the duty of *A*, a constable, to arrest *B*, it would be wrongful towards *A*, and would paralyse the administration of the law, if it were justifiable or excusable for *B* to kill *A* on the plea of *A*'s provocation. Such provocation, if it may be so called, the law enjoins, and, therefore, cannot permit to be resented. In cases of the homicides of constables, gamekeepers, and other officers, the rule of law may appear to be less remarkable for the peculiar capacity of the "party killed" as Hale intimates, than, because, in such homicides, usually the slayer has no malice in common sense; his sole, or, at least, paramount object being to escape, or to secure his booty.

Some writers have, indeed, laid the law down, as if, in resisting an officer, he be killed, though casually or by means not affording any reasonable presumption of danger to life, it will be murder. This may be thought to be going too far; whilst, on the other hand, the law may be deemed too inattentive to the protection of officers, in the case of their being killed when resisted, where there are defects though in the frame of process, or irregularity in its execution, unknown, at the time, both to the slayer and the slain. By the Scotch law, it is murder, if an officer of justice be killed, though the process be erroneous in its frame, be executed in an irregular manner, and on a wrong person, provided resistance be made with *lethal weapons*.

The uncertainty of the Common Law on this subject is illustrated by the difference of opinion between two great authorities of English law upon a case arising out of it. A constable of the parish of St Margaret's, Westminster, arrested a woman in that of St Paul's, Covent Garden, where he had no authority; the defendants, who were strangers to her and her case, attempted to rescue her, and the constable's assistant was killed. It was held by seven of the judges against five that there was a sufficient provocation to exonerate the prisoners from the charge of murder. Lord Holt said, "If one be imprisoned upon unlawful authority, it is a sufficient provocation to all people out of compassion, much more when it is done under colour of justice, and when the liberty of the subject is invaded. It is a provocation to all the subjects of England: a man ought to be concerned for Magna Charta and the laws; and if any officer against law imprison a man, he is an offender against Magna Charta." According to such reasoning the slayer would appear to have deserved a civic crown; whereas no one deemed him free from the guilt, at least, of manslaughter.

Sir M. Foster, among his remarks on this case, observes, "The prisoners saw a woman, a perfect stranger to them, led to the round house under a charge of a criminal nature. This, upon evidence at the Old Bailey, a month or two afterwards, cometh out to be an illegal imprisonment, a violation of Magna Charta; and these ruffians are presumed to have been seized, all on a sudden, with a strong fit of zeal for Magna Charta, and, in this frenzy, to have drawn upon the constable, and stabbed his assistant." Such militant opinions of so high authority that the legal world would have been overawed by either were the other away, are called by Lord Bacon *Antinomiæ;* he recommends that they should be put an end to by Parliament.[1]

[1] There was a remarkable case of one Hugget, upon this subject reported very briefly in Hale, as one of a sudden quarrel, which, he says, by the "advice

Sir M. Hale's *third* head of *malice in law*, "the person killing," "might, at first sight, lead us to expect homicides by pirates, or men with blackened faces, or Jack Ketch, were it not explained to mean a killing by John Stiles," "in prosecution of some theft, burglary, &c." The law authorizes resistance *à l'outrance* to the commission of felonies with violence, as in the case of the killing of the Marquis de Guiscard, pronounced by the legislature of Queen Anne to have been "a lawful and necessary action." Where the law *justifies* extreme resistance, it cannot allow such resistance to be regarded as a provocation which can justify or excuse the party killing any more than, as in the case of officers, where force is *enjoined*. If there be no resistance, the case falls under the first head of unprovoked homicide.

In a recent case, in which a man of property attempted the forcible abduction of a lady in Ireland, and because he was resisted, gave his armed followers what the judge termed a "miscreant order" to fire; had they obeyed, and homicide had resulted, the jurisprudence of a country would have been scandalized by the offence being reached only through the artificial doctrine of malice in *law*, and a distortion of plain English. It may seem, indeed, that our definitions of criminal law are defective, when Hale classes among *constructive* offences depending on the antagonism of law and fact, such homicides as may have been committed by ruffians like those of the Beggar's Opera who sing,

of all the judges, except *very few*," was ruled to be manslaughter. Kelyng reports the case, giving the special verdict, and the opinions of the majority and minority; from which it appears that the case was very similar to the one in the text. The trial took place at Newgate, and the conference of the judges seems not to have been official. The majority, among whom was Hale, said that they did not mean to be "bound by their opinion." The case was then removed by Certiorari into the King's Bench, where *all* the *four* judges held it was murder; but, in deference to the extrajudicial opinions of their colleagues, they irregularly allowed the prisoner his clergy, imprisoned him for eleven months, and required him to find sureties for good behaviour during life.

Let us take the road!
Hark! I hear the sound of coaches,
The hour of attack approaches,
To your arms, brave boys! and load;
See the ball—I hold!
Let the chemists toil like asses,
Our fire their fire surpasses,
And turns all our lead to gold.

Sir M. Hale's *fourth* head of *malice in law*, viz. *maliciously striking at A, and killing B*, is treated by Sir E. Coke as a case of *express malice*. The characteristic of such cases would appear to be, that murder is intended, and there results an homicide, but not that of the person whose life is aimed at. Several interesting examples have occurred that illustrate this head. A man gave poison in a roasted apple to his wife, intending to kill her, and she gave it to her child, who died in consequence, though the husband, being present, tried to dissuade the wife from giving the apple to the child. A woman mixed poison with some medicine received from an apothecary, with the intention of killing her husband, and, the poison having been suspected, the apothecary, in order to vindicate his character, drank of it, and died. A man shot his companion, whom he mistook for a resurrectionist in a churchyard. In the leading case upon this subject, which is in Plowden, it was argued that, if the man who gave poison in a roasted apple to his wife could not be convicted of murdering the child to whom the wife gave it, he would go *unpunished*, and thus the Queen would receive no satisfaction for the loss of her subject; a loss which the old writers describe as that of a head deprived of its mystical members. Hamlet would have been found guilty of the murder of Polonius, if a jury may be supposed to have been of opinion, that according to his own declaration, he "took him for his *better*," and did not, agreeably to his original exclamation, merely intend to kill a rat behind the arras. Hale might have added to this

category cases of mistake, as of Scævola, who killed Porsena's secretary by mistake for his master, and of whose erring hand it was written:[1]

> Major deceptæ fama est, et gloria dextræ,
> Si non errâsset fecerat illa minus.

Sir M. Hale (it has been seen) explains cases under the present head by a doctrine of malice being *transferred*, in *law*, from one person to another, or, as it is often expressed, *malitia egreditur personam*. Hale tells us that if a man try to murder another, and by accident kill himself (the very case has occurred where a smuggler fired at a revenue officer), he will be *felo de se*, and be construed to have malice or gall, by way of *transfer*, against himself. It may be thought that the state is interested in punishing attempts against human life directly occasioning a sacrifice of it; it is of less importance whether the slayer has succeeded or been thwarted as to the particular victim of his machinations.

Sir M. Hale's *fifth* and last head of malice in law, is that of purposely turning loose bulls, bears and other wild animals; to which some writers add the riding on kicking horses into crowds: Hale states that he had *heard* that this had been ruled to be murder *long since* at St Alban's, where the owner had been hanged for it, but adds, "but this is but a hearsay." Hale is usually cited as the authority for this doctrine, but without his *hearsay*. The celebrated case of Porteus, which is the foundation of Sir W. Scott's novel of the Heart of Mid-Lothian, falls within the same principle as Hale's zoological specimens. Capt. Porteus was sentenced to death for giving orders, when in command of the Edinburgh City Guard, to his soldiers to fire into a crowd, whereby seventeen persons were killed or wounded, justifiably or at least with extenuation according to most opinions, for his soldiers were attacked with stones when

[1] For opinions on Scævola, see the Author's *Gems of Latin Poetry*.

on duty at the execution of a popular smuggler. He was afterwards, for fear of a reprieve, inhumanly dragged out of prison and hanged by a mob.

Sir M. Hale states concerning the intention of the delinquent in this case of the wild animals, that the turning them loose amounts to malice in *law*, "although it were with design only to frighten people and make sport."—And, to the like effect, Sir M. Foster writes, "If an action unlawful in itself be done deliberately and with an intention to do mischief, or great bodily harm to particulars, or of mischief indiscriminately, fall it where it may, and death ensue, *against* or *beside* the original intention of the party, it will be murder."

It is conceived, however, that the expressions used by these high authorities might occasion a misconception calculated to spread unnecessary alarm among persons of a sportive turn of mind, as are commonly youths of fourteen or upwards. Nevertheless, in cases of the above description, the offence of murder may be fairly imputable, where from a person's conduct, and declarations, his age, the nature of his alleged pastime, and all surrounding circumstances, he may be presumed to have knowingly incurred the risk of endangering human life. Malice, in its ordinary sense, is out of the question; for, by the supposition, the slayer may have previously known nothing whatever of the individual slain. It may, indeed, appear incongruous to affirm that a person shall be hanged for killing, when he had no intention to kill; but not so, if it be stated that he is punished for killing, when he has intentionally done, from whatever motives not constituting a justification or excuse, what he may be presumed to have known might, in ordinary probability, result in killing.

Besides these five heads of malice in *law*, to be collected from Sir M. Hale's treatise, there is a sixth, of which the germ is to be found in his book, and which will be more particularly noticed, in treating of manslaughter and accident; it is the

enormous rule of law, that if a person be committing any kind of felony, say the shooting of a Cochin fowl, with a view to stealing it, and, by the purest accident, kills a man, this is murder upon Hale's principle of the transmigration of motives.

It may be observed, with regard to all these species of malice in *law*, that they exhibit an abuse of phraseology exceeding any which the dramatist has ascribed to Mrs Malaprop. The term *malice* has, owing to the legal ambiguity attaching to it, been expunged from the definition of murder in the Louisianian Code; and, in the Codes of countries which have not borrowed their jurisprudence from England, their founders have not had recourse to the like makeshift terminology. The offences, indeed, themselves which constitute the doctrine of malice in law (with the exception of the sixth head, which is not defensible on any principle) have a similarity of character and malignity, and their result is identical. They all of them imply, though not in the same degree, the knowingly and recklessly exposing of human life to peril. If they may be deemed to have this, or any similar common link, and may seem to require for their repression one and the same punishment, it may be expedient to class them under a general appellation, as that of *murder*.

It may be thought, however, that Sir M. Foster has entirely failed in explaining the mutual connexion between all murders from malice in *law* by his plausible, classical, and popular theory of a "heart regardless of social duty, and fatally bent upon mischief." This explanation may appear to afford no certain boundary for distinguishing the crime of murder, and to be equally vague and indistinct with Sir E. Coke's more ancient *copula*, which he applied to manslaughter as well as murder, and to a multitude of other offences besides, that they were termed felonies, because done *felleo animo*, as manifesting a heart full of *gall*.

The bilingual ambiguity of the term *malice* affords a pretext for juries to escape from their duty when it tends to the infliction

of capital punishment. Sir M. Hale himself, in his treatise, evinces that he had not emancipated his own mind from a notion that malice in *fact* was essential to the crime of murder. He writes, (what has ceased to be law,) that if *A*, having *B* his second, fight a duel with *C* having *D* his second, and *C* is killed, "it *seems* not to be murder in *D*, because, though he had *malice* against *A* and *B* his opponents, yet he had none against *C*, though *some* have thought it to be murder also in *D*. *Sed quære de hoc.*" In such a case, and, in many more, especially where there has not been an intention of killing any one, or where homicide has been committed in consequence of mistaking the law, or of erroneous process, or under provocation in *fact* though not in *law*, it becomes the duty of a judge to tell the jury, that, although the prisoner is indicted for killing with *malice aforethought*, yet, that malice, as affecting the prisoner's life, means something quite different from what they have been taught at school; and that it is one thing inside a court, and another out of doors. On hearing such a charge a jury may not unnaturally feel like the brothers of Lord Peter, in Swift's Tale of a Tub, when offered by him slices from a twelve-penny loaf, and told by him, "Come, brothers, fall to, and spare not; here is as excellent good mutton as any in Leadenhall Market."[1]

Another mischief arising from the term "malice in law" is that it imports a *matter of law* which must be decided by a judge and not by a jury. It followed from the doctrine having been eked out by extensions of the ancient common law devised by the courts from time to time, that the judges would naturally arrogate the right of giving their own application to the creature created, after an example in ancient mythology, out of their own brains. Sir M. Foster distinctly

[1] In the case of *malicious* injuries to property, it was found necessary to provide by statute, that the penalties should be enforced, "whether the offence shall be committed from malice to the owner of the property, or otherwise." The cases had previously given the natural construction to the term *malice*.

lays it down that the *malus animus* is matter of inference to be determined by the judge. In Major Oneby's case in the reign of George I. it was decided that the proper mode of directing a jury was thus: "If you believe such and such witnesses who have sworn such and such facts, the killing of the deceased was with malice prepense, or it was with malice implied, and you then ought to find the prisoner guilty of murder."

All technical constructions have been the parents of much uncertainty, and thus, upon this point, judges have differed in their practice. At the trial of Governor Wall, for homicide by military flogging at Goree twenty years previously, Ch. B. Macdonald left the question (according to Sir M. Foster's doctrine) of *bad heart* to the jury. After premising that he hoped to explain "the nature of malice in a very few intelligible words, because he intended to borrow them from the most intelligible writer we have in our law upon that subject," and then quoting Foster's opinions upon hearts, and reading the evidence, he concludes, "You will consider the extent of the punishment visited by the prisoner on the deceased; whether, supposing there might be a mutiny, eight hundred lashes with an instrument consisting of one solid elastic mass, instead of nine loose thongs, and in that climate, make out in *your* minds that *malicious intent* which I before explained, and which it is necessary *you* should fasten upon the prisoner before you convict him."

It is conceived that all malice, and especially what is termed malice in *law*, is peculiarly within the province of juries. The degree of probability that death will ensue from a particular act, and the intention of the agent, are inferences to be drawn from each peculiar combination of facts, that must vary from case to case, and can be only obscurely shadowed forth in law-books. Moreover, such inferences are to be deduced from ordinary transactions, and from the conduct and the language

of persons in various classes, generally the lower classes, of society; matters, not of black-letter, nor to be safely trusted to the adjudication of a single person, but depending upon the unlettered experiences of daily life, and of the motives of the human heart.

SECTION III.

Homicide Justifiable.

To justify the taking away of life otherwise than by the sentence of a Court of Justice, is a measure demanding the utmost prudence on the part of a legislature. Such justification ought to be not made a vehicle for fiscal exactions; it requires precise delineation, as regards the conduct both of the slayer and the slain; and it ought to be confined within the narrowest limits compatible with the instincts of nature, the security of society, and the due administration of justice.

Sir M. Foster writes of the distinction between innocent or justifiable homicide, and that which was deemed, in some measure, blameable, and barely *excusable*, that it had been left by preceding writers (including, it is to be presumed, Sir M. Hale) in "darkness and confusion." The practical question to be determined was, what homicide involved forfeiture, and what left the slayer in possession of his goods and chattels? Forfeiture for so-called *excusable* homicide being now taken away by a statute of George IV., to distinguish between it and that which is *justifiable*, can be longer of importance either to the lawyer or the Chancellor of the Exchequer; it remains, nevertheless, in most books of criminal law, as a stumbling-block to students.

Homicide is, and, according to some, was always justifiable without forfeiture, in cases of *self-defence* under circumstances mentioned by Sir M. Foster: "In the case of justifiable self-

defence, the injured party may repel *force with force*, in defence of his person, habitation, or property, against one who manifestly intendeth and endeavoureth with violence or surprise to commit a *known* felony[1] upon either. In these cases he is not bound to retreat, but may pursue his adversary till he findeth himself out of danger; and if, in a conflict between them, he *happeneth* to kill, such killing is justifiable." This is consonant to the sentiments expressed in the eloquent vindication of self-defence by Cicero in his oration for Milo.

Homicide is justifiable, and was excusable, but involved forfeiture, in other cases of self-defence, subject to some nice qualifications, thus stated by Sir M. Hale: "Regularly it is necessary that the person who kills another in his own defence fly as far as he may to avoid the violence of the assault" (which he usually calls flying to the *wall* or other *non ultra*) "before he turn upon his assailant; for though, in cases of hostility between two nations, it is a reproach and piece of cowardice to fly from an enemy, yet, in cases of assaults and affrays between subjects under the same law, the law owns not any such point of honour, because the king and his laws are to be *vindices injuriarum*, and private persons are not trusted to take capital revenge one of another." The person assaulted must, according to this doctrine, at his own inconvenience, afford the assailant a *locus pœnitentiæ*. It cannot, it seems, be made plain to the law that the assaulted would have been killed, if he had stood where he had a right to stand; such peril must be ascertained at the wall. Hale, in order to give some idea of legal distance in such cases, says, "suppose it *half a mile*."

[1] Blackstone writes: "Such homicide as is committed for the prevention of any *forcible and atrocious crime* is justifiable." This is, in a degree, more precise than a distinction between *known* and unknown felonies, and death by *happening*. Hale writes, that, at Common Law, "if a thief assaulted a man to rob him, and he had killed the thief in the assault, it had been *se defendendo*; but, yet he had forfeited his goods, as *some* have thought, though *other* books be to the contrary." He also says, that if a woman kills a man to prevent being ravished, it is *se defendendo*, because rape is a *felony*.

Another passage, however, in Sir M. Hale's treatise is to be contrasted with the foregoing extract; it may be thought to shew that he did not consider his *mural* rule as applicable to the defence of property, or, at least, of a house, which Hale calls a man's *castle*. He mentions a case in which a man was entering a house as a *trespasser*, and was killed by the owner, of the name of Harcourt, which homicide was adjudged to be manslaughter. Sir M. Hale writes: "But if *A* (the trespasser) had entered *into* the house, and Harcourt had gently laid his hands upon him to turn him out, and then *A* had turned upon him and assaulted him, the killing would have been *se defendendo*, though the entry was merely as a trespasser. And it *seems* to me, in such a case, Harcourt, being in his own house, *need not fly as far as he can*, as in other cases of *se defendendo;* for he hath the protection of his house to excuse him from flying; since that would be to give up the possession of his house to the adversary by his flight." It may be observed of this case, that it seems inconsistent to justify homicide in defence of property without a run for it, but not in defence of life; and that the king and his laws are *vindices injuriarum* to houses as well as to men; and that, in a house, serviceable means of escape are usually at hand by stairs, cupboards, back-doors, dustholes, or chimneys.[1]

Hale's rule of the wall or ditch seems to have been, originally at least, applicable to the affrays of our sword-girt ancestors, when, as was written in the time of Henry VIII., *In Anglię ad templum sive forum sine armis vadit nemo*, or such as are depictured in Romeo and Juliet. It seems, otherwise, to conflict with the rule that a felonious design of killing may be resisted internecially, without any retreat. Staunforde, the oldest authority on this subject, writes, "Icy il n'ad affaire ove un *laron*, eyns ove *loyall* homme, et le quel le person qui est

[1] Falstaff thought the chimney a place of safety, Mrs Ford was of opinion that the kiln-hole was safer.

occis, ou le person qui occist commenca l'affraye n'est material." Sir M. Foster, also, considers this rule as applicable only to *chance-medley*, in its proper sense of a sudden affray.[1]

Sir M. Hale adduces numerous decided cases which were scarcely required, in order to illustrate the rule of homicide *se defendendo;* for instance, he tells us that the *flight* must not be a feigned flight, to gain advantage of breath, or opportunity to fall on afresh," (he, probably, was thinking of the battle between the Horatii and Curiatii) "as *fighting cocks* retire to gain advantage."[2] So, "If *B*, having a pitchfork in his hand, *A* assaults *B* so fiercely that he runs upon the pitchfork of *B*, *B* offering no thrust at all against *A*, (though this be a very difficult matter of fact to suppose) it *seems B* forfeits no goods, because it was the act of *A* himself, and *some have said* rather, that, in that case, *A* is *felo de se*, and forfeits his goods." Hale writes that if *A* assault *B*, so fiercely that *B* cannot fly to a *non ultra*, or if he fall to the ground and then kill *A* to save his own life, this is

[1] In "Directions to Justices of the Peace," tem. Car. II. in Kelyng's Reports, it is recited, "For that it hath frequently happened of late, that some have been killed upon duels, others upon *suddain quarrels* in the streets." Lord Mahon says, that the wearing of swords was not singular at the close of the American War. A statute of Edward I. prohibits brawling in the streets *apres cover feu*, and punishes the wearing of arms, except by *grande seigneurs* ou autre prodromes de bone conyssaunce, whom it enjoins to have a torch.

[2] Sir M. Hale appears to have had a practical notion of cock-fighting, as it is described in a poem of his day :

Alter ab instanti paulùm se subtrahit hoste,
Effugium simulans ; multumque agitatus in orbem
Eludit gyro interior : subitusque sequentem
Devitat ; "Fugit, ecce fugit, de stercore natus
Ad charam properans Venerem, et, tua bella, Cupido,"
Vulgus ait. Non sic iratis passibus alter.
"Ecce decem pono libras : Quis pignore certat
Dimidio ?" Hunc alter transverso lumine spectat
Gallorum mores multorum expertus, et artes,
"Tecum, inquit, contendam."
* * * * * * *
Ceu Parthus, dans terga fugæ, versâque pharetrâ
Hostibus improvisus adest ; turbata retorto
Agmina agit jaculo, et victor cedendo triumphat.

se defendendo, because the necessity is *interpreted* a flight; but though *A*, the first assailant, will be held to have killed *B se defendendo*, if he fly to a wall, he shall not have the benefit of an *interpretative* flight. This, and other sharp points touching *priority* of assault, *passive* homicide, and homicide in defence of others, said to be in the *nature* of a *se defendendo*, which Hale introduces with *seemings* and *sayings* of *some*, or concludes with the *sayings* of *others*, or a *tamen quære*, are resumed, but left unsettled by Hawkins, East, and Russell, leaving the Common Law to be duly declared thereon, *ex post facto*, after prisoners shall have been brought to trial.

Forfeiture was inflicted for excusable homicide in self-defence; and a jury was, in a reported case, amerced, for humanely finding the goods and chattels of one who had killed another in self-defence of less than their real value. This odious law owed its origin, or at least its long continuance, to the cupidity of sovereigns prior to the exchange of the hereditary revenues of the Crown. It may be thought curious to observe the manner in which Lord Bacon, and, following him, Blackstone, attempts to varnish over this blemish in the law, which is now happily effaced. Blackstone writes, that "the law sets so high a value upon the life of a man, that it always *intends* some misbehaviour in the person who takes it away, unless by the command or express permission of the law; the law *intends* that the quarrel or assault arose from some *unknown wrong*, or some provocation, either in word or deed; and, since in quarrels both parties *may* be, and usually are, in fault, and it scarce can be tried who was originally in the wrong, the law will not hold the survivor entirely guiltless." The law, it would seem, would turn a deaf ear to the complaint of Juvenal's pedestrian:

> Si rixa est, ubi tu pulsas, ego vapulo tantum.

The mitigation of punishment in cases of homicide *se defendendo* is glanced at by Shakspere's Gravedigger, who throws out

that Ophelia would not have had Christian burial, but that the Crowner had found her suicide *se offendendo*.

Justifiable homicide is, by law, permitted in some cases in which, it is conceived that, in the present state of society, it is unnecessary for the due maintenance of public justice. It is stated by Hale and Foster to be the duty of every private individual, as well as peace-officer, (a duty the wilful neglect of which they say is punishable with fine and imprisonment) to use their best endeavours to apprehend every felon; and that, if a flying felon be killed when pursued, provided he "*cannot* otherwise be overtaken," this will be deemed justifiable homicide.[1] It is to be observed, with regard to the origin of this rule, that the goods and chattels of a felon killed in flight were forfeited to the king; whereas, if he escaped, the forfeiture was in danger of being lost, being regularly due only upon convictions. In misdemeanors there is no forfeiture, and, consequently, no privileged homicide.

It will be collected from this rule, in conjunction with what has been said, in the above pages, concerning the subtle distinction between felonies and misdemeanors, that questions of homicide being justifiable or not, may depend on technicalities, against which, until a recent statute, few indictments were proof. The point, also whether a felon *cannot* otherwise be secured must allow of a dangerous latitude of discretion. Except as regards offences of the deepest enormity, (say capital, or transportable for life), if even them, the mischiefs arising from the escape of a felon or suspected felon can rarely be so great as to outweigh the perils of delegating to peace-officers and private individuals the power of life and death. In Hale's

[1] The law is usually laid down in terms denoting *physical* impossibility; but it would seem to be satified by reasonable presumption. Foster writes, "felony *or* dangerous wound given." Hale says of attempts to arrest an innocent man, first, where there is no felony committed, or no probable suspicion, and secondly, where these concur; that in the first case, homicide will be *at least* manslaughter; as to the second, "*quære*, whether this will excuse him from manslaughter?" Foster *thinks* that the second case would be one of manslaughter.

time a felon killed in flying was deemed, if he had not fled, doomed to the gallows; now, far more commonly, to the treadmill. In Hale's time, ultimate escape, when a felon was once out of sight, was a probable reward of his agility; remarkable instances may be cited of the want of communication anciently between county and county. But in the present day, a felon, if he have an opportunity of escape, is pursued and usually overtaken without extreme violence, by means of an active police, the Hue and Cry Gazette, steam, electric wires, photographs, and international conventions.

Upon one case relative to justifiable homicide in the prosecution of public justice, Sir M. Hale and Sir M. Foster are at seeming variance. Sir M. Hale writes: "If a man be in danger of arrest by a capias in debt or trespass, and he flies, and the bailiff kills him, it is murder." Upon this opinion Sir M. Foster remarks: "I rather choose to say, it will be murder or manslaughter, as circumstances may vary the case. For, if the officer, in the heat of the pursuit, and merely in order to overtake the defendant, should trip up his heels, or give him a stroke with an ordinary cudgel, or other weapon not likely to kill, and death should unhappily ensue, I cannot think that this will amount to more than manslaughter, if, in some cases, even to that offence. The blood was heated in the pursuit, his prey, a lawful prey, just within his reach, and no signal mischief was intended: but had he made use of a deadly weapon, it would have amounted to murder." Hale here puts a case of wilfully killing, though from mistake of law: Foster meets it by putting a case of unintentional killing, and by means not likely to kill, which, probably, Hale would have admitted was only manslaughter, and that without the analogy of a fox-chase.

Some questions of justifiable homicide in the execution of justice have attracted much public attention. Sir M. Hale lays down as a rule: "If the sheriff vary from the judgment, as

where the judgment is to be hanged, and he behead the party, it is held murder." Sir M. Foster says, that the rule laid down by Sir M. Hale is not universally true. Sir E. Coke, indeed, writes that a warrant from the crown for an execution totally varying from the judgment, is illegal. But Sir M. Foster observes that beheading, in some special cases, by warrant from the crown, instead of hanging, has been practised in all ages, and he concludes that it is a part of the Common Law, though, as it would seem, a part unknown to Coke and Hale; he approves also of a *usage of the scaffold* in late times, whereby traitors were suffered to hang till they were dead, and women were stifled, through sentenced to be burnt alive, and all this by shrieval mercy.[1] Anne Boleyn, Katherine Howard, the Duke of Somerset, Lord Audley, Lady Lisle, Lord Stafford, and Lord Russell were beheaded; Lord Ferrers was hanged. The proceedings in Lord Stafford's case afford a striking illustration of the ruthless sentiments by which the nation was swayed during the prosecutions for the Popish Plot. The sheriffs of London scrupled as to beheading Lord Stafford in conformity with a royal warrant, and not inflicting the entirety of the barbarous and disgusting sentence pronounced upon him as in cases of high treason. They applied to the Houses of Lords and Commons for further directions. The Lords replied that the King's warrant ought to be obeyed. The House of Commons, after disgraceful debate, came to a singular resolution, "That this House is content that the sheriffs do execute William Viscount Stafford by severing his head from his body only."

Blackstone, after quoting from Hale and Hawkins, that if a judge who is not authorised by lawful commission pronounce sentence of death, and execution be done accordingly, he will be guilty of murder, cites, from Burnet, that Sir M. Hale on this

[1] Sir M. Foster remembered Catherine Hayes in 1726 being literally burnt alive; and in 1745, Colonel Morley, after being hanged six minutes according to shrieval usage, was still found to have life when cut down. The executioner, after giving him several blows on the chest in vain, cut his throat.

account "declined to sit on the crown side at the assizes, and try prisoners; having very strong objections to the legality of the usurper's commission." This statement is, in the main, incorrect, for during several years he tried criminals on the circuits, and at the Old Bailey, as Lord Campbell expresses it, "without any misgiving." But at a later period, after having quarrelled with the government respecting the administration of the criminal law, both sides were equally willing that he should confine himself to the decision of civil causes. Some transactions in the course of this quarrel, which are detailed by Burnet, might, if they be truly reported, have ruined the reputation of any other judge than Hale. He is said to have refused to serve on a commission for trying Penruddock on a charge of high treason, exclaiming, "The four terms and two circuits are enough, and the little interval that is between is little enough for my private affairs." And Burnet relates the case of a trial at Lincoln, wherein Sir M. Hale ordered the "prisoner's execution to be so suddenly done, that it might not be possible to get a reprieve; which, he believed, would have been obtained, if there had been time enough granted for it." The circumstances of this transaction were, very probably, misconceived by Burnet; they would go far to impeach Sir M. Hale of unjustifiable and inexcusable homicide, at least in the moral judgments of men of his own ordinarily just and humane character.

SECTION IV.

Homicide Accidental.

Punishment for accidental homicide may be regarded as a solecism in jurisprudence. Its effect would commonly be to accumulate penal suffering on an inoffensive person already transpierced with poignant remorse; and this, without attaining the object of punishment in preventing mankind from incurring

similar accidents. There is, however, great difficulty in imparting legal certainty to the term *accident.*

In some of the cases adverted to under the head of malice in *law*, the homicide might, in a particular sense, be termed accidental, and yet the punishment of the offender may appear productive of public benefit. Thus Sir M. Foster writes: "I will mention a case which, through the ignorance or lenity of juries, hath been sometimes brought within the rule of accidental death. It is where a blow aimed at one person lighteth upon another and killeth him. This, in a loose way of speaking, may be called accidental with regard to a person who dieth by a blow not intended against *him;* but the law considereth this case in quite a different light."

Sir M. Hale writes: "If *A*, without licence of *B*, hunt in the park of *B*, and his arrow, glancing from a tree, killeth a byestander, to whom he intended no hurt, this is manslaughter, because the act was unlawful." "So, if *A* had thrown a stone to kill the poultry or cattle of *B*, and the stone hit or kill a bye-stander, it is manslaughter, because the act was unlawful, but not murder, because he did not do it maliciously, or with an intent to hurt the bye-stander." Further, "Suppose a person not qualified under the statute of Henry VIII. shoots with a gun at a bird, or at crows, and by mischance it kills a byestander by the breaking of the gun or some other accident, this will be no more than *chance-medley* in him; for though the statute prohibit him to keep or use a gun, yet the same was but *malum prohibitum* and that only under a penalty, and will not enhance the effect beyond its nature."[1]

Mr Eden, who wrote about a century ago, exhibits the extent of absurdity to which the doctrine just noticed has led. "A

[1] Hale generally uses the term *chance-medley* as synonymous with accident; but this use of it is said to be improper by Sir M. Foster, and it does not appear etymologically correct. The term has been commonly considered to signify either an affray (medley) which is sudden and casual, or, an affray in the heat of blood (*chaud*).

man, shooting at a bird, and using proper and ordinary caution to prevent danger, unfortunately happeneth to kill his neighbour. The guilt of this man, in the eye of our law, and, consequently, the proportion of his punishment, will depend, partly on the nature, shape, and size of the bird; and, partly, on the intention of the man with respect to the bird; but will have no connexion whatever with the act of homicide. If the bird chanceth in evidence to prove a wild pigeon, *ferœ naturœ et nullius in bonis*, it will be *excusable* homicide; if a tame fowl, and shot at for the amusement or improvement of the marksman, it will be *felonious*, and manslaughter, because an unlawful trespass on the property of another; lastly, if the bird were private property, and intended to be stolen, which must be collected from the circumstances, it will be murder."

The Indian Law Commissioners put various cases in which the rule of the English law respecting accidental homicides may appear unreasonable, as for example, that of a pickpocket stealing a purse of a gentleman who has a loaded pistol in his pocket; the trigger is supposed to be accidentally touched, whereby the gentleman is shot. The Commissioners urge, that it would be a less capricious course to provide that every hundredth thief selected by lot should be hanged, than providing, that, besides the ordinary punishment for an offence, the offender shall run an exceedingly small risk of being hanged.

Hobbes, the contemporary of Hale and friend of Selden, imputes the law of accidental homicide to a misconception by Coke of a passage in Bracton, and says that he "does not believe a word of it." He writes, "If a boy be robbing an apple-tree, and by some chance fall therefrom and break the neck of a man standing underneath, the crime consists in a trespass, to the damage, perhaps, of sixpence. Trespass is an offence, but the falling is none, and it was not by the trespass, but by the falling that the man was slain, yet Coke would have him hanged for it, as if he had fallen of malice prepense."

According to this doctrine of the transmigration of motives, the main object of criminal law, that of deterring by example, is abandoned; for any person repeating the offender's act with the offender's intentions, would not, in ordinary probability, meet with the same accident, neither would his offence undergo the same misnomer. All regard to proportion of moral guilt is disregarded, which, however, juries cannot be expected to overlook, but by which they are usually governed more than by technical law even from the mouth of a judge. Sir M. Hale's distinction in this respect between *mala prohibita* (including smuggling and other offences, which would not be prohibited unless injurious to society) and *mala in se* (a distinction used also by Coke, Foster, Blackstone) may be thought objectionable in morality as well as jurisprudence, besides being indeterminate. St Germain, an older writer than Hale, in his *Doctor and Student*, published A. D. 1523, observes, "In every law positive there is something of the law of reason, and the law of God; and to discern the law of God and the law of reason from the law positive, is very hard."

The history of the law of ambulatory motives is, that, according to Sir E. Coke, undesigned homicide, occasioned by *any unlawful* act, though merely a civil trespass, was murder; according to Hale, if an act be simply unlawful, as a trespass, it is manslaughter only, on account of the want of *malice;* moreover, it is, according to him, not even manslaughter, if the unlawfulness be only such as is so deemed in the eyes of the legislature, and not in Scripture or books of casuistry. Finally, the present law is, as stated by Eden, that, subject to doubt upon the continuance of the distinction between *mala prohibita* and *mala in se,* any unlawful motive may, in its perambulations, be turned by accident into a felonious one; any felonious motive into a malicious one; coupled with an accident, a design of trespass to a fowl is felonious slaughter of a man, that of stealing it is murder *prepense.*

Homicide by accident (or as it was, and is now frequently called, by *misadventure*) was, for many reigns, punishable with forfeiture of goods and chattels: this was an anomaly in jurisprudence only to be accounted for by the personal interest which our Sovereigns formerly had in forfeitures. Yet our great legal Authorities do not appear to have raised their voices against it. Sir M. Hale writes of a person convicted of homicide by misadventure (an offence, if it be such, which was committed by an Archbishop), "though it was not his crime, but his misfortune, yet, because the king hath *lost his Subject*, and that men may be the more careful, he forfeits his goods, and is not presently discharged of his imprisonment, but bailed till the next term or sessions, to sue out his pardon." Sir E. Coke quotes a Latin line on the subject (a common artifice for veiling the deformities of the law): "Nec veniam, effuso sanguine, casus habet." Sir W. Blackstone thus apologises for the law as it was in force in his day: "In the case of misadventure, the law presumes negligence, or at least a want of sufficient caution in him who was so unfortunate as to commit it: who, therefore, was not altogether faultless." It is, however, clear that if negligence or want of caution can be presumed, homicide amounts to manslaughter. By a statute of George IV. homicide by misadventure, or what is not a crime but a misfortune as Hale above writes, is made dispunishable; the law has abandoned Blackstone's *presumptions* of negligence and want of caution; and the Sovereign no longer seeks a pecuniary compensation for "the loss of his Subject."

Besides cases of pure accident, much perplexity occurs in regard to degrees of probability connecting cause and effect, or where the effect *of death* may have partially or wholly resulted from intervening, concurrent, superinduced, or independent causes. It may be questioned whether Sir M. Hale has left satisfactory rules on this subject. He writes: "If a woman be with child, and any give her a potion to destroy the child within her, and she

takes it, and it works so strongly that it kills her, this is murder: he that gives a potion of this kind must take the hazard, and so ruled before me at the Assizes at Bury." He further lays it down, that if a wound occasion a gangrene or fever which may be the proximate causes of death, still the wound is the "*causa causati.*" But, he says, that "if a wound or hurt be not mortal, though with ill applications by the party or those about him of unwholesome salves or medicines the party dies, if it can clearly appear that this medicine, and not the wound, was the cause of the death, it *seems* it is not homicide."

It may be observed as to the case of a potion given to destroy a child, whilst in legal language it is *pars viscerum matris*, and not *in rerum naturâ*, that, in Hale's time, this was not, *per se*, a felony, and that the mother's death may have arisen from causes which no human sagacity could foresee. If the mother had given the potion to herself for the same purpose, she would, according to Sir M. Hale's ruling at Bury, have been *felo de se*. It is conceived that a person cannot, in a criminal point of view, be properly deemed "to take the hazard" of what a jury may think was, in ordinary probability, no hazard at all.

As to the occurrence of a supervening gangrene or fever, it may be thought to be a probable effect of a severe wound; and the like in all cases of grievous bodily injury: so, in such cases, there is a very probable risk of the injured party being treated with inferior skill, or of his death being occasioned by circumstances which might have been innocuous to a person in sound health; and the like, it may be thought, of unwholesome salves and medicines, provided the person administering them be not thereby guilty of manslaughter, when it might appear anomalous to attribute one death to two distinct felonies. Cases have gone the length of holding, that an injured person refusing to submit to a surgical operation, or, as in Governor Wall's case, drinking spirits immoderately in a hot climate, did not create a legal chasm between a primary cause and an ultimate effect.

Part of Sir M. Hale's doctrine it may be observed, is laid down with an *ut videtur*. And his rule of a *causa causati* is very latitudinarian. Mr Eden remarks on a decision in the reign of Charles II. as being a "harsh resolution," whereby it was held that if a person neglected the cure of his wound, or was disorderly, it was, nevertheless, murder, "because if the wound had not been, the man had not died." In a Scotch case, which occurred at Glasgow in 1819, a gamekeeper in a scuffle with a poacher discharged his gun, which lodged its contents in the poacher's thigh; the poacher was carried to the infirmary at Glasgow, where erysipelas happened at the time to be prevalent; he caught the disorder and died of it. The accused was acquitted of homicide, notwithstanding the logic, that if the poacher had not been shot in the thigh, he would not have died of erysipelas. Mr Alison, in his *Principles of the Law of Scotland*, lays down a rule which appears to be more definite and reasonable than Sir M. Hale's *wise saw* of a *causa causati*, viz. "In order to make out a charge of homicide, it is indispensable that the death be connected with the violence not merely by a concatenation of causes and effects, but by such direct influence, as, without the intervention of any considerable change of circumstances, was calculated to produce that effect."

It is remarkable that Sir M. Hale and Sir M. Foster are not agreed upon a particular case, whether it be one of accident or manslaughter. The case as stated by Sir M. Hale is this: "Levet being in bed and asleep in the night in his house, his servant hired Frances Freeman to help her to do her work, and about twelve of the clock in the night, the servant going to let out Frances, thought she heard thieves breaking open the door; the master rising forthwith, and, taking a rapier, ran down suddenly, Frances hid herself in the buttery lest she should be discovered; Levet's wife spying Frances in the buttery, and not knowing her, cried out, 'Here they be that would undo us,' Levet went into the buttery in the dark, not knowing

Frances, but thinking her to be a thief, and thrusting with his rapier before him hit Frances in the breast mortally, whereof she instantly died: this was resolved to be neither murder, nor manslaughter, nor felony. *Quære* whether it be not homicide by *misadventure;* for the party killed was, in truth, no thief, though mistaken for one, and, though it be not homicide voluntary, yet it *seems* to be *per infortunium.*" Sir M. Foster writes of this case: "*Possibly* it might have been better ruled manslaughter, due circumspection not having been used."

Accident, we are told by Sir M. Hale, may be regarded in a peculiar light, when it is followed by the homicide of a King. He writes: "As to the matter of high treason, where the life of the King is concerned, it is not safe too easily to admit an excuse by chance or misfortune; for though such fact cannot be treason, yet a treasonable intention may be disguised under the colour of chance, and the safety of the king's life is of the highest concernment. And, therefore, when Walter Tyrrel, with a glance of an arrow from a tree involuntarily, as M. Paris tells us, killed William Rufus, it could not be treason, because there was no purpose of any mischief, and he shot at the deer by the king's command, yet the fact was of such consequence, that he fled for it, which was a circumstance that might probably infer, that there was some ill intention, which might make him guilty of treason, and not barely accident."

It is conceived, that "the high concernment of the safety of the king's life" ought not to be suffered to affect a question which is not one of loyalty; and that although Hale introduces his caution as directed rather to evidence of *facts* than to *law*, yet his inference drawn from the flight of Tyrrel, who was a foreigner, shews how easily the two may be confounded. It must be recollected that the historian tells us how the string of Rufus's bow broke in shooting at a hart, whereupon he called on Sir Walter Tyrrel to shoot in terms, as Knighton relates, "*Trahe, trahe arcum ex parte diaboli!*"

SECTION V.

Manslaughter.[1]

Manslaughter is defined by Sir M. Hale to be the "voluntary killing of another without malice, express or implied." In another place he writes, "Murder is accompanied with malice aforethought, but bare homicide is from a sudden provocation or falling out."

These definitions present a very inadequate description of the heterogeneous *genera* of manslaughter, even according to the common law of Hale's time. In this offence are included, (1) Cases of negligence in exposing human life to peril; wherein manslaughter, in extreme cases, closely approximates to misadventure on the one hand, and, on the other, to murder. Hale, indeed, in noticing detached examples of careless driving, correction, and custody of wild animals, says that they are manslaughter "*Quia non adhibuit debitam diligentiam.*" (2) Cases of homicide committed suddenly, under grave provocation, or, as Lord Bacon writes, "a perturbation of the judgment and reason, such as, in presumption of law, man's nature cannot overcome." Foster terms it a *brevis furor*. Under colour of these cases has sprung up a class of decisions, where homicide has been committed in some manner or by some instrument not

[1] The chapter in Hale upon this subject, as previously noticed, relates almost entirely to the statute of stabbing and to pardons. Chief Justice Kelyng informs us that the statute of stabbing was passed because juries were apt to reduce homicide arising upon verbal provocations to manslaughter; a testimony shewing that the distinction in this respect between words and blows is not conformable to the sentiments of juries. As to *pardons*, when Hale wrote they were common both for manslaughter and murder before trial; and the pardon of Lord Danby, when under a parliamentary impeachment, led to a provision on the subject in the Act of Settlement. Kelyng reports a case in which the question was, whether a pardon for murder could be pleaded to a conviction for manslaughter? It was ultimately allowed, and Kelyng adds that, when the prisoner had his pardon, he "paid gloves to the judges, which is a due fee for that." It is one of the absurd distinctions between felonies and misdemeanors, that a pardon for the former must be pleaded on the prisoner's knees.

likely to kill; and reliance has been placed, whether necessarily, or *ex majori cautelâ*, upon some semi-grave provocation. (3) Cases of homicide accidentally occasioned in the commission of some unlawful act not amounting to felony, provided, according to Hale, it be *malum in se:* this head, for the reasons stated in the previous section upon accidents, may appear to demand the pruning knife of law reform. Livingstone has made an apparently just objection to the English law of manslaughter, that it is too multifarious, as including offences of very different characters, and which are improperly visited with an indiscriminate punishment.

Anciently there was no occasion to distinguish between crimes now designated by the term manslaughter and those now termed murder. The latter term was originally used to denote a secret killing, especially of a Dane or Roman; all other killings were, according to Glanville, (who wrote in the time of Henry II.), called by the common name of *homicidium.* When this ancient use of the term *murder* was worn out, it was still employed, for several reigns, simply to augment the horror inspired by indictments for homicide. But when the benefit of clergy was taken from "murder with malice prepense," by a statute of Henry VIII., homicides deprived of clergy took the specific name of murders, and other felonious homicides retained the ancient generic name of manslaughters.

The introduction of the words "voluntary" and of "a sudden provocation or falling out" into Sir M. Hale's definition, is consistent with the language of older writers, though Blackstone, in accordance with modern decisions, divides manslaughter into two classes of *voluntary* and *involuntary.* It may be probable that, at the period of Henry VIII., culpable homicides not resulting from express malice, usually arose from "voluntary killings upon sudden provocation," and that negligent homicides were commonly treated as forfeitable *misadventures.* Staunforde, in the time of Philip and Mary, writes,

"Homicide is either justifiable, or *se defendendo*, or *per misadventure;* and if it be none of these, it is *voluntary* homicide, which is of two kinds—*murder* and *chance-medley*." Sir E. Coke writes, "Some *murders* be voluntary and not of malice aforethought, upon some sudden falling out, *Delinquens per iram provocatus puniri non debet.* And this, for distinction sake, is called *manslaughter*. There is no difference between murder and manslaughter, but that one is upon malice aforethought, and the other upon a sudden occasion, and, therefore, is called *chance-medley*."

The first above-mentioned head of manslaughter, that arising from *negligence*, and which is only cursorily adverted to by Sir M. Hale, has become familiar, in modern times, in consequence of accidents imputed to railway officials. The ancient instances, that have become a *cantilena* in books of criminal law, relate chiefly to correction,[1] driving, workmen throwing materials from tops of buildings; all which, according to circumstances, may be misadventure, manslaughter, or murder. The law regarding negligence, and, what induces the same legal consequences, rashness or want of due circumspection, followed by loss of life, has attracted much attention in some medical cases, as that of St John Long, convicted of manslaughter, and fined 250*l*. Twenty-nine of his patients gave testimony in his favour: it appeared that the deceased, Miss Cashin, died from mortification consequent on a wound in her back produced by a lotion, and that, a few days before her death, St John Long declared that her wound was in a "beautiful state," and that he would give a hundred guineas if he could produce a similar wound on the persons of some of his patients.

[1] The modern books, which are transcripts from the more ancient ones upon these points, might mislead in what respects the right of a master to correct his servant. Hale writes, "The law alloweth him to use moderate correction." Blackstone writes, "A master may by law correct his *apprentice* for negligence, or other misbehaviour, though, if a master or master's wife beat any other servant of full age, it is good *cause of departure*."

The *second* head of manslaughter above mentioned, is the suddenly killing upon *grave provocation*, and which Hale, with the old writers, appears to have considered the *only* noticeable head of manslaughter. It may be observed, that, in addition to the recognised ground of extenuation arising from the excited passions of the slayer in such cases, usually resentment is felt against the violent conduct of the slain. Sir M. Hale refers on the subject of provocation to a resolution upon Lord Morley's trial, 18 Car. II., whereby it was agreed by all the judges except *one* (an important exception if Hale were *he*), that "if *A* gives slighting words to *B*, and, thereupon, *B* immediately kills him, this is murder in *B*, and that such words are not, in law, such a provocation as will extenuate the offence into manslaughter." He adds (what is not to be found in the report of the case in the State Trials, or in subsequent writers), "but it was there held that words of menace[1] of bodily harm would come within the reason of such a provocation as would make the offence to be but manslaughter." Sir M. Foster states the general doctrine established in Lord Morley's case, adding thereto "indecent or provoking actions and gestures expressive of contempt or reproach;" but he is silent as to words of *menace*.

It would appear from Hale, that the Common Law upon this point had not been long settled before his time, as may be collected from the case detailed by him of a Welshman, who had a prototype in Shakspere's Fluellen, and who was considered guilty of *manslaughter*, 14 Car. I., under the following

[1] Hale was present at the resolutions in Lord Morley's case, for Kelyng mentions that he left his collar of SS. behind him in the country. Kelyng does not mention anything passing about words of *menace*; his expression is, "no words, be they what they will," his instances are giving the lie, or calling another "son of a whore." Judicial opinions have been much influenced by circumstances long after they have transpired; thus the provoking taunts of the Scotch and English upon the accession of James gave occasion to the statute of stabbing, and, probably, had a permanent influence on the decisions of courts. So the practice of wearing swords, of the consequences of which the duel between Lord Byron and Chaworth is an example among many, may have tightened the law of provocations.

circumstances: "Upon St David's Day the prisoner, David Williams, had a leek in his hat, and there was, at the same time, in waggery, a Jack-a-lent[1] in the street put up with a leek, and one Nicholas Redman spake to the prisoner, and, pointing to the Jack-a-lent, said, 'Look at your countryman!' and the prisoner being therewith enraged, threw a hammer at Redman, which missing him, did hit one Francis Marbury, whereof he died." So, even subsequently to the resolution in Lord Morley's case, Hale cites a special verdict whereby it appeared that a man had killed a woman by throwing a broomstick at her for calling him a "son of a whore." Hale says that two points were raised, one, whether "*bare words, or words of this nature would extenuate?*" the other, touching the broomstick. The prisoner was pardoned.

The law respecting provocation by words and gestures is, at present, in accordance with the main resolution in Lord Morley's case, as confirmed by the authority of Sir M. Foster. But it must be observed that, inasmuch as the principle of extenuation is founded on the want of self-control occasioned by provocation, it is obvious that gross insults by word, gesture, or even caricature, may have as potent a tendency to move many persons on a sudden to violent passion as bodily injuries. Thus the name of *hunchback* is represented (probably from personal experience) as peculiarly aggravating in Byron's *Deformed Transformed*. And the word of *denial* has been treated as inevitably productive of strife, at least if not qualified by Shakspere's *peace-maker*, an *if*.[2]

Sir M. Hale has not thrown light upon a point that occurred in the case of the *Welshman* Williams above noticed, and which remains still in obscurity, how far, in estimating degrees of provocation, the particular temperament of the person provoked

[1] A figure set up during *Lent* to be thrown at, usually for a penny, as appears from several old plays.

[2] A treatise published in Venice, in 1566, contains the following heads of chapters, "Of all kinds of lies; of the lie direct; of the lie hypothetical; of the lie general; of the lie special; of the immaterial lie."

ought to be taken into consideration. Armstrong, in his poem on Health, cautions some persons:

> If your wrathful blood be apt to boil,
> Or, are your nerves too irritably strung,
> Wave all dispute.

Scriblerus thought that the muscles of choleric people were in fault, as the *buccinators* or blowers out of the cheeks, and the *dilators* of the nose. Even blows are represented, in Hudibras, to produce very different effects on the minds of different individuals; with some, a kick in a certain part of the body

> More
> Hurts honour than deep wounds before.

Whilst others

> Have been beaten till they know
> What wood a cudgel's of by th' blow:
> Some kick'd, until they can feel whether
> A shoe be Spanish or neat's leather.

The intensity of provocation may depend less on words or blows than on the state of feelings in the person provoked, and the relations of the parties, whether the injury come from a stranger, or from a "familiar friend." The Poet of Human Nature has touched on the effect of recent affliction in sharpening resentment at sudden provocation:

> CASSIUS. I did not think you could have been so angry.
> BRUTUS. O Cassius, I am sick of many griefs!
> CASSIUS. Of your philosophy you make no use
> If you give place to accidental evils.
> BRUTUS. No man bears sorrow better. Portia is dead.
> CASSIUS. How scap'd I killing, when I cross'd you so?

And he exhibits the poignancy by which an injury, though consisting in words, is augmented, when proceeding from a daughter; thus he makes Lear complain of Goneril:

> Struck me with her tongue,
> Most serpent-like, upon the very heart.

As to manslaughter under the provocation of adultery, Sir M. Hale writes, agreeably to the present law, "If *A* commits adultery with *B* the wife of *C*, who comes up, and takes them in the very act, and, with his staff kill the adulterer upon the place, this is manslaughter." Upon which subject the Indian Law Commissioners write: "One outrage which wounds only the honour and the affections is admitted by Mr Livingston to be an adequate provocation. 'A discovery of the wife of the accused in the act of adultery with the person killed is an adequate cause.' The law of France, the law of England, and the Mahomedan law are also indulgent to homicide committed under such circumstances. We must own that we can see no reason for making a distinction between this provocation and many other provocations of the same kind. We cannot consent to lay it down as an universal rule, that in all cases this provocation shall be considered as an adequate provocation. Circumstances may easily be conceived which would satisfy a court that a husband had in such a case acted from no feeling of wounded honour or affection, but from mere brutality of nature, or from disappointed cupidity. On the other hand, we conceive that there are many cases in which as much indulgence is due to the excited feelings of a father, or a brother, as to those of a husband. That a worthless, unfaithful and tyrannical husband should be guilty only of manslaughter for killing the paramour of his wife, and that an affectionate and high-spirited brother should be guilty of murder for killing, in a paroxysm of rage, the seducer of his sister, appears to us inconsistent and unreasonable. It appears to us that the principle of extenuated homicide, being ascertained to be the loss of self-control arising from that human infirmity which is so general and almost universal as to render it proper to make allowance for it in admeasuring punishment, it is expedient to leave the consideration of this subject to juries, unfettered by arbitrary distinctions."

Next, with regard to those cases of *semi-grave provocation*

where there has been no apparent intention of killing. Sir M. Hale has laid down the law more leniently than, perhaps, is consistent with modern decisions. He writes: "If *A* be passing the street, and *B*, meeting him (there being convenient distance between *A* and the wall) takes the wall of *A*, who, thereupon, kills him, this is murder; but, if *B* had *justled A*, this *justling* had been a provocation, and would have made it manslaughter; and so it would be if *A*, riding on the road, *B* had whipped the horse of *A* out of the track, and, then, *A* had alighted and killed *B*, it had been manslaughter." He writes, indeed, "*A* and *B* are at some difference, *A* bids *B* take a pin out of the sleeve of *A*, which *B* doth accordingly, and then *A* strikes *B*, whereof he died, this was ruled murder:" for which ruling, however, one reason assigned is, "Because it is no provocation, when he did it by the *consent* of *A*." It may appear, that, in the present day, the provocation in all these cases, though it be regarded as an *assault*, would not extenuate a homicide to manslaughter, the killing being supposed intentional. In a modern case, a distinction has been taken between the provocation of a box on the ear by a woman, and a blow by her with an iron patten fetching blood.

Sir M. Hale states, further, "If *A* come into a wood of *B*, and pull his hedges, and *B* beat him, whereof he dies, this is manslaughter." Sir M. Foster, in commenting on this case, writes, that *B* beat *A* "merely to chastise for the trespass, and to deter him from committing the like. For if he had knocked his brains out with a bill or hedgestake, or had given him an outrageous beating beyond the bounds of ordinary resentment, whereof he had died, it had been murder."

Another case is that stated by Sir M. Hale as from Coke's Reports: "*A*, the son of *B*, and *C*, the son of *D*, fall out in a field and fight. *A* is beaten, and runs home to his father all bloody: *B* presently takes a *staff*, runs into the field, being three-quarters of a mile distant, and strikes *C* that he dies; this

is not murder in *B*, because done in sudden heat and passion." Sir M. Foster explains the case differently, forasmuch as from another Reporter it appears that the prisoner gave only a single stroke with a *small cudgel* not likely to kill: and Sir M. Foster does not consider that the plea of provocation could have availed the prisoner, had he killed the deceased with a hedgestake or any other deadly weapon, or by repeated blows of the cudgel. He says, that "with what weapon and in what manner the child was beaten, Coke is totally silent." Coke, however, expressly states that the weapon was a *cudgel*, and the manner was upon the *head*.

There have been numerous modern decisions whereby offences have been held to be manslaughter on the ground of *semi-grave* provocation, there being no intention of killing, as in the instances of throwing a four-legged stool, a pair of tongs, or the leg-bone of a cow, striking with clogs because they were not cleaned, ducking a pickpocket. It may be questioned, however, how far the moral provocation in such cases may have been thrown in as a make-weight, and whether they do not depend on the circumstances of an absence of a design to kill, and the improbability of the means of aggression occasioning death.[1] But, to cases of this description, the rule of Scotch law, as stated by Mr Alison, may seem applicable. "The crime of murder is committed, if death ensue from an intention to commit an *inferior* bodily injury, provided it be of such a kind as plainly, and in the ordinary course of events, puts the life of the sufferer in hazard." The cases, however, suggest the qualification of a maxim which is found in Hale, and is repeated by Foster, that a "wrong-doer cannot apportion his own wrong."

As to the *third* head of manslaughter above mentioned, viz.

[1] Administering snuff with liquor, and giving nine glasses of brandy to a boy ten years old, which have been followed by death, have been held manslaughter.

homicide occasioned by doing an *unlawful act*, Sir M. Hale's doctrine has been before adverted to in treating of accidental homicide, where it is regarded as unjust and impolitic: it may be added, that it seems, in one point of view, more unreasonable than the analogous rule of visiting accidents by felonious acts as murders, where the nature of the crime intended and that imputed have the same *legal* character, and were formerly punished alike: but here, a civil trespass is converted into felony, besides a crow metamorphosed into a man.

This objectionable doctrine has, as might have been anticipated, given rise to much legal uncertainty and to differences among legal authorities, besides affording a dangerous latitude to judicial discretion. Sir M. Foster, acting upon this vague rule, and considering that the judge was the proper authority for determining its application, writes: "A man, at the diversion of cock-throwing at Shrovetide, which hath too long prevailed,[1] missed his aim; and a child looking on received a blow from the staff, of which he soon died. I once on the circuit ruled it manslaughter. It is a barbarous unmanly custom, frequently

[1] Sir T. More mentions cock-throwing as one of the diversions of his childhood:

> I am called Chyldhood, on play is all my mynde,
> To cast a coyte, a *cockstele*, and a ball,
> But, would to God, those hateful books all
> Were in a fyre brent to powder small.

Cock-throwing and threshing the fat hen originated in the practice of farmers giving their labourers a feast and pastime before the commencement of Lent, at "merry Shrovetide." The head and tail of the cock were exposed, but the body was placed in an earthen vessel; whoever broke the vessel by throwing at it with a cudgel, and thus set the cock at liberty, took him as a prize: leaden cocks were afterwards invented, perhaps after Sir M. Foster's decision. Cock-throwing is a diversion introduced into the first of Hogarth's Four Stages of Cruelty. In Chaucer's *Nonne's* Priest's tale there is mention of a cock that omitted to crow one morning, whereby a Priest did not rise from his bed for matins, and, in consequence, lost a benefice, out of retaliation from having been lamed by the Priest when a boy:

> There was a cok,
> That for a Priest's son gave him a nock
> Upon his leg, while he was young and nice,
> He made him for to lose his benefice.

productive of great disorders, dangerous to the byestanders, and ought to be discouraged." The expression "dangerous to byestanders" seems to be thrown in by way of make-weight. In this case it would appear, that the death was purely accidental, and occurred in a sport, which, at the time, was not criminally punishable, and was popular throughout the country.

Another matter arising out of the same technical rule set at variance Sir M. Hale with Sir M. Foster. The question in issue was, whether death accidentally occasioned in wrestling, cudgelling, foils, and other like diversions, be manslaughter? Hale treats it as such; but Foster looks upon cudgels, foils, or Cornish hugs, as "manly diversions, tending to give strength, skill, and activity, and fitting people for defence public as well as personal in time of need." It is curious to see how two of the highest authorities upon criminal law draw different conclusions in aid of their respective views from Sir J. Chichester's case; one, that it shews the playing with *foils* to be unlawful; the other, that it only proves that making a pass with a sword in a scabbard is legal negligence.

Hale has not elucidated the point, whether Judge or Jury is the legitimate tribunal for determining upon questions of extenuation. The practice, in this respect, has varied among modern Judges of great eminence, and seems to require settlement by the Legislature. If there be one matter rather than another upon which juries of various several grades and occupations may be thought more competent to decide than learned judges, it is on the natural effect of multiform species of provocation upon the different minds of persons in every class of society. And, where a decision is apt to be influenced by the particular temperament and disposition of the party to decide, it seems expedient to leave it to twelve rather than to one man, though habited in ermine and carrying a library in his head. Judge Twisden, whom Saunders reports to have delivered sundry decisions *totis viribus* and *quasi in furore*, might have felt

reluctant to cast the first stone against a prisoner charged with the commission of an offence indicative of his being born under a sanguineous constellation.

A conviction of manslaughter may be found upon an indictment for murder; a rule owing, probably, to the ancient identity between murder and manslaughter. This was so in Hale's time, and it is law in the present day; but the anomaly was not so striking as at present in Hale's time, when both were capital offences, though one was clergyable. Hale, however, is scarcely justified in stating, that murder and manslaughter "differed only in degree." A verdict of manslaughter affords a pretext for sensitive consciences, and a convenient middle ground of compromise for jurors of extreme views. A prisoner, indeed, may sometimes be embarrassed by such duplicity of accusation; but it multiplies his chances of acquittal for a capital offence. This practice amounts, in effect, to that provision of French law, the expediency of which has been much canvassed, viz. permitting a jury to return a verdict of guilty, with "extenuating circumstances."[1]

With regard to the punishment of manslaughter, it is now put upon an entirely different footing from that on which it stood in the time of Sir M. Hale. Originally, it has been seen, manslaughter and murder were regarded as identical crimes in point of law, both capital, but both entitled to clergy. After the statute of Henry VIII., whereby the benefit of clergy was taken away from murder committed with malice prepense, manslaughter still continued a clergyable capital crime. By the present law, manslaughter is not, under any circumstances, a capital offence; and the punishment is now visited equally on all classes of the community, clergy, peers, peeresses, commoners, whether men

[1] There is a discussion in Hale, whether upon an *appeal* of murder, the jury may not find a verdict of *not guilty*, though the offence be manslaughter, "because it is the suit of the *party*, and *he* should lay his case according to the truth;" such an obligation was, by all the authorities, admitted not to be incumbent on the *king*, whose *forfeitures* might thereby be in jeopardy.

or women, contrariwise to what Sir M. Hale laid down without animadversion.

SECTION VI.

Child-Murder.

By a statute of James I., in force when Hale wrote, it was enacted that the mother of a bastard child shall suffer death as in murder, unless she prove by one witness, that the child was born dead. Sir M. Hale states that the statute was continued in his day by virtue of a clause in a statute of Charles I., for *the relief of the northern army;* an example, among a multitude of others, that might be adduced, of the ridiculous want of arrangement in our statute law.

Sir M. Hale treats this statute as creating no new crime, "but only directing the evidence." Such legal presumptions of crime, however, differ but slenderly from new crimes. Blackstone says of this law that, though it savours pretty strongly of severity, it is, nevertheless, also to be met with in the criminal codes of the Danes and Swedes.

According to the modern law, concealing of the birth by any woman, is made a substantive misdemeanor; but it is provided, that if any woman tried for the murder of her child, shall be acquitted thereof, it shall be lawful for the jury so acquitting her, to find her guilty (if the case be so) of concealing the birth. This alternative is usually advantageous to a guilty prisoner; as it affords a middle ground of compromise, when jurors differ in opinion; and a quietus to tender consciences, when, as is very commonly the case, there is a disposition to acquit coupled with some inklings of duty.

The general policy of the law of child-murder has been considered at the commencement of this chapter. Its provisions have not been altered except with regard to concealment. According to Sir M. Hale, cases of infanticide are to be referred

to the head of malice in *law*. The Countess of Macclesfield, mother of the poet Savage, was a rare example of a mother being influenced against her offspring, even to aiding towards his consignment to an ignominious death, by malice in *fact*.

SECTION VII.

Suicide.

A *felo de se*, according to Sir M. Hale, forfeits his goods and chattels, but not his lands. He makes no mention of other ancient severities, concerning which the law of suicide has been mitigated in the reign of George IV., in so far that the body of the deceased felon is no longer buried, with a stake driven through it, in the highway; though it is still denied *Christian burial;* and the personal estate of the deceased is forfeited. Pope's "Unfortunate Lady" would now be allowed "room in sacred earth," but hallowed dirges would not be permitted to be muttered over her tomb. Ophelia would not have "shards, flints, and pebbles thrown on her;" but the churlish priests could "do no more."

The subject of forfeiture incident to suicide is particularly discussed by Sir M. Hale, and he notices the celebrated case of Dame Hales, from Plowden's *Commentaries*. She would have been entitled, by survivorship, to a term of years upon the death of her husband, Sir J. Hales, an eminent judge; but her husband being, as is supposed, moved by compunction at his conduct in some religious matter occurring in the reign of Philip and Mary, drowned himself in his garden: it was held, in the reign of Elizabeth, that the Sovereign's title by forfeiture was prior to the wife's by survivorship. Blackstone's remarks on this decision are characteristic: "And though it must be owned that the letter of the law herein borders a little on 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."

Sir M. Hale, after observing of Dame Hales's case "that the law was well resolved in that case I do not doubt," proceeds to state some reasons of a contrary tendency, which may be thought by some lawyers to stultify that decision. Shakspere, in his scene of the grave-diggers, appears to have ridiculed it. In the case, as reported in Plowden, it was argued by the crown lawyers that "the act of suicide consists of three parts—the imagination, the resolution, the execution." Shakspere's clown says, "If I drown myself wittingly it argues an act; and an act hath three branches, to act, to do, and to perform; argal, she drowned herself wittingly."

The reasons for the posthumous punishment of suicides given by Sir M. Hale, are 1st, that the *felo de se* commits a sin against God.[1] 2ndly, That the Sovereign had an interest in his life. Accordingly, Blackstone panegyrises the law of England in regard to suicide as "wise and *religious*," and designates the crime as an "invasion of the *prerogative* of the Almighty."

The material questions regarding the policy of the law of suicide, appear to be, whether it is calculated, in any considerable degree, to prevent the continuance or increase of the offence? and supposing it may be so, whether the certain collateral mischief it produces, be not greater than the contingent benefit proposed by it? The remarks of Eden are, as to this point,

[1] The terme of life is limited,
Ne may a man prolong or shorten it.
The soldier may not move from watchful sted
Nor leave his stand, until his captain bed.
Who life did limit by almightie doome,
Quoth he, knows best the terms established:
And he that points the centonell his roome
Doth license him depart at sound of morning droome.
SPENSER'S *Faery Queen*.

deserving of consideration: "Such men are deaf to the voice of God, and it cannot be expected that they will listen to the comparative insignificance of human edicts. Temporary considerations have no weight with those to whom the prospect of eternity is become a subject of indifference." Hobbes observes, that suicide is generally committed from an apprehension of something worse than death; and, adverting to the meaning of the term felony, sanctioned by Coke and Hale, asks if the *felo de se* is actuated *felleo animo* against his own life?

The want of property, and, more particularly, the sudden deprivation of it, are among the commonest causes of suicide. Ruined speculators, luckless gamesters, and discarded females, with, perhaps, the larger portion of suicides, have little or no property the enjoyment of which by their relatives after their deaths can deeply concern them. The owners of broad lands, by an unequal law, are resigned by the State to the commission of suicide, without any warning terror of their estates being confiscated. It is soaring too high to draw down reasons from Heaven for forfeitures instituted in the time of our ancient Sovereigns, whose personal income was increased by the ruin of a suicide's deserted family.

Notwithstanding the views of Hale and Blackstone meant in all piety, the law of suicide is so inhuman that it has never been strictly enforced. Sir M. Hale thinks it necessary to observe "that it is not every melancholy or hypochondriacal distemper that constitutes a man *non compos* when he commits suicide, for that there are few who commit that offence but are under such infirmities." And Hawkins takes notice of "a strange notion which has unaccountably prevailed of late, that every one who kills himself must be *non compos* of course," and Blackstone writes, "that the excuse of insanity ought not to be strained to that length to which our coroners' juries are apt to carry it, viz. that every act of suicide is an evidence of insanity." The jurisprudence of the Country has, in many instances, derived its first

tincture of humanity and good sense from the perverseness and perjuries of Juries.

With regard to the deprivation of Christian rites of burial, which seemed to Blackstone in the nature of a retaliation for invading a Divine prerogative, thus committing spiritual high treason, and still more, the ancient burial in a highway, with a stake run through the body, are calculated to inflict unmerited sufferings on relatives, and are a perpetuation of that barbarous spirit of posthumous retribution which instigated the Parliament of the Restoration to pass a Resolution, which thus stands, "Resolved, that the carcases of Oliver Cromwell, Henry Ireton, John Bradshaw, Thomas Rede, (whether buried in Westminster Abbey or elsewhere) be, with all expedition, taken up, and drawn upon a hurdle to Tyburn, and there hanged up in their coffins for some time, and, after that, buried under the said gallows." The corpse of the renowned Blake, also, was taken up from Westminster Abbey by the command of Charles II., and buried in a pit with others in St Margaret's churchyard, "In which place," says Wood, in his *Fasti*, "it now remaineth, enjoying no other monument but what is reared by his valour, which time itself can hardly deface."

CHAPTER VI.

PERSONAL INJURIES.

THE personal injuries treated of by Sir M. Hale that are less than homicide, but which are felonies, are (1) Wounds, and like injuries. (2) Rape. (3) Abduction. (4) Bigamy.

SECTION I.

Wounds, and like Injuries.

Sir M. Hale and the old writers are very diffuse upon the subject of the construction of a statute of James I., against *stabbing*, which, it appears, had become a common mischief between the Scotch and English, upon the King's accession to the throne of England; it has been said by Hale, as before observed, to have been passed in consequence of the reluctance to find persons guilty of an unclergyable offence, who had been provoked by *words*, &c.: this statute has been repealed. Sir M. Hale also quotes a statute of Henry IV.[1] against "cutting the tongues, and putting out the eyes of his Majesty's subjects of malice prepense," which the Act recites to have been daily done; it being a felony to rob, but none to incapacitate the party robbed from accusing the robbers. This law was extended to other dismembering, as cutting off ears, by a statute of Henry VIII., "but," Hale adds, "by an Act of this present Parliament, this and some other dismemberings are made felonies out of the benefit of clergy." Sir M. Hale here alludes to an Act, commonly called the *Coventry Act*, whereby it was provided, that any person, who, by lying in wait, shall slit the

[1] By the *old* Common Law, if a man maimed another, whereby he lost any part of his body, the delinquent was sentenced to lose the like part.

nose, or cut off or disable any limb or member of any subject of his Majesty, with intent, by so doing to maim or disfigure, shall suffer death without clergy."

The occasion of passing the statute of Henry IV., is stated by Sir E. Coke, to have been, that robbers cut tongues and put out eyes in order to incapacitate their victims from giving evidence. The Coventry Act is a chronicle of a particular incident that occurred in the reign of Charles II. It had been proposed in Parliament to lay a tax upon playhouses; to which the courtiers objected, that the players were the king's servants, and a part of his pleasure; as to which Sir J. Coventry, a gentleman of the country party, asked, in allusion to the two famous actresses Davis and Nell Gwin, "whether the King's pleasure lay among the male or female actresses?" Not long afterwards, several officers of the guards, instigated, as it was believed, by the King, waylaid Sir J. Coventry, and, having disarmed him, cut his nose to the bone, in order as they said, to teach him the respect he owed to his Majesty. Nose-slitting may appear to have been, at that period, a favourite mode of revenge; for at the celebrated trial of the Quakers Penn and Mead, the lord Mayor said in court to the jury, in reference to the famous champion of their rights, Bushell, "Have you no more wit than to be led by such a pitiful fellow? I will *slit his nose.*"[1]

The law, in Sir M. Hale's time, as collected from the above statutes, appears to have been very imperfect. Many severe injuries did not fall within those statutes (in which case they would be only misdemeanors) unless the delinquent had a like intention to that of the assailants of Sir J. Coventry, viz. either to maim, or to disfigure. In the reign of George I., an attorney of the name of Coke hit his brother-in-law several blows about

[1] The assault upon the poet Dryden by a gang of ruffians hired by Lord Rochester, called the *Rose Alley ambuscade*, is, like the assault upon Sir J. Coventry, a stigma on the supposed polite reign of Charles II.

the head and face with a hedge-bill, the consequence of which was that his brother-in-law was disfigured, and his nose was cut athwart. Coke urged that his intent was to *murder*, (of which, indeed, there was strong evidence) and not to maim or disfigure within the terms of the Coventry Act. He was, however, hanged, but whether in conformity with the statute or not different opinions have been entertained by eminent lawyers. A servant who had attempted to murder his master by giving him fifteen wounds with a hatchet, but without killing him, was convicted and executed, not for attempted assassination, but for constructive burglary, because, in order to enter his master's chamber, he had been obliged to lift up the latch of a door.

A very daring attempt at murder occurred a few years before Sir M. Hale's death, not within the scope of the Coventry Act, or, indeed, of the modern statutes. Colonel Blood having harboured revenge against the Duke of Ormond, attacked his coach, at night time, as it drove along St James's street in London, and made himself master of his person. He might there have murdered his victim, had he not meditated refinements in his vengeance. He was resolved to hang the Duke at Tyburn, and, for that purpose, bound him, and mounted him on horseback behind one of his companions. They were advanced a good way into the fields, when the Duke, making efforts for his liberty, threw himself upon the ground, and brought down with him the ruffian to whom he was fastened. They were struggling together in the mire, when the Duke of Ormond's servants, whom the alarm had reached, came and saved him. Blood and his companions, after firing their pistols in a hurry at the Duke, rode off and saved themselves by means of the darkness.[1]

The actual law, with regard to personal injuries, is more

[1] Charles II. persuaded the Duke of Ormond not to prosecute Blood. This daring man afterwards attempted to carry off the crown and state jewels from the Tower. In this attempt he severely wounded the keeper. Nevertheless he was pardoned by Charles II. who gave him an estate worth £500 a year, and encouraged his presence at court.

lenient than in the time of Hale, for which reasons may be found in the chapter on capital punishments, but it is also more complete. By modern statutes, the inflicting of "grievous bodily harm," or to "stab, cut, or wound," irrespectively of the intent, is made an aggravated misdemeanor. To shoot any person, or to attempt to discharge any loaded arms at any person, or to stab, cut, or wound any person, with *intent* in any of the cases aforesaid to *maim, disfigure, or disable* such person, or to do some other *grievous bodily harm* to such person, or to attempt to *resist* or prevent the lawful apprehension or detainer of any person, is made felony, with an extreme punishment of transportation for life. Certain *attempts* to commit *murder* though unattended with bodily harm, are made felonies, and punishable to the extent of transportation for life. And "Whoever shall *administer* to, or cause to be taken by any person, any poison or other destructive thing, or shall *stab, cut, or wound* any person, or shall by any means whatsoever cause to any person any *bodily injury dangerous to life*, with *intent*, in any of the cases aforesaid, to commit *murder*, shall be guilty of felony, and, being convicted thereof, shall suffer death." Without infringing on the politic principle of jurisprudence, that of making a wide distinction between the punishment of inchoate and consummated crimes, it manifests improvement of legislation to mark, by corresponding degrees of penalty, disparities in the amount of bodily injury inflicted, and in the mischievous intents with which *overt acts* have been perpetrated.

In the modern law, we have the words, "stab, cut, and wound," which have occasioned a multitude of nice and often conflicting decisions where general terms might be more convenient. One of the Judges recently wrote to the Lord Chancellor, with much pleasantry, upon the notion of there being an internal wound without severing the outward cuticle; twelve other Judges, however, after hearing medical testimony, concurred in the conviction of a prisoner for such a *wounding*, as

not being a matter of merriment.[1] It has been questioned whether a bite with the teeth of a dog be a statutory wounding? We have, moreover, intents to maim, disfigure, disable, and to do grievous bodily harm, which have likewise occasioned many controversies, and admit of being simplified. The indefinite term "grievous bodily harm," seems less eligible than the analogous definite offence of the Code Napoleon, "tout individu qui aura fait des blessures, ou porté des coups, s'il est resulté de ces actes de violence une maladie, ou incapacité de travail personnel, pendant plus de vingt jours." The Indian Criminal Law Commissioners adopted this test of the severity of bodily injuries. *Maim* is a term which is conspicuous in this branch of law, and ought to be abolished. It is singularly omitted among Hale's felonies; it means an injury whereby a man or woman is rendered less capable of pugnacity; and, in pursuance of this principle, it has been held, that to knock out a *fore-tooth*, is to maim; but not so a *grinder*, as being made rather for mastication than combat.

SECTION II.

Rape.

The offence of rape proceeds from the abuse of a passion, on the due regulation of which depend the existence, and much of the happiness of mankind, but which, if uncontrolled, tends to destroy the morals of society, and to inflict an injury on the weak by the strong which is sometimes more grievous than the loss of life. The story of Lucretia (referred to by Coke in conjunction with rapes related in Genesis and Samuel) afforded one of the most admired of Ovid's themes. It is the subject of the only extant composition in Latin verse of Pope Leo X.[2]

[1] "The definition of *wound* in the proposed act is remarkable for the alternative whereby the skin is divided *either* externally *or* internally; the latter branch of the alternative denoting a possibility of wounding by dividing the internal cuticle, without dividing the external, *which must be intended to anticipate some future discovery of science.*"

[2] See the author's *Gems of Latin Poetry*, p. 281.

It has been questioned whether rape was a felony at Common Law, or was made one by a statute in the reign of Edward I.[1] The Benefit of Clergy was first taken away by a statute of Elizabeth. By a statute of Victoria, the offence is no longer punishable with death, but, at most, with transportation for life; previous to that statute, the capital punishment was almost invariably enforced.

Notwithstanding the detestable nature of the crime of rape, a legislator might hesitate to affix to it an irremediable punishment, seeing that, as Sir M. Hale writes, the accusation is "easy to be made, and hard to be proved, and harder to be defended by the party accused, though never so innocent." He adds, that "he shall never forget a trial before himself for a rape. The prisoner was sixty-three years old, and the rape was sworn against him by a girl of the age of fourteen, with the concurrent testimony of her father, mother, and several relations: the accused had no witnesses, but prayed an inspection in Court; to avoid the indecency of which the jury were directed to withdraw with him into a private room. On their return they acquitted the prisoner, reporting that they conceived the rape impossible, owing to a hideous rupture as big as the crown of a hat." It may be thought, also, that education among the lower orders may have checked a propensity to the commission of this crime, and that increased contiguity of habitations may have rendered its perpetration more difficult than anciently. But whatever opinion may be entertained on these points, such is the prevailing aversion to the infliction of capital punishment, that the attempt to enforce it

[1] See Barrington's remarks on this statute which makes a distinction between *rape*, and *rape by force*; the former meaning seduction of a ward with intent to marry her. The statute of Westminster II. contains fifty chapters, all of them in *Latin*, except the provision against rape, which is in *French*. Hale states that, by the *old* Common Law, the punishment for rape was castration and loss of eyes, which, he says, "*seems* continued" till the reign of Edward I. So, by the *old* Common Law, according to Britton, Staunforde and Dalton, it can be no rape, if a woman conceive with child; but this, Hale says, *seems* not to be law.

for the offence of rape would, most probably, result in frequent impunity.

Sir M. Hale commences his treatment of the subject of rape with a definition by Sir E. Coke, who makes the crime to include carnal knowledge of a female *above the age of ten years* against her will, and of one under the age of ten years with or against her will. But in a later part of his chapter Sir M. Hale observes that the words "ten years" have "by some mistake *crept* into Lord Coke's definition," and that the age of consent of a female is not ten, but twelve years. The modern authorities shift the imputation of *creeping* which Hale casts on Coke back again on Hale; and, by the most recent statute upon this subject, special provision is made, though it be not altogether satisfactory, for the ravishment of girls between the ages of ten and twelve.[1]

Sir M. Hale's age of *twelve* is borrowed from the Civil Law concerning marriage, and may have been better adapted to the climate of Byzantium than that of Teutonic races, whose forefathers, according to Tacitus, were habituated to the *sera Venus*. In the present day the public voice would be raised against Ben Jonson's *Masque of Hymen*, composed to celebrate the ill-starred marriage of a bridegroom of fourteen, and bride of thirteen, notwithstanding the fascinations of the Muses, and the presence of royalty.[2] Neither is the inference satisfactory, that a girl who is of legal age to contract marriage *in facie ecclesiæ*, and with the consent of parents, does not require the protection of the law against consenting to a secret rape.

The evidence of an infant of tender years in cases of rape,

[1] Concerning the *penetratio* and *emissio seminis* at Common Law and under the statutes there is a cloud of conflicting decisions, and Hale *supposes* that Coke is *mistaken*. Concerning the hymen and vagina nice questions have occurred, in modern times, of medical jurisprudence. It has been held, in Reg. *v.* Neale, that carnal knowledge of a girl between the ages of ten and twelve, against her will, and with force, was a *misdemeanor*. The case depended on sections 16 and 17 of 9 Geo. IV. c. 31. The judges made no comments.

[2] The subject of the early intercourse of the sexes was investigated in the testimonies produced on the occasion of the divorce of Henry VIII. with reference to the prior marriage of Queen Catherine with the youthful Prince Arthur.

might, according to Sir M. Hale, be taken without oath; and the narration of a child made presently after the offence might be admitted upon the oaths of her mother, or other relations. These doctrines are not now law. However, Sir M. Hale's cautions on receiving the testimony of children have lost none of their weight; nor, perhaps, has justice been promoted by receiving or rejecting the evidence of children according as they answer or not a judge's catechism; for erudition in which a trial has even been postponed till another assizes. Mr Bentham, in his *Rationale of Judicial Evidence*, has treated of the rules concerning the testimony of children with much ability. In the course of his remarks, he observes: "The relevant question is, what the child has seen, heard, or felt? The irrelevant question relates to an abstruse matter, and includes a string of questions, what she has been taught, what she has comprehended, and what she has retained? If the child has not been tutored in the requisite manner, she may have been abused, and mangled, the malefactor goes unpunished. On the other hand, the rule holds out to false accusation a receipt for fabricating evidence, and by a false gloss, bestowing on it an appearance of trustworthiness. Delighted with the advances made by the sweet child in the science of theology, to entertain a doubt of its veracity, would be impiety in the eyes of jurisprudential science."[1]

A considerable portion of Sir M. Hale's chapter on Rape concerns the Appeal of Rape. Appeals in criminal cases have been abolished; but Sir M. Hale gives us examples of the

[1] Sir M. Hale writes that "*regularly* an infant under *fourteen* years is not to be examined upon his oath as a witness." He mentions exceptions, as the case of *treason*. In a case of *witchcraft*, he tells us, an infant of *nine* years old had been allowed a witness against his own mother. See Voltaire, *Questions sur l'Encyclopédie*, Art. *Crimes*—a remarkable instance of a child at Lyons, at the age of five years and a half, giving minutely circumstantial evidence against his own mother, on a charge of assisting in a rape and murder, and throwing the body into the Rhone; but which turned out to be wholly false, the child having been suborned by two children of his mother's accusers; "Il avoit été sur le point de faire bruler sa mère, pour avoir des confitures."

actual working, in his day, of the Appeal of Rape, upon which if the ravisher was convicted, he might have been hanged, and the King could not pardon him. Sir M. Hale informs us, that if the ravished woman "consented not at the time of rape committed, but consented afterwards," she is barred of her appeal, but her husband, if she be married, shall have it; and, if she have none, then her father or next of blood, "shall have an appeal of such rape."

Sir M. Hale does not anticipate the modern devices for carnal knowledge, by means of exciting or stupifying potions, or by false personation of husbands: but there is one case to which he adverts, which has not been paralleled in modern times, that of Lord Audley, executed for being instrumental to a rape upon his own wife. It was stated by the evidence, that whilst his servants, by his command, ravished her, he held her down by the arms and one leg.[1]

A French *tableaux*-writer of State Trials, makes the following representation of the manner of Lady Audley giving her testimony: "Dans un pays où l'on est extrèment attaché à la lettre de la loi, il s'en fallut peu que le défaut d'une formalité ne mît quelque obstacle à un châtiment si juste. La pratique criminelle porte que l'accusateur doit étre presenté au coupable en présence des juges; comment faire consentir une jeune dame, dans des circonstances si cruelles, à soutenir la vue d'une nombreuse assemblée et la presence de celui qui l'avoit outragée? Après bien des deliberations pour accorder la bienséance avec la loi, on prit un tempérament qui fut autorisé par l'approbation réunie de la cour et du parliament: ce fut de permettre à la jeune dame de se couvrir le visage d'un voile. On se contenta du serment de quatre personnes nommés pour l'aller prendre chez elle, qui renderent témoignage, en la presentant aux juges, que c'étoit le

[1] This is one of the cases of positive denial of guilt at the scaffold—Lord Audley was convicted by a majority of only fifteen to twelve of his Peers. See some able strictures on this trial in Phillimore's *History and Principles of the Law of Evidence as illustrating our Social Progress.*

malheureux object du crime dont on attendoit la punition. Toutes les interrogations furent renouvellées devant elle; mais avec des mesures qui ne l'exposèrent à rien de trop facheux pour sa douleur et sa modestie. On lui epagna les réponses qui n'étoient pas absolument nécessaires, et elle en fut quitte pour prononcer quelquefois *oui* ou *non*."

A more modern ravisher has obtained an unenviable immortality, by having hitched into several of Pope's rhymes, and by his celebrated epitaph written by Dr Arbuthnot;—the notorious Chartres. The epitaph states that, "having deserved the Gibbet for what he did, was, at last, condemned to it for what he could not do." It appears, however, that, although Chartres was twice condemned for rapes, he was pardoned, and died in Scotland, in 1731. At his funeral the populace tore his body out of the coffin, and cast dead dogs into the grave along with it.

SECTION III.

Abduction.

Abduction may seem an offence indicating the ferocity of ancient manners, and the want of order, which, it may be collected from the Paston Letters, characterized the time of Henry VII., when the first statute on the subject was passed. The offence, however, has attracted public notice at later periods.

In the year 1691, Lord Mohun and Captain Hill attempted to abduct Mrs Bracegirdle, the celebrated actress, as she came from the theatre. They engaged a coach and six horses, and hired soldiers for the purpose, and carried with them several cases of pistols. Mrs Bracegirdle was dragged by them out of her own coach, but in consequence of her mother, who had been to the playhouse with her, holding her round the waist, time

was given by the struggle for alarming the neighbours, who frustrated the abduction.[1]

In the year 1827, two brothers of the name of Wakefield and their mother were convicted of a conspiracy for the abduction of Miss Turner, a girl under the age of sixteen, the statutes having been evaded by the marriage having taken place in Scotland. The marriage was, afterwards, set aside by a Parliamentary divorce; it was proved by the Blacksmith of Gretna Green, who, when he gave his testimony, was seventy-five years of age, and during the previous forty-eight years had been practising marriages.[2]

In Ireland, Sir H. Hayes's case, for abducting a Quakeress, by forging a physician's letter, and a recent *attempt* there, are flagrant instances of the popularity of the crime, and of the lenity of government.

The statute of Henry VII. was followed by one of Elizabeth taking away the benefit of clergy; but, in the reign of George IV., the offence ceased to be capital. Between the reigns of Henry VII. and George IV. several changes in the constitution of society bearing on the subject of Abduction had intervened. Force cannot now be so easily and successfully employed as in times, when, according to the Paston letters, *fellowships* of armed men committed many lawless acts throughout the country; clandestine transport is more difficult, and pursuit more easy,

[1] Captain Hill had been incensed by Mrs Bracegirdle refusing to marry him, and thought that Mountford the player stood in his way. After the attempt at abduction, Lord Mohun and Captain Hill waited for Mountford in Norfolk-street, where he lived, full two hours, with drawn swords, and had wine brought them, which they drank in the street; on Mountford returning home he was killed by Captain Hill, before he could draw his sword. Hill escaped by absconding. Lord Mohun was tried for murder, and acquitted, though, probably, the reader of his trial may coincide with the fourteen lords who pronounced him guilty. Lord Mohun was tried for another murder seven years afterwards, and was at length killed in a duel, in which he killed his antagonist the Duke of Hamilton.

[2] The marriage ceremony was described, as putting a ring on the lady's finger, joining their hands as man and wife, wishing both well, and shaking their hands; "whereupon," as the blacksmith said, "they embraced each other very agreeably."

especially by means of electric wires. And as the offenders against this law had usually a marriage in contemplation, the formalities of the marriage acts must be generally an insuperable impediment to matrimony without consent in England.

The ancient and modern law confine the offence to a forcible abduction for purposes of *lucre*. It would, thus, seem to have been founded on aristocratic principles; professing to give relief only for monied females who are forcibly abducted for the sake of their money. The abducted female herself is an object of less concern than her disappointed relatives; for the taking is not purged by her marriage or defilement with her free consent. Sir M. Hale observes, in defence of this family rule, that "the consent to marriage or defilement might be won, after the *taking* against her will, by *flatteries*."[1]

The descriptions of the possessions of a woman of fortune in the respective reigns of Henry VII. and George IV. indicate the progress of refinement in the modifications of property. The language of the statute in the former reign is "substances, some in moveable goods, some in lands and tenements, and some being heirs apparent to their ancestors;" whereas that of the modern statute is "any Interest legal or equitable, present or future, absolute, conditional or contingent in any real or personal estate, heiress presumptive or next of kin to any one having such interest." An exception in the statute of Henry VII. concerning the abduction of *bondwomen* and of *wards*, points to ancient grievances of the country under which a large proportion of the population groaned, but which are now happily abolished.[2]

Sir M. Hale mentions, without remark, a great scandal occasioned by the law of abduction, arising from the necessity, in his time, of proving an actual marriage, or actual defilement,

[1] The King would, moreover, lose his *forfeiture*. By the statute of West. ii. if a ravished woman "assented after, yet the king shall have the suit."

[2] In the Paston letters, is a curious instance of secretly removing a *ward*, and, to divert attention, sending in a different direction a *sham-ward*.

viz., "That if a woman be taken forcibly in the County of Middlesex, and married in the County of Surrey, the fact is indictable in neither county." So, because the force and defilement were in different counties, in the year 1804, two prisoners, a clergyman and his brother, were acquitted. They had forcibly taken away in a chaise Mrs Lee, from her house in London, and one of them defiled her at Oxford; but, before entering Oxfordshire, she took a steel necklace with a camphor bag attached to it from her neck, (which camphor she explained to be a sedative against sensual desire) and threw it out of the window of the chaise, saying, "That was my charm against pleasure, I have now no occasion for it!"[1]

This anomaly is now remedied by the statute of George IV., whereby an actual defilement or marriage is not necessary for the completion of the offence, which is made to consist in "taking away or detaining a woman against her will from motives of lucre, with *intent* to marry or defile her." Curran, in his speech against Sir H. Hayes, attributes the change of the law to a delicacy for the prosecutrix in detailing the particulars of her own dishonour. It may be said, that a compulsory defilement is guarded by the law of rape, and a compulsory marriage is almost impracticable, whilst the injury sustained by a woman, rich or poor, who is forcibly taken away or detained is not to be measured by the standard of simple false imprisonment. If the modern law appear, in this respect, to be more severe than anciently, it is to be recollected that a wider cast of the penal net, when expedient in cases of abduction, is not attended with that drawback which discouraged it in Sir M. Hale's time, the multiplying of capital punishments.

[1] Previous to the trial of this case, the counsel for the prisoner, at his request, attended him in prison, when he told them that he had only one suggestion to make, leaving his defence, in other respects, entirely to them; he suggested that in such a cause, he had most to fear from passionless, pale, and Cassius-looking jurymen, and therefore he wished them to challenge every juryman who had not a red face.

In the reign of Queen Anne, one Swensden, a Dane, was hanged for abduction, though there was evidence of consent both at and after the marriage, but whether under fear or not was left doubtful; Lord Holt ruled that consent was immaterial. The prisoner had caused one Pleasant Rawlins, who had personal estate of the value of 2,000*l.*, and land of the value of 20*l.* a year, to be arrested under a writ, for no just cause but in order to effect his purpose. On her arrest she was taken in a coach to the Vine Tavern, in Holborn, where she was threatened with being sent to Newgate unless she consented to be married. The Chaplain of the Fleet and his clerk had been sent for; they proved a marriage in a room in the tavern, the parson having first asked Rawlins if she consented, to which he stated, she replied affirmatively, without any appearance of compulsion. It is to be observed, however, that the parson was not upon his oath,[1] and that he with his clerk sat together, for a quarter of an hour before the marriage, drinking a pint of wine at the prisoner's expense, who also ordered a fowl for their dinner after the ceremony.

SECTION IV.

Bigamy.

Bigamy is an offence which may occasion very severe calamity as regards the *status* and feelings of the person. It has,

[1] This trial took place in the same year when witnesses for a prisoner were sworn, but before the passing of the statute. Ch. J. Holt commences the parson's examination thus: "Come, Doctor, you are not upon your oath; how came you to be concerned in this match?" On the trial of Swensden's confederate, Sarah Baynton, one of the jurymen persisted that Rawlins was as willing as Swensden, which gave rise to a remarkable conversation between the judge and jury illustrative of the inconvenience of requiring an unanimous verdict, as the rule is stated by Hale, "If there be eleven agreed, and, but one dissentient, who says, he will rather die in prison, yet the verdict shall not be taken by eleven. If they agree not before the departure of the justices into another county, the sheriff must send them along in carts."

however, been considered too entirely of a religious character; to which notion the tenet, in Catholic times, of marriage being a sacrament, and the jurisdiction of the Ecclesiastical Courts in matrimonial causes, may have contributed. Hence there are no legal degrees of bigamy, though there may, in fact, be the widest difference in the nature of the injury committed; as whether the party injured be a man or woman, whether the first marriage be concealed or be known. It is conceived, however, that an abuse of the formalities of marriage ought, in every case, to be visited with punishment, though the ceremony may not always, as formerly, partake of a religious character. Prosecutions for this offence are too often instituted from the wounded family pride of relations; or by churchwardens, from regard to parochial consequences, in the event of the family of a second marriage acquiring *settlements* by parentage.

The law of bigamy in the time of Sir M. Hale was based on a statute of James: it was a capital felony, though offenders were not deprived of the benefit of clergy.[1] The present law depends on a statute of George IV., whereby the extreme punishment is that of seven years transportation. Sir M. Hale makes no animadversion on the inequality of the law in his day, whereby, among other partialities of the law of clergy, some men for every, some for the first offence, might escape punishment altogether, or, if neither priest nor peer, might be branded on the hand; whilst a female bigamist, generally a less mischievous offender, (if she were not a peeress tried for her first fault,) was hanged. This signal example of injustice and inhumanity could not have escaped the notice of Sir M. Hale; for in his day, A. D. 1663, on a trial for bigamy, which attracted much attention, that of Mary Modin, commonly known by the name of the German Princess, the judge observed to the jury: "If

[1] By the *old* Common Law, Coke tells us, "If any Christian man did marry with a woman who was a Jewess, or a Christian woman that married with a Jew, it was a felony, and the party offending should be *burnt* alive." He cites Fleta, who says, "contrahentes cum judæis et judæabus in terrâ vivi *confodiantur*."

guilty, she must die; a woman hath no clergy; she is to die by the law, if guilty."[1]

A divorce *a mensâ et thoro* is one of the exceptions in the statute of James. By the statute of George IV. the divorce must be from the "bond of marriage" (*vinculo matrimonii*). The change is conducive to public morals and decency; and, perhaps, indicates the decline of the authority and prestige of the Ecclesiastical Courts since the time of King James, who, for obvious reasons, preferred them to the Courts of Common Law, whose professors, according to Strafford, did "hang their noses over the flowers of the prerogative, and blowed and snuffled upon them till they had taken both scent and beauty off them."

Exceptions are made in the statute of James in favour of persons whose husbands or wives have remained beyond the seas for the space of seven years together; or shall have absented themselves in any place within the king's dominions the one not knowing the other to be living within that time. By the statute of George IV. these exceptions are now altered to that "of any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time." Thanks to modern mails, a reunion of husband and wife, though one of them has been absent beyond seas for seven years, is not considered desperate, or such absence a civil death.[2]

[1] This scandalous rule was not remedied till a statute of William and Mary. Modin's case exhibits the comparative slightness of the injury of a second marriage, when inflicted by a woman. After her arraignment, her second husband waited on her to bid her adieu. To which she replied:

Nay, my lord, 'tis not amiss
Before we part, to have a kiss.

And, after saluting him, said, "what a noise here, of a cheat—you cheated me and I you; you told me you were a lord, and I told you I was a princess; and, I think, I fitted you." And so, saluting each other, they parted.

[2] A private act of parliament was passed for legitimating the children of Sir R. Sadler by the wife of a labourer who had not been heard of for *five* years.

With reference to the exceptions just mentioned, Sir M. Hale gives an example of the construction *in favorem vitæ*. Ireland was "beyond seas," within the first exception dispensing with notice; but it was also within the "king's dominions," in the terms of the second exception requiring notice. As to which quillet Sir M. Hale observes, "It *seems* that, *in favorem vitæ*, absence in Ireland, though *with notice*, will prevent the second marriage from being criminal." "Not so," he adds, "for the Isles of Wight, Scilly and Lundy, as they are not beyond seas, but within counties; *tamen quære* of Guernsey and Jersey." By the recent statute, the law is purified from distinctions so subtle and senseless.

The rule laid down by Sir M. Hale, and followed in the present day, that a woman is not a lawful witness against her husband, is often found inconvenient in prosecutions for bigamy. Here is no domestic confidence to be violated; and if the marriage cannot be proved otherwise than by the first, or only wife in law, the delinquent escapes. If the marriage may be proved *aliunde*, the proof is frequently attended with much trouble and expense. From the nature of the evidence, it is often necessary to bring the witness or witnesses from a distance; and, as sometimes the witnesses must appear, first, before the committing magistrates, and, at another day, upon the trial,[1] there is double expense, toil, and trouble.

The most celebrated instance of a trial for bigamy in this country, is that of the Duchess of Kingston, the prosecution of which was instituted after the Duke of Kingston's death by his relatives, with a view of setting aside his will in the Duchess's

[1] The impolicy of the rule for excluding the testimony of married women in any case is very ably discussed by Bentham, in his Rationale of Judicial Evidence. The rule has been abolished in civil cases, after much grumbling by some high authorities. It may be observed, that the deposition of Eugene Aram's wife, taken inadvertently before the coroner, is far more satisfactory than the evidence of the accomplice Housman, or any other testimony delivered at the trial; and yet it revealed nothing imparted to her by her husband in confidence, if that were a ground for suppressing truth.

favour. The Duchess of Kingston had been privately married to the Earl of Bristol whilst she was a Maid of Honour. Both afterwards having formed other attachments, their marriage was declared void in the Ecclesiastical Court, by means of a collusive suit of Jactitation of Marriage; so that the former husband had no injury to complain of by reason of the second marriage. After a long and celebrated trial in the House of Lords, the Duchess was found guilty of bigamy; but, by the law of clergy in force, she was discharged by the Lord High Steward, without branding or other punishment, in these terms: "Madam, the Lords have considered of the prayer you have made to have the benefit of the statutes, and the Lords allow it you. But, Madam, let me add, that although very little punishment *or* none can now be inflicted, the feelings of your own conscience will supply that defect. And let me give you the information likewise, that you can never have the like benefit a second time, but another offence of the same kind will be capital. Madam, you are discharged, paying your fees."[1]

It may be interesting, in this place, to lay before the reader a note contained in a Report of the Indian Law Commissioners relative to the chapter of their proposed Code entitled "Offences relating to Marriage." Printed copies of the Report were circulated among official persons in India, but it is believed that they are not easily procurable in this country.[2]

"As this is a part of the law in which the English inhabitants of India are peculiarly interested, and which we have framed

[1] The will of the Duke of Kingston was held valid, notwithstanding the result of the trial. The Duchess was personated as Lady Kitty Crocodile in Foote's farce of *A Trip to Calais*, which she procured to be prohibited. She was treated as a Princess by the Pope and Cardinals at Rome, was intimate with Frederic the Great and the empress Catherine of Russia, to whom she presented the pictures of the Kingston family that still form part of the imperial collection. She was accustomed to sail in a magnificent yacht after the manner of Cleopatra. She died A. D. 1788, in great affluence at her hotel in Paris; she bequeathed a large diamond to the Pope.

[2] The Report is signed by T. B. Macaulay, J. M. Macleod, G. W. Anderson, F. Millett.

on principles widely different from those in which the English law on the same subject is framed, we think it necessary to offer some explanations.

"The act which in the English law is designated as bigamy is always an immoral act. But it may be one of the most serious crimes that can be committed. It may be attended with circumstances which may excuse, though they cannot justify it.

"The married man who, by passing himself off as unmarried, induces a modest woman to become, as she thinks, his wife, but in reality his concubine, and the mother of an illegitimate issue, is guilty of one of the most cruel frauds that can be conceived. Such a man we would punish with exemplary severity.

"But suppose that a person arrives from England, and pays attentions to one of his countrywomen at Calcutta. She refuses to listen to him on any other terms than those of marriage. He candidly owns that he is already married. She still presses him to go through the ceremony with her. She represents to him that if they live together without being married she shall be an outcast from society, that nobody in India knows that he has a wife, that he may very likely never fall in with his wife again, and that she is ready to take the risk. The lover accordingly agrees to go through the forms of marriage.

"It cannot be disputed that there is an immense difference between these two cases. Indeed, in the second case, the man can hardly be said to have injured an individual in such a manner as calls for legal punishment. For what individual has he injured? His second wife? He has acted by her consent, and at her solicitation. His first wife? He has certainly been unfaithful to his first wife. But we have no punishment for mere conjugal infidelity. He will often have injured his first wife no more than he would have done by keeping a mistress, calling that mistress by his own name, introducing her into every society as his wife, and procuring

for her the consideration of a wife from all his acquaintance. The legal rights of the first wife and of her children remain unaltered. She is the wife; the second is the concubine. But suppose that the first wife has herself left her husband, and is living in adultery with another man. No individual can then be said to be injured by this second invalid marriage. The only party injured is society, which has undoubtedly a deep interest in the sacredness of the matrimonial contract, and which may therefore be justified in punishing those who go through the forms of that contract for the purpose of imposing on the public.

"The law of England on the subject of bigamy appears to us to be in some cases too severe, and in others too lenient. It seems to bear a close analogy to the law of perjury. The English law on these two subjects has been framed less for the purpose of preventing people from injuring each other, than for the purpose of preventing the profanation of a religious ceremony. It therefore makes no distinction between perjury which is intended to destroy the life of the innocent, and perjury which is intended to save the innocent; between bigamy which produces the most frightful suffering to individuals, and bigamy which produces no suffering to individuals at all. We have proceeded on a different principle. While we admit that the profanation of a ceremony so important to society as that of marriage is a great evil, we cannot but think that evil immensely aggravated when the profanation is made the means of tricking an innocent woman into the most miserable of all situations. We have therefore proposed that a man who deceives a woman into believing herself his lawful wife when he knows that she is not so, and induces her, under that persuasion, to cohabit with him, should be punished with great severity.

"There are reasons similar, but not exactly the same, for punishing a woman who deceives a man into contracting

with her a marriage which she knows to be invalid. For this offence we propose a punishment which, for reasons too obvious to require explanation, is much less severe than that which we have provided for a similar deception practised by a man on a woman.

"We also propose to punish every person who, with what we have defined as a fraudulent intention, goes through the forms of a marriage which he knows to be invalid.

"We do not at present propose any law for punishing a person who, without practising any deception, or intending any fraud, goes through the forms of a marriage which he knows to be invalid. The difficulty of framing such a law in this country is great. To make all classes subject to one law would, evidently, be impossible. If the law be made dependent on the race, birth-place, or religion of the offender, endless perplexity would arise. Races are mixed; religion may be changed or dissembled. An East Indian, half English half Asiatic by blood, may call himself a Mahomedan, or a Hindoo; and there exists no test by which he can be convicted of deception. We by no means intend to express an opinion that these difficulties may not be got over. But we are satisfied that this part of the penal law cannot be brought to perfection till the law of marriage and divorce has been thoroughly revised.

"We leave it to his Lordship in Council to consider whether, during the interval which must elapse before the necessary inquiry can be made, it might not be, on the whole, better to retain the existing law applicable to Christians in India, objectionable as that law is, than to allow absolute impunity to bigamy.

"We considered whether it would be advisable to provide a punishment for adultery, and in order to enable ourselves to come to a right conclusion on this subject we collected facts and opinions from all the three Presidencies. The opinions differ widely. But as to the facts there is a remarkable agreement.

"The following positions we consider as fully established: first, that the existing laws for the punishment of adultery are altogether inefficacious for the purpose of preventing injured husbands of the higher classes from taking the law into their own hands; secondly, that scarcely any native of the higher classes ever has recourse to the Courts of law in a case of adultery for redress against either his wife, or her gallant; thirdly, that the husbands who have recourse in cases of adultery to the Courts of law are generally poor men whose wives have run away, that these husbands seldom have any delicate feelings about the intrigue, but think themselves injured by the elopement, that they consider their wives as useful members of their small households, that they generally complain not of the wound given to their affections, not of the stain on their honour, but of the loss of a menial whom they cannot easily replace, and that, generally, their principal object is that the woman may be sent back. The fiction by which seduction is made the subject of an action in the English Courts is, it seems, the real gist of most proceedings for adultery in the Mofussil. The essence of the injury is considered by the sufferer as lying in the 'per quod servitium amisit.' Where the complainant does not ask to have his wife again, he generally demands to be reimbursed for the expenses of his marriage.

"These things being established, it seems to us that no advantage is to be expected from providing a punishment for adultery. The population seems to be divided into two classes —those whom neither the existing punishment nor any punishment which we should feel ourselves justified in proposing will satisfy, and those who consider the injury produced by adultery as one for which a pecuniary compensation will sufficiently atone. Those whose feelings of honour are painfully affected by the infidelity of their wives will not apply to the tribunals at all. Those whose feelings are less delicate will be satisfied by a payment of money. Under such circumstances we think it best to treat adultery merely as a civil injury.

"Some who admit that the penal law now existing on this subject is, in practice, of little or no use, yet think that the Code ought to contain a provision against adultery. They think that such a provision, though inefficacious for the repressing of vice, would be creditable to the Indian Government, and that by omitting such a provision we should give a sanction to immorality. They say, and we believe with truth, that the higher class of natives consider the existing penal law on the subject as far too lenient, and are unable to understand on what principle adultery is treated with more tenderness than forgery or perjury.

"These arguments have not satisfied us that adultery ought to be made punishable by law. We cannot admit that a Penal Code is by any means to be considered as a body of ethics, that the legislature ought to punish acts merely because those acts are immoral, or that because an act is not punished at all it follows that the legislature considers that act as innocent. Many things which are not punishable are morally worse than many things which are punishable. The man who treats a generous benefactor with gross ingratitude and insolence, deserves more severe reprehension than the man who aims a blow in a passion, or breaks a window in a frolic. Yet we have punishments for assault and mischief, and none for ingratitude. The rich man who refuses a mouthful of rice to save a fellow-creature from death may be a far worse man than the starving wretch who snatches and devours the rice. Yet we punish the latter for theft, and we do not punish the former for hard-heartedness.

"That some classes of the natives of India disapprove of the lenity with which adultery is now punished, we fully believe, but this, in our opinion, is a strong argument against punishing adultery at all. There are only two courses which, in our opinion, can properly be followed with respect to this and other great immoralities. They ought to be punished very

severely, or they ought not be punished at all. The circumstance that they are left altogether unpunished does not prove that the Legislature does not regard them with disapprobation. But when they are made punishable the degree of severity of the punishment will always be considered as indicating the degree of disapprobation with which the legislature regards them. We have no doubt that the natives would be far less shocked by the total silence of the penal law touching adultery, than by seeing an adulterer sent to prison for a few months while a coiner is imprisoned for fourteen years.

"An example will illustrate our meaning. We have determined not to make it penal in a wealthy man to let a fellow-creature, whose life he could save by disbursing a few pice, die at his feet of hunger. No rational person, we are convinced, will suppose because we have framed the law thus that we do not hold such inhumanity in detestation. But if we had proposed to punish such inhumanity with a fine not exceeding fifty rupees we should have offered a gross outrage to the feelings of mankind. That we do not think a certain act a proper subject for penal legislation does not prove that we do not think that act a great crime. But that thinking it a proper subject for penal legislation, we propose to visit it with a slight penalty, does seem to indicate that we do not think it a great crime.

"Nobody proposes that adultery should be punished with a severity at all proportioned to the misery which it produces in cases where there is strong affection and a quick sensibility to family honour. We apprehend that among the higher classes in this country nothing short of death would be considered as an expiation for such a wrong. In such a state of society we think it far better that the law should inflict no punishment, than that it should inflict a punishment which would be regarded as absurdly and immorally lenient.

"There is yet another consideration which we cannot wholly leave out of sight. Though we well know that the dearest interests of the human race are closely connected with the chastity of women, and the sacredness of the nuptial contract, we cannot but feel that there are some peculiarities in the state of society in this country which may well lead a humane man to pause before he determines to punish the infidelity of wives. The condition of the women of this country is unhappily very different from that of the women of England and France. They are married while still children. They are often neglected for other wives while still young. They share the attentions of a husband with several rivals. To make laws for punishing the inconstancy of the wife while the law admits the privilege of the husband to fill his zenana with women, is a course which we are most reluctant to adopt. We are not so visionary as to think of attacking by law an evil so deeply rooted in the manners of the people of this country as polygamy. We leave it to the slow, but, we trust, the certain operation of education and of time. But while it exists, while it continues to produce its never-failing effects on the happiness and respectability of women, we are not inclined to throw into a scale already too much depressed the additional weight of the penal law. We have given the reasons which lead us to believe that any enactment on this subject would be nugatory. And we are inclined to think that if not nugatory it would be oppressive. It would strengthen hands already too strong. It would weaken a class already too weak. It will be time enough to guard the matrimonial contract by penal sanctions when that contract becomes just, reasonable, and mutually beneficial."

The second offence for adultery or fornication was made capital by an ordinance of the Commonwealth, in 1650; but this is not among the *ruins* of law that was in force during the libertine reign of Charles II.

CHAPTER VII.

OFFENCES AGAINST PROPERTY.

OFFENCES relating to Property, that mainspring of industry on which depend the prosperity and happiness of a nation, have been subject to greater vicissitudes than those which relate to the person, owing to the altered circumstances of national wealth, and of the distribution of it among various classes of society. A chronological detail of the statutes and changes of Common Law relating to offences against Property, would furnish a history of national improvement in the arts, and in the conveniences and refinements of domestic life. They will be considered in the following order: I. Theft. II. Robbery. III. Burglary. IV. Arson. V. Forgery.

SECTION I.

Theft.

Theft is the most common of the offences relating to property. It originally imported the clandestine but real taking out of the real possession of the owner by means of a trespass, and really carrying away from his real presence and against his real will the few species of moveable property of value in a rude age. In the time of Sir M. Hale, the judges had, in some instances, responded to the exigencies of the community, by enlarging the definition of theft through the device of constructions, this being the irregular process by means of which the Common Law has been made serviceable, though not without ridicule, from reign to reign. Since the time of Hale the judges have continued their *quasi* legislative amplifications, thereby

verifying, in many instances, the expression recently applied to a point of commercial law, "nous (the judges) avons changé tout cela." The legislature itself has, also, in modern times, been occasionally awakened to its legitimate functions, particularly in cases where the escape of some notorious delinquent has suggested the making of a law, as Lord Bacon writes, on the spur of the occasion. It will be convenient, in considering this subject, to notice how the law is left in Sir M. Hale's treatise, with reference to the following points: 1. Definition of theft. 2. Taking of stolen property. 3. Carrying away. 4. *Animus furandi.* 5. Ownership. 6. Species of property. 7. Proof. 8. Punishment.

1. *Definition of Theft.*

The definition of an offence of such common occurrence as theft, ought to be single, plain, and unambiguous, whereas it is multiform and replete with technicalities. The definitions stated by Sir M. Hale are borrowed by him from Bracton and Coke. Bracton's definition is: "*Fraudulenta contrectatio rei alienæ cum animo furandi, invito domino cujus res illa fuerit.*" Sir E. Coke's, "the *felonious* and fraudulent taking *and carrying away* by any man or woman of the *mere personal* goods of another."

Sir M. Hale does not furnish any definition of his own. About a dozen definitions of theft, all differing in some respects from each other, have been laid down by eminent text-writers or judges. And in two recent cases (R. *v.* Holloway and R. *v.* Thurborn) in which the subject was much considered, the Court was of opinion that no text-writer had given a complete definition conformably with the decided cases.[1]

It may be observed of the two definitions given by Sir M. Hale, that they differ materially, and that the terms "animus

[1] "The books do not give a full definition of that crime." Parke, B. "It is safer to be guided by the cases than by the definitions given by text-writers." Coltman, J.

furandi," and "felonious," amount to no more than making the thing defined a part of its own definition, and saying, that to thieve is to take property with the intention of thieving, or in a manner to subject the taker to the punishment of theft, viz. forfeiture; or as Sir E. Coke, and Hale too, have it, *felleo animo*, with a heart full of *gall*.

The definition, in order to comprise decided cases, it has been ruled, should express that the thief must have intended to usurp the entire dominion over property, and not merely a partial or temporary use of it; and that the taking should be not only wrongful and fraudulent, but, also, without any colour of right.

Lucri causâ is an ingredient in several definitions of theft; it is derived from the Civil Law, and has the sanction of Blackstone. According to the tenor of the latest authorities, it would appear to be immaterial; though, in recent cases, judges have sometimes thought it advisable not to deny, but rather to confess and avoid it, however sophistically. In a case where some servants in husbandry had the care of their master's team, they entered his granary by means of a false key, and took out of it two bushels of beans, which they gave to his horses. The case was decided in 1816, before criminal appeals were argued by counsel. Out of eleven judges, three were of opinion that there was no felony. Of the eight judges who were for a conviction, some (it is not stated how many) alleged that by the better feeding of the horses the men's labour was lessened, so that they took the beans to give themselves *ease*, which was, constructively at least, *lucri causâ*. When a similar case afterwards came to be decided by the judges, it was said to be no longer a *res integra*.[1]

The above observations are applicable on the surface to the definition of theft; the full depth of its mysticism can only be gaged by a review of its several items under the following heads into which the subject has been divided by Sir M. Hale.

[1] *Stolen* beef is, according to a vulgar error, a cure for corns; the *lucri causa* would, probably, be held to be that of dancing a Polka.

2. *Taking.*

Sir M. Hale's observations on this head serve for an ancient law-mark, indicating the extensions of criminal law which have been made by judicial constructions since his time, behind the stalking-horse of the ancient and worn-out definition of theft; as well as those tardy and capricious remedies which have been applied by the legislature for failures of justice that Hale shews to have been rank in the reign of Charles II.

It is to be observed, with regard to the *taking* of property, that it is a mystery involved in the definition of theft, though not expounded to the vulgar, that every theft includes a *trespass vi et armis*. In the reign of Charles II. judges differed on the point, whether, upon an indictment for a theft, judgment might not be given for a *trespass?* Chief Justice Kelyng writes, as the prevalent opinion, "Though felony includes trespass, yet if a party indicted be discharged of felony, which is the principal, he is thereby acquitted of the trespass, *tamen quære* of this."

Among a medley of cases set forth by Sir M. Hale on the subject of feloniously *taking* goods, we find that (A), "If *A* deliver a horse to *B* to ride to *D* and return, and he rides away, *animo furandi*, this is no felony; the like of other goods." Sir E. Coke, it may be observed, explains this case, on the ground, that there was a lawful possession, originally, by *delivery*, and not an original *taking*.

(B) According to Sir M. Hale, (citing Coke), "If a man deliver goods to a carrier to carry to Dover, and he carries them away, it is no felony; but, if the carrier have a bale or trunk with goods delivered to him, and he *break* the bale or trunk, and take away the goods *animo furandi*, or, if he carry the whole pack to the place appointed, and then carry it away *animo furandi*, this is a felonious taking: but that must be intended when he carries them to the place, and delivers, or lays them down; for then his possession by the first delivery is determined, and the taking afterwards is a new taking."

(C) "*A*, a servant of *B*, receives the rents of *B*, and *animo furandi* carries them away, this is not felony at Common Law, because *A* had it by *delivery*."

(D) "If *A* comes to *B*, and by a false message or token, receives money of him and carries it away, it is not felony, but a cheat punishable by indictment at Common Law, or by the statute of Henry VIII."

(E) "He that hath the care of another's goods, hath not the *possession* of them, and, therefore, may by his felonious possession of them be guilty of felony, as the butler that hath the charge of his master's plate, the shepherd that hath the charge of his master's sheep; the like law of him that takes a piece of plate set before him to drink in a tavern; for he hath only a liberty to use, not a possession by delivery."

(F) "If *A* find the purse of *B* in the highway, and taketh and carrieth it away, and hath all the circumstances that prove it to be done *animo furandi*, as denying it, or secreting it, yet it is no felony; the like in taking a wreck, or treasure trove, or a waif, or stray."

Cases of the description of that marked (A), have, since the time of Sir M. Hale, been dragged within the definition of theft, provided a jury find that the original possession (say, of a horse hired) was obtained with a preconcerted design of purloining; thus holding, with some boldness of construction, that such a *delivery* was, in *law*, a constructive *taking*, and that, moreover, *invito domino;* the owner's actual pleasure at parting with the possession of his goods for a supposed valuable consideration, being, in *law*, *constructive* grief. If the entire right of property be parted with, and not merely such right as may be conferred under a contract of bailment, the constructive process is exhausted, the swindler is no thief.

Cases of the description of that marked (B), commonly called cases of *breaking bulk*, exhibit an attempt to reach by the device of a *constructive* theft, *breaches of trust*. This construction is as

old as the reign of Edward IV., and involves the absurd consequence of its being felony to steal *part* of a pack, but a breach of trust to steal the *whole*. Ch. J. Kelyng said that he "marvelled" at this notable construction, and Mr East and Sir O. Russel observe, that it "*savours* of contradiction" and "stands more on positive law than sound reasoning." Mr Alison, in his treatise on the criminal law of Scotland, condemns the cases of "breaking bulk" as "obviously contrary to reason." This ingenious device of reaching cases included by the Code Napoleon under the head of *abus de confiance*, has been extended, in recent times, to bailees who are not carriers; and the subtraction of one stave out of many has been ruled to be "*equivalent* to breaking bulk." It is distressing to witness judges gravely stating and adjudicating upon this doctrine as though it were, as hath been said of the Common Law, the "perfection of reason." If any striking example be required of the want of reform in the law relating to crimes, it may be given in the doctrine of "breaking bulk."

The insufficiency of the threadbare definition of theft to reach cases of misappropriation by trustees, has been partially remedied by statutes passed at different periods; as by a statute of William and Mary for punishing thefts by lodgers who could not, in *law*, *take*, by way of trespass, furniture *delivered* to them for a term by their landlords; for, in such cases, it was said, in law gibberish, there was an *asportavit*, but no *cepit*. Bankers, attorneys, agents, factors, have, by modern statutes, been dealt with much in the same way as carriers who have *broken bulk*. One of the *spurs* of occasion for these statutes was the absconding of the stock-broker Walsh with a large sum of money belonging to Sir J. Plumer, and intended for the purchase of the estate of Canons, condemned by Pope to "everlasting fame." Under this statute, which, in some of its clauses, betrays the haste in which it was passed, has been recently witnessed the condemnation of the bankers, Strahan, Paul and Bates, whose mercantile house was

established about the period when Hale wrote, but whose delinquency would have escaped the penal net which he unfolds.

Cases of the description of that marked (C), which are finely distinguishable from breaches of trust, have been reached by various constructions; as, for example, holding that, although if a shopman receive money and convert it to his own use, this be not theft, yet if he put it in a till and afterwards abstract it, this is theft; so the putting down a load of hay at a master's stable-door by a servant, makes him, if he purloin it, a thief; had he stolen it on the way, he would not have been a thief. Nevertheless it was thought advisable, instead of taxing too far the ingenuity of the judges, to have recourse to a specific remedy for so called *embezzlements* in certain cases, by a process of transmutation, enacting that they shall be *deemed* thefts. This remedy, however, is applicable only to embezzlements by *clerks* and *servants*, concerning which categories there have been a multitude of nice legal distinctions. A parish-clerk, for instance, appointed to collect money from communicants, is not, it has been held, the *servant* of the parson, churchwardens, or the poor. The line is often so shadowy between embezzlements *deemed* thefts by statute, and thefts by judicial construction, that it was judged expedient to enact that a person should not be acquitted, because indicted for theft at common law, instead of embezzlement by statute, or *vice versâ*; a singular remedy for the indefiniteness of definitions and for the hair-splitting of offences, by making indictments as well as crimes, constructive.

Cases of the description of that marked (D) are now reached by the law of *false pretences*, and are governed by a statute of George IV. making the offence a misdemeanour. The characteristic of cases of this description is not explained by Sir M. Hale, but would appear to be, that the *right of property* in the thing taken is parted with, and not the *possession* only; the owner has been the more thoroughly and fraudulently swindled, but such

swindling could not, perhaps, in all cases, be punished as a theft, without giving rise to an inconvenient multiplication of offences frequently of a doubtful character. It has been, perhaps, wisely considered by the legislature that the *false pretence* must answer a definite description, and relate to existing facts; a subject which has been very prolific of decisions. The statutory remedy, however, in many instances, so closely resembles that which had been arrived at by the judicial path of construction, (if, indeed, a great number of the cases upon this subject be not utterly irreconcilable to each other,) that a statute of George III. reciting, "Whereas a failure of justice frequently arises from the *subtle* distinction between larceny and fraud," provides, that "a person indicted for false pretences shall not be acquitted on the ground of his offence amounting in law to theft." Subtlety of crime is remedied by subtlety of indictment.

Cases of the description of that marked (E), viz. of *bare* charge, *custody* or *use*, have not been limited to instances where thefts are committed by servants or guests, but have been held to include all cases in which there is not an *independent possession*, and to meet the frauds of ring-dropping, and other devices of modern villany. In the early history of the law of bailments their character as contracts was often disregarded, and the bailees were improperly held guilty of theft, on the alleged ground that the goods were delivered only for a *special purpose*. In modern times, with more reason, property is considered to continue in the possession of an owner whilst it remains in his presence; and, with somewhat more subtlety, where a servant or other employee parts with property to a spoiler, *without authority*. The law, even according to Sir M. Hale's examples, appears to have been extended beyond the primary notion of theft; for the thing stolen has been originally *delivered* and not *taken*, except by construction. A statute of Henry VIII. recites that it was doubtful whether, at common law, servants stealing their master's goods were guilty of theft. However the term *possession*

in its popular sense, which is somewhat vague, is not obviously violated, by treating the stealing of sheets on a guest's bed at an inn, or plate in a butler's pantry, as *takings* from the *real* though not *manual possession* of a Boniface or a Lady Bountiful.

Cases of the description of that marked (F), or *findings*, have undergone a considerable change as to the Common Law by which they are governed, since the time of Sir M. Hale. The present rule seems to be, that if a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not theft; but, if he takes them reasonably believing that the owner can be found, as, for example, by being previously acquainted with the chattel taken, or from marks or a name upon it, it is theft: moreover, if a chattel be taken without any intent of stealing it originally, as if a finder really believes, upon examination, that the owner of the article found cannot be ascertained, but afterwards discovers the owner, and, subsequently to such discovery, fraudulently misappropriates the chattel, this is not theft. The moral guilt of the finder, and injury to society, are not diminished by *pro tempore* innocence; but the notion of a *trespass* evaporates. The owner's *possession*, though he may be at the Crimea at the time of finding, is fabled to continue if a guilty hand first invade it; but if the hand be primarily innocent, and secondarily guilty, construction is at a *non-plus*. A man cannot *take* from himself; his villany must commence at the proper technical moment. As a natural effect of one technicality generating more, according to *some* a finder cannot be guilty of theft without a subsequent *conversion;* this is denied by *others*.

In a recent case, in which the *new* Common Law of finding property was elaborately considered, Baron Parke expresses a doubt whether the recipe of a *constructive taking*, if a finder know circumstances by which an owner can be ascertained,

were ancient or modern. It would appear to have been more modern than the time of Sir M. Hale. The same learned judge observes, that it cannot be doubted that if, at this day, the punishment of death was assigned to theft and usually carried into effect, the misappropriation of lost goods would never have been held to constitute that offence. By the Louisianian Code, theft by finding is subjected to a less severe punishment than theft by ordinary means. Chancellor Kent designates the punishment of a fraudulent finder for a theft, as a "stern doctrine of Ulpian." *Treasure trove*, according to the Code Napoleon, belongs half to the *finder*.

Numerous questions have occurred respecting thefts by finding, where property has been left in conveyances, or where bureaus containing money unknown to the owner have been sold, or bailed. In such cases, the loser has commonly been in fault, by exposing a finder to temptations through his own negligence; and although the property found continue, in *law*, still in its owner's possession *constructively*, for the purpose of dragging the taking within the definition of theft, the law and its construction are manifestly opposed to the senses and to reason. Nevertheless it is a mark of refinement in society, when property is protected though it be out of the visible custody of the owner; and in cases of conflagrations, demolitions, and accidents to buildings, property may seem to require peculiar protection. But this protection should not itself be *stealthy*. It was a step in civilisation when shipwrecked property on our "lucky shores" was preserved to the owner, if there came ashore alive, a man, a dog, or a cat; and stealing from shipwrecks is, in the present day, with good sense, punished directly, and not by means of a fanciful *possession*. The fisherman in Plautus's *Rudens* expresses what are common notions of the ignorant in law concerning property *found:*

> Ubi dimisi retem atque hamum, quidquid hæsit extraho,
> Meum quod rete atque hami nacti sunt, meum potissimum 'st.

3. *Carrying away.*

It will have been observed that Bracton's definition of theft does not include a *carrying away*, or, in the old language of records, an *asportavit;* and, before the reign of Edward III., it would appear that a thief detected with stolen property upon him which he had not carried away, was liable to be tried without indictment, because he was taken in the *mainour* (*in manu*). Sir M. Hale mentions two cases illustrative of what is, and what is not a *carrying away*. "If a guest lodge at an inn, and takes the sheets of a bed with intent to steal them, and carries them out of his chamber into the hall, and going into the stable to fetch his horse, is apprehended, this is a felonious taking and carrying away." On the other hand, a severance is necessary. "*A* hath his keys tied to the strings of his purse, *B*, a *cut-purse*,[1] takes his purse with money in it out of his pocket, but the keys which were hanged to his purse-strings hanged in his pocket. *A* takes *B* with his purse in his hand, but the string hanged to his pocket by the keys, it was ruled that this was no felony, for the keys and purse-strings hanged in the

[1] The term *cut-purse* was taken from the practice of persons carrying their purses tied to their girdles, before the use of pockets. In the year 1553, Fleetwood, Recorder of London, and some brother magistrates, took a day's diversion in exploring the haunts of thieves. In one house they discovered a room used for teaching boys to steal purses. The practices employed have been engrafted into a modern popular novel; they were these: A pocket and a purse were hung up; the pocket and purse had in them certain counters, and both were hung round with hawks' bells, and over them hung a *sacring* bell, (used at the elevation of the *host*). He that could take out a counter from the pocket without any noise, was accounted an adept *foyster* (pickpocket). And he that could take a counter out of the purse without noise, was adjudged a clever *napper* (pick-purse, or cut-purse). The mysteries of cutting purses are revealed by Shakspere's *Autolycus*, and in Ben Jonson's play of *Bartholomew Fair*. It is remarkable, that Autolycus says "Every lane's end, shop, *church*, session, *hanging*, yields a careful man work," and Ben Jonson, in his song of a *Caveat against Cut-purses*,

> At plays, and at *sermons*, and at the sessions,
> 'Tis daily their practice such booty to make;
> Yea, under the gallows, at *executions*,
> They stick not the stare-abouts' purses to take.

pocket of *A*, whereby *A* had still, in law, the possession of his purse, so that *licet cepit, non asportavit.*"

In modern cases the doctrine of *asportavit* has been still further subtilised. Thus, where a prisoner removed a cask of wine from the head to the tail of a waggon, the *asportavit* was held to be complete; whereas, when another moved a package from an horizontal to a vertical position, by placing it on an end for the purpose of cutting open the side of it to get out its contents, so that every particle of the surface of the package had not changed its locality, the *asportavit* was held to be incomplete. Where a thief had raised a portmanteau from the bottom of the boot of a coach, but had not got it up quite to the top before he was apprehended, this was held a perfect *asportation.*

The progress of the doctrine of *asportavit* illustrates the manner in which the Common Law has been formed. Staundforde, who wrote in the reign of Philip and Mary, states the very case adduced by Hale of a guest taking sheets out of his bed-room at an inn, and going to fetch his horse, observing, that the sheets did not appear to have been taken out of the *possession* of the owner, inasmuch as they were never taken out of his *house.* "Ideo quære quel le ley voet in tiel cas a cel jour, car n'est marveil que il fuist allovve pour ley a cel temps, (s. *regnante Ed. tertio,*) *quia tunc temporis voluntas reputabatur pro facto.*" Sir E. Coke, in his Institutes, repeats the same identical case, concluding that it had been adjudged felony. Sir M. Hale re-echoes the case, citing for his authority Coke's Institutes. The citation from the Year-Book, which Coke and Hale quote as conclusive, is that from the Liber Assisarum, or Pleas of the Crown in the reign of Edward III., which Staundforde, from whom both Coke and Hale frequently borrow, deems inconclusive, as founded on a notion that, like in treason, a person was, in the time of Edward III., punishable for compassing and imagining a theft. The Common Law on the subject is now conformable to Hale, and has divested itself of Staundforde's scruples.

A *carrying away* is not, according to the Louisianian Code, made essential to the crime of theft. The *taking* is defined to be "either by *removal*, or simply by *laying hold* of an article directly by the hand, or by means of any instrument, in such way as to evince a *design to remove* it." The *laying hold* of an article is a more equivocal act than *removing* it, and, if it stood alone, might be productive of perplexing questions and frivolous prosecutions. But appropriation can scarcely be said to be made more complete by removal, if the property be removed only an inch, than if it have been removed a yard, but may have remained attached, as by a string to a counter. Anciently, it is probable that a more perfect appropriation was indicated by the expression "carrying away," which would seem to import a removal of a stolen article *away* from the presence of its owner. However, if it be deemed expedient that there should be any removal at all, and that the law should be satisfied with an infinitesimal removal, there seems an impropriety of diction which is calculated to mislead, in designating removals like the drawing a book about an inch above the top of a pocket, as constructive "*carryings away*," of which, it appears, the legal sense is more subtle than that applied, in the nursery rhyme, to the *Knave* of *Hearts*, who *took* his stolen property *quite away*.

4. *Animus Furandi.*

On this head, Sir M. Hale adduces a few detached cases; one of them involves in it the obvious principle that, taking goods, however mistakingly, under a *bonâ fide* claim of title, is not theft; and another shews that, in this country, a *furtum possessionis* is not recognised, though, by the definition of theft, in the Civil Law, "Furtum est contrectatio fraudulosa, lucri faciendi causâ, vel ipsius rei, vel etiam usûs ejus possessionisve." Both these doctrines are now part of the prevalent Common Law; and the latter has been carried very far, as, in an instance, where

thieves had stolen property, and, furthermore, took a horse out of the stable of the man whom they had plundered, in order to carry away their plunder with facility, which having done, they turned the horse loose. Sir M. Hale says that if the lord of a manor seize a horse as an estray, though he be not entitled to it, yet it is not felony, "*because* not done *felleo animo*," (p. 506); the lord's *gall* is in its right place.

Sir M. Hale curtly concludes this subject, by observing that, "In cases of larceny the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to describe all the circumstances evidencing a felonious intent, or the contrary." Mr Livingstone is of opinion that the conviction of guilt, and the acquittal of innocence, might be made more certain than Hale here leaves it. Hale's remarks, indeed, appear to refer chiefly to matters of evidence, and the same might be applied to treason, homicide, and every other branch of Criminal Law, all of which are subservient to the maxim, *Actio non facit reum, nisi mens sit rea.*

5. *Ownership.*

The first case on this subject mentioned by Sir M. Hale is that of the self-robber. He writes, "If *A* bail goods to *B*, and, afterwards, *animo furandi*, steals the goods from *B*, with a design, probably, to charge him for them in an action of detinue, this is felony."

Another of Sir M. Hale's cases illustrates how a man may give a *quasi* consent to being robbed: "If a wife take the goods of her husband and delivers them to *B*, who knowing it, carries them away, this, *in favorem vitæ*, is no felony, though it is a trespass, for they are taken *quasi* by the consent of the husband: and so I take the law to be, notwithstanding various opinions."

A third case relates to eloping thieves: "If a man take away another man's wife *cum bonis viri*, this is felony by

statute. But, if it be by the consent of the wife, though against the consent of the husband, it *seems* to be no felony, but a trespass; for it cannot be a felony in the man, unless it be a felony in the woman who consented to it; but Dalton *thinks* it felony." Coke says, on this subject, that husband and wife are *duæ animæ in carne unâ.*

A fourth case shews how theft may be excused by a *quodammodo* custody: "If servants in the house embezzle their master's goods after his decease, this *seems* not to be felony at Common Law, because the goods were *quodammodo* in their custody; and, therefore, remedy is provided by the statute of 33 Hen. VI. c. 1, that if they appear not upon proclamation, they shall be attaint of felony, but if they appear, they shall answer for it as a trespass."

The *first* case put by Sir M. Hale is still law; but it may be doubted how far it is consistent with the general principles of the law of theft. It seems rather an incipient act done with intent to perpetrate a fraud *in futuro*, than a fraudulent appropriation of the property of another *invito domino*. And, although a possession be resumed in fraud of another's temporary right of possession, it may be questioned whether the act be not merely a *furtum usûs* or *possessionis*, which, although a theft by the Civil Law, is not so by the law of England, nor, indeed, by the criminal codes of several countries in which the Civil Law has been more closely adhered to than with us, as in those of Austria, Bavaria, and Wurtemberg.

In the *second* case, Sir M. Hale writes, it has been seen, that the decision is *in favorem vitæ*, which, perhaps, implies that, but for the punishment being capital, it ought to be the other way: still, now that the punishment is no longer capital, the rule remains,—the foundation of it only is taken away. The judges, however, have shorn the rule close, by holding, that if the wife and a stranger *in company* take the husband's goods, this is a theft by the stranger.

As to the *third* case put by Hale, Dalton's *thinking*, as Hale expresses it, is to this effect. "It should be observed, that if a wife should steal the goods of her husband, and deliver them to *A*, who knowingly carries them away, being the *adulterer* of the wife, this, *according to a very good opinion*, would be felony in *A*; for, in such case, no consent of the husband can be *presumed*." According to the *very good*, but anonymous opinion cited by Dalton, adultery made a taking of goods capital, which, without it, would have been *presumed* to have been taken with the *quasi* consent of the owner: a ruling, which, though apparently disapproved of by Hale, has been sanctioned by the most recent authorities,[1] who, therein, imitate the puritanical severity of the Protectorate, which made adultery and fornication, for the second offence, capital. Notwithstanding such nice and ethical distinctions, the reader will, probably, be of opinion, that, guilty knowledge being assumed, the wife's impunity ought not, in any of the cases proposed, to be transferable, but should be restricted to Coke's *unity* of *flesh*.

As to the *fourth* case, of servants despoiling property of a deceased master, the statute of Henry VI. is now repealed. Barrington, in his Observations on the Ancient Statutes, remarks on this statute as being one of those which have been productive of injury by casting doubt on the antecedent Common Law where no real doubt existed. It appears, however, that it *seemed* to Sir M. Hale, that a servant rifling his late master's goods was not a thief, because of his *quodammodo* custody; but the servants' custody, according to Hale himself, was never more than a "bare charge," and upon the master's death, the master's executor, or the ordinary, became master, if even the servant, except hired *de novo*, be any more than a stranger.

[1] In a recent case on the subject it is said by the court, that the rule is "properly and reasonably qualified when the wife becomes an adulteress," as if authorising the plunder of a husband was a wife's privilege, *quamdiu casta vixerit*.

6. *Species of Property.*

A catalogue of the subjects of theft in the time of Charles II. places in a striking point of view the difference between objects deemed to require the protection of the Criminal Law, at two periods with a long interval. Sir M. Hale, after premising that theft can be committed only of "goods personal," writes, "Of chattels real no felony can be committed, and, therefore the taking away of a *ward*" (Coke adds an *advowson*) "cannot be felony; nor of a *box* or chest of title-deeds concerning land." Sir E. Coke says that the land *draws* to it the box, agreeably to the maxim, "Omne majus trahit ad se minus dignum." Some ancient writers make a distinction between the box being open, and its being sealed or locked. The case of the box may, probably, be referred to the doctrine which continues to set at nought all legal analogies, even though it no longer apply, that *in favorem vitæ*.

"Neither," according to Hale, "can larceny be committed of things that adhere to the freehold, as trees, grass, bushes, hedges, stones, or lead of a house, or the like." But, "If a man come to steal trees, or the lead of a church or house, and sever it, and, after *about an hour's* time *or so*, come and fetch it away, this hath been held felony, because the act is not continuated, but interpolated, and in that interval the property *lodgeth* in the right owner as a chattel." Some authorities state, for the legal interval, "a day," others "an hour exactly," others "any time," others "afterwards."

"Larceny cannot be committed of corn standing upon the ground; for though it be a chattel personal, and goes to the executor, yet while it stands so, it *savours* of the realty." This kind of *savour* is often mentioned in law, and is contrasted with the expression *pure personalty*.

"Larceny cannot be committed of things that are *feræ naturæ*, unreclaimed, and *nullius in bonis*, as of deer or conies

in a park or warren, fish in a river or pond, wild fowl, wild swans, pheasants. Of domestic cattle, as sheep, oxen, *horses*, &c. larceny may be committed, for they are under propriety and *serve for food*. Of those beasts or birds that are *feræ naturæ*, but reclaimed, and made tame or domestic, and *serve for food*, larceny may be committed, as deer, conies, pheasants, partridges."

"Larceny cannot be committed of some things whereof the owner may have a lawful property, and such whereupon he may maintain an action of trespass, in respect of the *baseness* of their nature, as mastiffs, spaniels, greyhounds, bloodhounds, or of some things wild by nature, yet reclaimed by art and industry, as bears, foxes, ferrets, &c. or their whelps, or calves, because, though reclaimed, they *serve not for food*, but *pleasure*, and so differ from pheasants, swans, &c. made tame, which, though wild by nature, *serve for food*. Only of the reclaimed hawk, in respect of the nobleness of its nature and use for *princes and great men* larceny may be committed, if the party know it to be reclaimed." Lord Coke says, that hawks "are subjects of larceny, because serving *ob vitæ solatium* of princes, and of noble and generous persons, to make them fitter for great employments."

The rules above extracted from Sir M. Hale's treatise shew that they were framed to meet the wants and to correspond with the notions of society in a rude state of civilisation. Two leading principles seem to pervade these rules, viz. that the property must be, as Sir E. Coke writes, "*mere* personal goods" not *savouring* of the realty, in fact *moveables* by nature, and not, like leases or mortgages, moveables in *law*. Secondly, with regard to animals, that they must be domestic, or reclaimed, and, moreover, fit for the food of man, with the exception of hawks.[1]

[1] In ancient pictures of princes, or great lords and ladies, they are frequently represented to be attended by their hawks; as in the Bayeux tapestry, and in an ancient picture of the nuptials of Henry VI., whose hawk is present at the ceremony. According to a book of St Alban's Abbey, particular species of hawks might be used by persons in different grades of society, down to a "holy-water

Hobbes, the contemporary of Hale, says of the legal crotchets concerning the subjects of theft, that, so far from answering the boasted attribute of the common law, that of the "perfection of reason," they appeared to him ridiculous. He says, in his "Dialogue between a Lawyer and a Philosopher,"—after enumerating a variety of absurd conclusions of law, "how unconscionable thing it is, that he that steals a shilling's worth of wood that the wind has blown down, and which lieth rotten on the ground, should be hanged for it, and he that takes a tree worth forty or fifty shillings, should answer for it only in damages:" to which the lawyer replies, "'Tis somewhat hard, but it has been so practised time out of mind."

It will have been noticed that Sir M. Hale classes *horses* among animals serving for food: Blackstone, as if to include horses without treating them as esculents, classes as subjects of theft at common law, "all *valuable domestic* animals, as horses and beasts of draft;" some authorities speak of animals "used for domestic purposes." Most writers follow Hale in excluding animals of a *base* nature, without defining with precision in what the *baseness* of animals consists. A stock of bees, though not fit for food, has it seems, escaped the imputation of *baseness*. The distinction between animals for food or pleasure, as subjects of property even for civil purposes, was discussed in the reign of Henry VIII. It was argued, however, that there might be pro-

clerk." In the Bayeux tapestry, Harold, when in captivity, is represented with a hawk on his fist, but the hawk's head is turned the wrong way, or towards its master. It appears, from a scene in Ben Jonson's, "Every man in his humour," that, in his day, the recreation of hawking had descended to the wealthy yeomanry, among whom "hawking language" was more studied than Greek and Latin. The pastime is described with great vivacity by several of our early dramatists as, particularly, in Massinger's "*Guardian*" and Heywood's "*A woman killed with kindness.*" Hawks were so domesticated, as sometimes to be brought to church, as in Barclay's "*Ship of Fools.*"

> Into the church then comes another sotte,
> Withouten devotion, jetting up and down,
> Or to be seen, and shew his garden cote,
> Another *on his fiste a sparhawke or falcon.*

perty in a popinjay or thrush, "que chant al moy et refresh mes spirits queux sont cause de bon valetude de mon corps, que est le plus graund treasure de touts riches, et graund comfort al moy."

In the progress of society, the distinctions of stealing moveables, and the productions of the earth easily rendered moveable, and of animals answering or not a culinary test, became ridiculous. It was found necessary to provide, by statute, against the fraudulent misappropriation of fixtures, bills, bonds and negotiable securities, dogs, animals ordinarily kept in a state of confinement, vegetable and mineral productions, and a multitude of other species of property whether real or personal. The numerous enactments on these subjects, passed at different times, were, to a great extent, consolidated in the reign of George IV., but are still capable of improvement in regard to uniformity. The subjects of theft exhibit the anomaly of belonging partly to the Common Law, and partly to Statute Law, and, therefore, governed by different rules for construction. Moreover, a *stealing*, (for that term is used, in modern statutes, in a popular sense) of various species of property, though but narrowly distinguishable from the subjects of larceny, has frequently been submitted to the summary jurisdiction of magistrates; or, at least, by making the offence a misdemeanor, has been exempted from the odious penalty of forfeiture.[1] The provisions of law relating to the subjects of theft which are stated in Sir M. Hale's treatise

[1] Blackstone illustrates a *demurrer* by stating that, if a man be indicted for feloniously stealing a greyhound, he may demur, i. e. confess the fact, but allege that the offence is only a *misdemeanor*. Dogs are not commonly property in the East, except in China, where, according to Goldsmith, in his *Animated Nature*, there are dog-butchers. *Swans*, if *marked*, though in a public river, are subjects of larceny. Coke says that *swans* were, in many respects, privileged in law, on account of their *song*; and he quotes:

> Dulcia defectâ modulatur carmina linguâ
> Cantator Cygnus funeris ipse sui.

In the year 1677, the *mace* was stolen out of Lord Chancellor Finch's house, in Queen Street, by one Sadler, who was hanged for this theft at Tyburn; the *great seal* was saved in consequence of the Lord Chancellor sleeping with it under his pillow.

would be as insufficient for modern use, as if the weapons in the Spanish armoury at the Tower were despatched for the equipment of our army at Sebastopol.

7. *Proof.*

The most important of the observations of Sir M. Hale concerning the proof of theft, do honour to his humanity and caution in criminal cases. He writes, "I would never convict any person for stealing the goods *cujusdam ignoti* merely because he would not give an account how he came by them, unless there were due proof made that a felony was committed of these goods;" and, again, after observing that "presumptive evidence must be very warily pressed," he writes, "If a horse be stolen from *A*, and, the same day, *B* be found riding upon him, it is a strong presumption that *B* stole him; yet I do remember that before a very learned and wary judge, in such an instance, *B* was condemned and executed at Oxford Assizes, and yet, within two Assizes after, *C* being apprehended for another robbery, and convicted, upon his judgment and execution, confessed that he was the man that stole the horse, and, being closely pursued, desired *B*, a stranger, to walk his horse for him while he turned aside on a necessary occasion, and thus escaped; and *B* was apprehended with the horse, and died innocently."

With regard to the stealing the goods *cujusdam ignoti* and the necessity of proving a felony to have been committed, it is observable that Sir M. Hale writes, "I would never convict;" it is conceived, however, that the question is, properly, one for a jury, and not for a judge. Sir M. Hale's rule has been deviated from in some modern cases, with regard to articles, such as corn or sugar, the identity and ownership of which cannot be strictly proved, as where prisoners employed in carrying such articles from ships and wharves have been detected, recently after their coming from such places, with property of the same kind upon them.

In a case decided by the Criminal Court of Appeal, in 1854, it was proved that a prisoner indicted for larceny was seen coming out of the lower room of a warehouse in the *London Docks*, in the floor above which a large quantity of pepper was deposited, and where he had no business to be. He was stopped by a constable, who suspected him from the bulky state of his pockets, and said, "I think there is something wrong about you:" upon which the prisoner said, "I hope you will not be hard upon me," and, then, threw a quantity of pepper out of his pocket on the ground. The witness stated, that he could not say whether any pepper had been stolen, nor that any pepper had been missed; but that which was found upon the prisoner was of a like description with the pepper in the warehouse. It was held by all the judges, that the prisoner, upon these facts, was properly convicted of larceny. It was argued that, according to Hale, the *corpus delicti* must be proved in every criminal case; but it was answered by Mr Justice Maule, that, "if a man go into the *London Docks* sober, without means of getting drunk, and comes out of one of the cellars very drunk, wherein are a million gallons of wine, this will be reasonable evidence that he had stolen some of the wine in that cellar, though it could not be proved that any wine was stolen or missed."

As to the presumption arising from the possession of stolen property, it is one which is strengthened, weakened or rebutted by concomitant circumstances, such as the length of time elapsing, vicinity to the spot, nature of the property, and the prisoner's behaviour. This is, perhaps, the most common of all evidence in cases of theft, and has, sometimes, been improperly treated as a presumption of law. It is in such cases as the melancholy mistake detailed by Sir M. Hale, that the importance to the vindication of innocence of that full defence by counsel which was unknown to him, is particularly manifested. It may be remarked that a *prisoner's story* is entitled to more weight than it frequently receives; seeing the impracticability of his producing

witnesses in many cases, owing to their delinquency, or his own inexperience, or want of money or of friends.

Modern experience furnishes many instances of the fallacies of circumstantial evidence in regard to the stealing of property. One which has been made the subject of dramatic representations is that of the Maid and the Magpie, or La Pie voleuse. A citizen of Paris having lost several silver forks, accused his maidservant of theft, she was tried, found guilty, and executed. Six months afterwards, the forks were found under an old roof, behind a heap of tiles, where a magpie had laid them. When it was discovered that the innocent girl had been condemned unjustly, an annual mass was founded at St John-en-Grese for the repose of her soul. A similar occurrence happened at Florence, where the maid, under torture, confessed herself guilty of stealing a necklace, which, after her execution, was discovered in a magpie's nest. The magpies of Calcutta, which sometimes enter and walk about rooms without fear, have been known to fly away with forks and spoons, and may, probably, have atoned for bringing undeserved punishment on one or two heads, by being fathered with the delinquencies of many rogues.

The following curious case of mistaken identity of property stolen, is related in Burnett on the Criminal Law of Scotland.—"A girl, whose chest had been broken open, and whose clothes had been carried off, swore to the only article found in the prisoner's possession, and produced, viz. a white gown, as being her property. She had previously described the colour, quality, and fashion of the gown, and they all seemed to correspond with the article produced. The house-breaking being clearly proved, and the goods as it was thought distinctly traced, the proof was about to be closed by the prosecutor, when it occurred to one of the jury to cause the girl to put on the gown. This appeared rather a whimsical proposal, but it was agreed to by the Court, when, to the surprise of every one present, it turned out, that the gown which the girl had sworn was hers, which corresponded

with her description, and which she said she had used only a short time before, would not fit her person. She then examined it more minutely, and, at length, said, that it was not her gown, though almost in every respect resembling it. The prisoner was acquitted, and it turned out, afterwards, that the gown produced belonged to another woman, whose house had been broken into about the same period by a person with whom the prisoner cohabited."

Another remarkable case of fallacious presumptive evidence in regard to stolen property occurred in the year 1742. A gentleman in travelling was stopped by a highwayman in a mask, within about seven miles of Hull, and robbed of a purse containing twenty guineas. The gentleman proceeded about two miles further, and stopped at the Bull Inn, kept by Mr Brunell. He related the circumstances of the robbery, adding, that as all his gold was marked, he thought it probable that the robber would be detected. After he had supped, his host entered the room, and told him a circumstance had arisen which led him to think that he could point out the robber. He then informed the gentleman that he had a waiter, one John Jennings, whose conduct had long been very suspicious; he had long before dark sent him out to change a guinea for him, and that he had only come back since he (the gentleman) was in the house, saying he could not get change; that Jennings being in liquor, he sent him to bed, resolving to discharge him in the morning; that at the time he returned him the guinea, he discovered it was not the same he had given him, but was marked, of which he took no further notice until he heard the particulars of the robbery, and that the guineas which the highwayman had taken were all marked. He added, that he had unluckily paid away the marked guinea to a man who lived at some distance. Mr Brunell was thanked for his information, and it was resolved to go softly to the room of Jennings, whom they found fast asleep; his pockets were

searched, and from one of them was drawn a purse containing exactly nineteen guineas, which the gentleman identified. Jennings was dragged out of bed and charged with the robbery. He denied it most solemnly; but the facts having been deposed to on oath by the gentleman and Mr Brunell, he was committed for trial. So strong did the circumstances appear against Jennings, that several of his friends advised him to plead guilty, and throw himself on the mercy of the court. This advice he rejected; he was tried at the ensuing assizes, and the jury without going out of court found him guilty. He was executed at Hull a short time after, but declared his innocence to the very last. In less than twelve months after this event occurred, Brunell the master of Jennings, was himself taken up for a robbery committed on a guest in his house, and the fact being proved on his trial, he was convicted and ordered for execution. The approach of death brought on repentance; and repentance, confession. Brunell not only acknowledged having committed many highway robberies, but also the very one for which Jennings suffered. The account he gave was, that after robbing the gentleman, he arrived at home some time before him. That he found a man at home waiting, to whom he owed a small bill, and not having quite enough of money, he took out of the purse one guinea from the twenty which he had just possessed himself of, to make up the sum, which he paid to the man, who then went away. Soon after the gentleman came to his house and relating the account of the robbery, and that the guineas were marked, he became alarmed. Having paid one of them away, and not daring to apply for it again, as the affair of the robbery and the marked guinea would soon become publicly known, detection appeared inevitable. Turning in his mind every way to escape, the thought of accusing and sacrificing Jennings, at last struck him; and thus to his other crimes he added that of the murder of an innocent man.

8. *Punishment.*

Shakspere's Orlando asks, "With whom doth time gallop withal?" and Rosalind answers, "With a thief to the gallows." Falstaff says to Prince Henry, "Shall there be gallows standing in England when thou art king? Do not thou, when thou art king, *hang a thief.*" These and numerous other passages in old authors shew that the hanging of thieves was a familiar occurrence. If the question be that of leaving for execution stealers of sheep or horses, or prisoners convicted of various species of compound larceny, every barrister who has had "fifty winters o'er him," must respond, "*quæque ipse miserrima vidi.*"

In Sir M. Hale's time there was a notable distinction in regard to the punishment of theft, viz. that of *grand* and *petit* larceny, or the stealing of property exceeding or not the value of twelve pence: this distinction occupies two whole chapters; it was not abolished till the reign of George IV. Grand larceny was a capital offence, but clergyable,[1] unless attended with certain aggravations. Petty larceny was punishable with whipping, "or some such corporal punishment less than death;" and, being a felony, it was subject to forfeiture, whether upon conviction or flight. Petty larceny, rape, and mayhem, were the only three felonies not punished capitally at Common Law.

The history of grand and petit larceny is instructive to the jurist, as exemplifying the inexpediency of laws founded on pecuniary values, unless they be seasonably revised, which can scarcely be expected from our Parliaments. In the time of Henry I. twelve-pence was the stated value of a pasture-fed ox, and Spelman remarks, that "whilst everything else had

[1] In Shakspere's Henry VI. "*Cade.* I fear neither sword nor fire. *Dick* (aside). Methinks he should stand in fear of fire, being burnt in the hand for stealing of sheep." According to the *old* Common Law, a petty larciner lost an *ear;* but cut-purses to whatever amount, lost their *right thumbs.*

risen in its nominal value, the life of man had continually been growing cheaper."[1]

Grand, or capital larceny, stealing in dwelling-houses, shops, churches, chapels, booths, and tents to certain amounts, and stealing privily from the person, (the capital punishment of which was defended by Blackstone, on the ground that it was an offence "even in a state of nature") afford signal illustrations of the inefficacy of severe laws, which witnesses and juries conspire to enervate. The sanguinary punishment of these offences has been repealed, contrariwise, in most instances, as observed by Lord Denman,[2] to the unanimous opposition of the Judges within living memory, no less peremptorily expressed than that of their Successors against a Code of the Criminal Law. Sir M. Hale tells us, it had been construed, that stealing from the person, (an offence from which benefit of clergy had been taken away) if it were not of some article exceeding the value of twelve-pence, was still petit larceny, and not capital; and so, he adds, "if a man could possibly steal a horse of the value of twelve-pence only." He might have testified surprise at modern Old Bailey prices of articles; for juries, long before the legislature interfered, claimed a right of *construction* in imitation of the judges; and what was fact out of the jury-box,

[1] Watches, that sore temptation of thieves, began to be used in the reign of Henry VIII. and were not common in that of Elizabeth. The eccentric traveller Coryat, introduced *forks* in the reign of James I.; Ben Jonson and the literary coterie which made him their butt, used to call him *furcifer*. Silver teaspoons date from the reign of Anne, the common use of silver forks from that of George III. The chronicles speak of old men remembering the change from wooden platters to pewter, and wooden spoons to tin. Shakspere, however, gives us an example of the theft of a piece of personal property, worth more than twice fifteen pence. *Falstaff* says to *Pistol*, "When Mrs Bridget lost the handle of her fan, I took it upon mine honour thou hadst it not." To which *Pistol* replies, "Did'st thou not share? hadst thou not fifteen pence?"

[2] See Lord Denman's pamphlet on the Examination of Parties. The Judges, however, were for speaking daggers rather than using them: a short time before the abolition of capital punishment for stealing to the amount of forty shillings in a dwelling-house, Lord Kenyon sentenced a young woman to death for that offence: whereupon she fainted, and the judge, in great agitation, exclaimed, "I don't mean to hang you; will nobody tell her, I don't mean to hang her?"

ceased to be fact within it; thus, they virtually abolished the distinctions between Grand and Petty, simple and compound Larceny by miscalled "pious perjuries." It was familiar to them to find bank-notes for the payment of 5*l.* or 10*l.* or larger sums, either of the value of twelve-pence, four shillings and sixpence, or twenty-nine shillings, according as humanity, not truth or justice, made it necessary for evading a capital sentence.[1]

SECTION II.

Robbery.

It was pleaded on behalf of a Hundred charged with a loss incurred by robbery on Gad's Hill, that, time out of mind, it had been customary to rob upon Gad's Hill. Had evidence been allowed in support of this plea, it may be presumed that Shakspere's play of Henry IV. would have been a cogent piece of tradition. Later, in Farquhar's "Beaux Stratagem," first acted in 1707, two characters of the names of *Hounslow* and *Bagshot*, indicate a change in the wonted locality for robbers. Since then we read of Abershaw being hanged in chains on Wimbledon Common, which had been the scene of his closing exploit; on the *Sunday* after which occurrence, we are told, that, the day being very fine, London was unpeopled,

[1] In 1737, a person in a respectable station of life, who lived in Holborn Court, Gray's Inn, was for a long time in the habit of breaking open and robbing chambers in the inns of court, without any suspicion attaching to him; it is remarkable that, during this period, he always went to Abingdon's coffee-house, in Holborn, on an execution day, to see from thence the prisoners pass by, in their carts, to Tyburn, and at no other time did he frequent that coffee-house. On the other hand, the fatal example of George Barnwell, in the tragedy of that name which used to be acted at both theatres every Christmas till 1819, shews that capital punishment may not be valueless, even when it is fictitious. Mr Ross, the original performer of the character of George Barnwell, received for ten years at his *benefit*, an anonymous letter containing a ten pound note, and these words, "A tribute of gratitude from one who was saved from ruin by witnessing Mr Ross's performance of *George Barnwell*."

its inhabitants having all gone to view the spectacle at Wimbledon. Townsend, the Bow-street officer, in his evidence before the police committee, in 1816, states, "I remember, in very likely a week, there would be from ten to fifteen highway robberies, some on Hounslow Heath, some on Wimbledon Common, some on Finchley Common. I have come to Bow-street in a morning, and, while I have been leaning over the desk, had three or four people come in, and say, 'I was robbed by two highwaymen in such a place.' They used to be ready to pop at a man as soon as he let down his glass. Where are these highway robberies now?" It is related in the Gentleman's Magazine, that on the 6th of September, 1776, the Lord Mayor of London was robbed near Turnham Green, in his chaise and four, in sight of all his retinue, by a single highwayman, who swore he would shoot the first man who made resistance. Thus, the offence of robbery was, in former times, very different, in regard to frequency and atrocity, from its present aspect: but the change may be attributed, with better reason, to the altered condition of the country and the increased density of its population, than to penal terrors.[1]

[1] The communication between towns was anciently much conducted by means of carriers, as appears, *inter alia* by Milton's facetious epitaph on Hobson, the famous inventor of the *choice*. The usual width of ancient roads in England was about eight feet, adapted for travelling on horseback, and conveying goods in pack saddles, or packages on horses' backs. On a complaint against a *hundred* in Berkshire, in the time of Elizabeth, that some clothiers had been robbed, it was answered that they did not travel with the great troop of clothiers, and, also carried their money openly in wallets upon their saddles. Roger North tells us that Lord Keeper Guildford, when newly called to the bar *rode* the Norfolk circuit with Serjeant Earl one of the *cocks* of that circuit, because no one else would *starve* with him. Besides the inclosure of most of the ancient haunts of highwaymen, an order of Council in 1797, operating to the substitution for gold of bank-notes which might be more easily concealed, is supposed to have been detrimental to the occupation of robbers. Abershaw was the last of the great highwaymen, some of whose exploits have found a place in Mr Macaulay's history. Of Robin Hood, the first of note among English robbers, Stowe writes: "In this time (1190) were many robbers and outlaws; among whom *Robin Hood* and *Little John*, renowned thieves, continued in woods, despoiling and plundering the goods of the rich; they killed none but such as would invade them, or by resistance for their own defence. The said Robin entertained a hundred tall men and good archers with such spoils and

Robbery is defined by Sir M. Hale to be "the felonious and violent taking of any money, or goods, from the person of another, putting him in fear, be the value thereof above or under one shilling." More anciently, in the time so late as that of Henry IV., an attempt to rob was felony, for, by the *then* Common Law, *voluntas reputabatur pro facto.*[1]

In this definition the term "*felonious,*" as observed on several other occasions, has no precise meaning, but is a convenient cloak for any meanings which a judge may assign to it. The *taking* may be, Sir M. Hale informs us, "a *double* kind of taking," including a taking in *law*, *i.e.* a different kind of taking from that in vulgar use: and the fear may be a *constructive fear.*

The following example of a taking in *law* is given by Sir M. Hale. "If thieves come to rob *A*, and finding little about him, enforce him by menace of death to swear upon a book to fetch them a greater sum, which he doth accordingly, this is a *taking* by robbery." This hint has been turned to account in modern times; and it has been held that *givings* in cases of threats of bodily violence to other persons than the party robbed, of injuries to habitations or other property, and not to the person, and of criminal imputations[2] are, in construction of law, *takings.*

thefts as he got, upon whom four hundred (were they ever so strong) durst not give the onset. He suffered no woman to be oppressed, violated, or otherwise molested; poor men's goods he spared, abundantly relieving them with that which, by theft, he got from the abbies, and the houses of rich earls. He hath been blamed for his rapine and theft, but of all thieves, history affirms him to be the prince, and the *most gentle thief.*" The lighting of roads is a very modern improvement. In November, 1730, the King and Queen coming from Kew Green to St James's, were overturned in their coach at Parson's Green, about six o'clock in the evening, through the wind having blown out their flambeaux, whereby the coachman could not see his way.

[1] *Attempts* to rob, and to do injury to *property* (in like manner as to *persons*) have, in modern times, been subjected to specific punishments, upon more rational principles. When the old rule of *compassing* offences less than treason was laid aside, and the distinction, in regard to punishment, between inchoate and consummated crimes was wisely recognised, the former were, for a long period, overlooked.

[2] It has been questioned, whether a threat used to a wife of preferring a charge for an infamous offence against her husband, be constructive force.

Sir M. Hale writes that the *taking* need not be, according to the strict terms of the definition, "from the person of another," but it may be a taking, "in his presence." This construction, however, though it have long hands, does not reach cases within the same mischief, where a person is driven by violence to abandon possession of property, which is not taken by the robber until he is out of sight.

The Courts have recognised the doctrine of *constructive fear*, where the person robbed may disavow fear, but the circumstances were calculated to have produced it in ordinary minds; as where the person robbed has voluntarily gone to meet the robber for the purpose of apprehending him: this is said to be *in odium spoliatoris* (constructions being commonly veiled in Latin). And, although mere *snatching* is not robbery, yet, the snatching a watch, and breaking the neck-chain by which it was suspended, has been held to be sufficient, in *law*, both for *force* and for *fear*. Where, in the act of snatching an earring, a lady's ear was rent, and in that of snatching a diamond pin with a corkscrew stalk, some of a lady's hair was torn away, it was resolved that in *law*, the ladies were robbed by being *put in fear*, although, in *fact*, they did not part with the earring or pin from fear, and probably, their frights or faintings did not begin until the *takings* were ended; and this, notwithstanding it had been held, in Hale's time, that, if a person privately steal money, but afterwards keep it by putting the owner in fear, this is not robbery, because the fear came subsequently to the taking.

With regard to the *punishment* of robbery, the greater part of Sir M. Hale's chapter on that offence consists of an exposition of a statute of Henry VIII., whereby clergy was taken away; robbery being, in Sir M. Hale's time, a clergyable offence, unless, in the terms of that statute, it was committed in or *near* the highway, or in a mansion house, the owner, his wife, children, or servants being in the house and put in fear. In the construction of this statute it was held to be robbery without benefit of

clergy to rob in a ship below *the* bridge, because the Thames *there* is *alta via regia*, or, if it were not, it is *not far off from it.* The locality of a robbery is not now material, it will be so equally above as below London Bridge.[1]

According to the present law, robbery is not a capital offence, unless the robber shall "at the time of, or immediately before, or immediately after such robbery, stab, cut, or wound the party robbed." The word *immediately* is not adapted to legal calculation; and the terms "stab, cut, and wound," are overladen by decisions, so as to render expedient the use of some more general expression, and one free from ambiguity.

Fortescue, the author of the celebrated treatise *De laudibus legum Angliæ* in the reign of Henry VI., mentions that there were more men hanged in England for open robbery in a year, than in France, during seven years, which he ascribes to the "lack of heart" of the French people. But it must always have been impolitic to punish capitally simple robbery, or, perhaps, robbery attended with a stab, cut, or wound; for juries are commonly reluctant to take away life, except where life has been taken away or purposely endangered; and, as to the robbers, the reflections of Montesquieu, in his *L'Esprit des Loix*, may appear pertinent: "A la Chine, les voleurs cruels sont coupés en morceaux, les autres non: cette difference fait que l'on y vole, mais que l'on n'y assassine pas. En Moscovie, où la peine des voleurs et celle des assassins sont les memes, on assassine toujours; les morts, y dit on, ne racontent rien."[2]

A remarkable instance of a mistake of justice with regard to a prosecution for robbery, was related by Mr Sheriff Wilde

[1] In a case reported in Popham, one Baynes was hanged upon a misconstruction of this statute. Ch. J. Kelyng says of it, "This resolution I hold clearly not to be law." Popham's hangings are sung of by Donne.

[2] The custom anciently of breaking on the wheel for robbery in France, is said to have converted nearly all robberies in that country into murders. This argument is used by Curran in his famous speech against the posthumous attainder of Lord E. Fitzgerald, (a speech and an attainder affording striking illustrations of what is said in a previous chapter on confiscation).

before the Criminal Law Commissioners. "There were two men tried of the names of Anderson and Morris, for the capital offence of robbing a person in Westminster of the sum of 1*l.* 2*s.*, connected with violence on his person. The prosecutor stated, that he met a woman in Westminster, and that she took him to a house where he was robbed by the prisoners, who, using considerable violence, ultimately threw him out of the house after having plundered him. He gave such evidence (I was present at the trial), that the judge, the Recorder Knowlys, called on the prisoners for their defence. They had counsel, and the prisoners at the bar gave an entirely different account of the transaction from the prosecutor. The prisoners asserted their innocence. During this moment a noise was heard at the outer door of the court, and with some difficulty a female came rushing into the court, who was apparently the witness the prisoners wished to call, and she, it appeared, was the individual who had taken the prosecutor to the house in Westminster. She gave an entirely different account of the transaction to that of the prosecutor, stating, that he had gone with her to this house, which she had improperly taken him to, being the house of Morris, with whom she was cohabiting, and that when Morris came home, and found a man there, he kicked him out, and that, in truth, that was the real transaction. The Recorder took a strong impression from what had passed against the prisoners, and in a very few moments, after a very short address to the jury, they found the prisoners guilty, together with a woman who was also a prisoner with them, she being in their company and in the house at the time. Upon the jury finding the prisoners guilty, the recorder immediately made an address to the witness, Hannah Morris, by telling her she was a bad, corrupt woman, and ordered her into custody to be tried for perjury. Having heard the case tried, it appeared to me that the story she had told was true. I therefore, after the court was up, took the governor of Newgate into the prison, where she repeated

all the facts she had deposed to. One most material fact was, that the prosecutor, a day or two after the alleged robbery, had taken the parties up before a magistrate at Queen's-square office, and that they were only charged with a common assault. This fact, of course, was easy to be ascertained; and ultimately, after inquiring into every fact to which she had deposed, it turned out that her statements were true. I, therefore, finding that the two male prisoners had been ordered for execution, thought it my duty to submit the facts to the Secretary of State, Sir Robert Peel, urging, that, at all events, inasmuch as the Recorder had ordered this woman to be tried for perjury, there ought to be a respite until that trial was over, to ascertain whether the prosecutor or the witness had sworn truly. After several communications with Sir Robert Peel, but not until half-past eleven o'clock on the night before they were to have been hanged as on the following morning, was I able to procure a reprieve. If I had not had the assistance of the governor of the prison (the late Mr Barrett), the facts and circumstances establishing the innocence of these prisoners would never have been made to appear.

"Both the prisoners were to have been executed?—Yes. Two days after the time when they would have been executed the sessions came on, but the prosecutor never dared to appear to support the indictment against Hannah Morris. All the documents connected with that case are to be found at the Home Office; and it was at the sessions, no doubt, of May, 1828, during the year I was Sheriff."

SECTION III.

Burglary.[1]

The atrocity of the crime of burglary consists chiefly in the terrors brought upon those who are found asleep and defenceless,

[1] Hale in his chapter on burglary, treats of what he calls *vulgar* and *legal* burglary; the former consisting of repealed statutes for *housebreaking*. Of one

and who are deprived of that security in which they have a wonted confidence. It arouses the indignation naturally felt at an outrage on all those feelings finely expressed by Cicero, which are connected with the idea of a person's *domus sua*.

The definition of burglary adopted by Sir M. Hale is that given by Sir E. Coke: "A burglar is he that, in the night-time, breaketh and entereth into a mansion-house of another, with intent to kill some reasonable creature, or to commit some other felony within the same, whether the felonious intention be executed or not." In this definition, the breaking (which Hale terms "a *double* kind of breaking"), the entering, if not also the mansion-house, and the night, may all be constructive. The "reasonable creature" is the same expression that occurs in Coke's definition of a *murdered man*, and might, in strictness, exclude lunatic asylums.

The night,[1] according to Sir M. Hale, was determined by the uncertain criterion of a man's countenance being visible or not by the light of the sun, though he says that this is the *later opinion*, for that previously, according to many authorities, it had been usual to hang *twilight* burglars. By a recent statute of Victoria, night is defined more precisely as commencing at nine o'clock P. M. and concluding at six o'clock A. M. on the next day. Sir M. Hale writes (as Eden says, "with a latitude very unusual to his temper in capital cases") that one night may be transferred constructively to another; as if a person break on one night and enter on another, "it shall be *supposed* that he broke

decision upon this subject by Chief Justice Popham, who had, in his early days, been himself a Knight of the Road, Hale observes, that "it *seems* somewhat too severe." According to the *old* Common Law down to the time of Crompton, Sir A. Brown held that *approaching* a house with intent to commit burglary, was felony, agreeably to the ancient maxim *voluntas reputatur pro facto*. By a recent Act, *attempts* to commit burglaries, and having, at night, instruments of house-breaking, or being found, by night, with blackened or disguised faces, is made a misdemeanour, on the principle stated *supra*, p. 205, n.

[1] In old records, this is, sometimes, called *inter canem et lupum*, when the dog sleeps, and the wolf seeks its prey. So the offence was called *Hamsokne* or *home* invasion.

and entered on the night when he entered."[1] Hale writes, in seeming contradiction to this passage, "If the breaking of the house were in the daytime, and the entering in the night, this will not be burglary; for both make the offence, and both must be *noctanter*." It may be observed, that the case in the Year-Book to which Hale refers for the latter point, does not come up to his position, for in that case, it did not appear who made the hole through which the thieves entered. Coke is impelled by the mention of felony at night, to quote from Horace—"ut jugulent homines, surgunt de *nocte* latrones."

The *mansion-house* is defined by a statute of George IV. as including a dwelling-house, together with buildings having a communication therewith, either immediate or by means of a covered and enclosed passage. In Sir M. Hale's time the mansion-house was regarded with reference to the enclosure or *curtilage* within which it stood; our ancient houses being frequently built with a view to being beleaguered by *fellowships*, such as are described in several of the *Paston Letters*, and are pointed at in the old writs of the Register, *De manso obsesso*, and *Quod fenestras in minutas partes secuit*. It appears from Sir M. Hale's cases, that the question whether a building was parcel or not of a dwelling-house sometimes depended on the point whether it was within *bowshot*.

According to Sir M. Hale, a house shall, in an indictment, be "*supposed* to be a *domus mansionalis*," though broken open during a prolonged absence of the owner, as a lawyer's chambers in the long vacation, (a popular doctrine in Westminster Hall) provided only that he had an *animus revertendi*, as, according to the circuit toast, on *Cras Animarum*. It is, however, obvious that, in such a case, the alarm attributed to burglary can

[1] The law here annihilates *time:* it sometimes, by construction, annihilates *space*,—as, where the sheriff, by writ, is ordered to return jurors *de vicineto*, Hale says that this shall be intended of persons residing at opposite ends of a county, who are neighbours in *law*, though not in *fact*.

be only *constructive.* Hale disapproves of an indictment *quod shopam Richardi burglariter fregit*, which was held good, according to Coke's opinion, on the ground that a *shop* is a place "to converse in." A church, according to Hale and Coke, is *Domus mansionalis omnipotentis Dei.*[1] A *quære* is made by Sir M. Hale as to breaking open cupboards and fixed counters;[2] it has been above seen that Sir M. Foster recommends that they should not, for this particular purpose, be deemed parcel of a house though passing to the heir, for the obsolete reason that such a construction is *in favorem vitæ.*

Constructive breakings are mentioned by Sir M. Hale, as unlatching a door or obtaining admission through false pretences. In one case, Sir M. Hale mentions an owner issuing out of his house with a staff, whereupon a thief put his pistol within the door; this, "by great advice," was adjudged burglary, although Sir M. Hale says, "he *brake* not the door." As to the point of breaking by coming down a chimney, Sir M. Hale writes: "There was one arraigned before me at Cambridge for burglary, and it appeared that he crept down a chimney. I was doubtful, whether this was burglary, and so were some others, but, upon examination, it appeared that, in his creeping down, *some of the bricks* of the chimney were *loosened*, and fell down in the room, which *put it out of question*, and direction was given to find it burglary; but the jury acquitted him of the whole fact." Perhaps the jury may be thought more sensible than the judge, in disregarding the accidental fall of bricks as decisive of a prisoner's life. Hawkins lays it down (apparently only upon this authority), and it is found in all modern books, that coming down a chimney is a *breaking*, with or without loose bricks; the door

[1] Coke, for this *law*, cites Matthew xxi. 23.

[2] Hale writes, that, upon a *special verdict* from Cambridgeshire it was held that breaking open a chest, though not fixed to the freehold, was all one, for this purpose, with breaking a door; "yet I must needs say that the *course of Newgate* hath always been since my time to the contrary."

of construction being unlatched in Hale's time, has opened wider, and thus, *constructive breakings* have become familiar, by threats, frauds, conspiracies, the connivance of servants, and even where a house-door is opened purposely for the admission of the burglar with a view of apprehending him.

Breaking out of a dwelling-house at night-time is made burglary, by a statute of George IV. Sir M. Hale thinks that this was not burglary, against the opinion of Dalton,[1] because "*fregit et exivit, non fregit et intravit.*" It may, perhaps, be thought that a breaking out is not so alarming as a breaking in, and, indeed, may be a relief to the minds of the inmates: they may exclaim with Cicero of Catiline "*Magno me metu liberabis, dummodo inter me atque te murus intersit.*"

Entries may be highly constructive. Sir M. Hale mentions entries by putting a hand over a threshold, or a hook through a window. He makes a *quære* however, with a *seeming* to the contrary, as to an entry by a bullet fired into a house; but this is laid down affirmatively by Hawkins, without the *query*. Hale states various cases of *vicarious* entries, as by associates of a gang, wives, or children, where a party may be found guilty of breaking and entering a house, without moving his hands or feet. Some nice points concerning entry have been laid down in modern times. It is an entry if a person descend a chimney, but is arrested before he can get low enough to enter any room; it is an entry to open a window entirely, but not to push it up or down when part opened; putting a finger or a pistol over a threshold is an entry, but not a centre-bit or crowbar, these instruments being intended for breaking, and not, except by a chain of reasoning, for stealing.

[1] The *middle*, or Hale's, Common Law of burglary appears, in many respects, to have been very different from that which prevailed shortly before him. Thus, besides the above change, those concerning *attempts* and *night* have been noticed; and according to Ch. J. Hyde, tem. Car. I. and Crompton, or, as Hale expresses it, "in the remembrance of some yet alive," an unlawful entry through *open* doors, was held a breaking in *law* (or *clausam fregit*), for the purpose of burglary.

It may be observed of technical constructions in general, that their mischief is not to be measured solely by the subtleties with which the law is disfigured by means of them, but, also, inasmuch as they countenance or engender a multitude of crotchets, which may be stifled in their embryo, but not till after they have occasioned much loss of public time, expense, delusive hopes, and scandal of the law. Thus Sir M. Hale thinks it necessary to tell us that Saunders Ch. B. held that, if a man break a hole in a house, and frighten the owner into throwing money out of window, yet that, in such a case, standing *without* the house in *fact*, is, in *law*, standing within it: Sir M. Hale judiciously adds, "*tamen quære.*"

With regard to the burglar's *intention*, it must be that of committing a felony, not a misdemeanour, as *ad verberandum ipsum*. As regards those felonies which are no longer capital, the crime of burglary has lost much of its ancient appearance of atrocity. With regard to the offence of a rape, which was not a capital felony at Common Law, Hale states that it had been considered burglary to break and enter at night with intent to commit it, according to "the more *warrantable* opinion." In modern books Hale's opinion is stated without qualification as more or less warrantable.

As to the *punishment* of burglary, the benefit of clergy was taken away from the offence at the time of Sir M. Hale,[1] though he states several thorny questions as to claims of clergy by accessories. Burglary is no longer a capital offence, unless accompanied by an assault with intent to murder, or with stabbing, cutting, beating, wounding, or striking. Sir M. Hale mentions, that, in his time, more offenders escaped by the over easy ear given to exceptions in indictments than by their own innocence; accordingly the latinizing of the term *burglary* seems

[1] Barrington, in his observations on the law of Henry VIII., the first general law for taking away clergy, gives an interesting history of the infliction of capital punishment, for the invasion of various species of property and their receptacles, in a series as they successively became objects of value and importance.

to have been an anchor of hope to burglars; it was held that *burgariter* or *burgenter* for *burglariter* were fatal flaws, but that *burgulariter* satisfied *judicial* criticism.

SECTION IV.

Arson.

Arson is commonly an offence of deep malignity, being fatal to the security of innocent occupiers, dangerous to the lives and possessions of persons even unknown, and unlimited in its consequences. It is, however, susceptible of many degrees; for it matters much whether property be a heap of dried grass, or a great city, whose conflagration may be commemorated as by "London's column pointing to the skies;[1] and whether a house be actually inhabited, and the lives of its inmates exposed to peril, or be inhabited only in law, as a barrister's chambers in the long vacation. Arson is the only felonious injury to property treated of by Sir M. Hale which is not committed for the sake of gain or some advantage to the delinquent, but which is said to be *malicious*, a denomination that, since Hale's time, is applicable to a multitude of felonies and minor offences, the numerous statutes concerning which were consolidated by a statute commonly known as Lord Lansdowne's Act.

Arson is defined by Hale, after Sir E. Coke, to be "the malicious and voluntary burning the house of another by day or by night." Afterwards, Sir M. Hale tells us that the word "*domus*" in indictments for arson, includes (what may appear

[1] The fire of London consumed 400 streets, 13,200 dwelling-houses, eighty-nine churches, St Paul's Cathedral, Guildhall, and four city Gates. The column was the work of seven lord mayors, whose names are perpetuated at the end of Littleton's Dictionary, by what he calls an *heptastic vocable*. The inscription imputing the fire to the Catholics was erased in the reign of James II. and restored in that of William III.

Jack the *Painter* is, perhaps, the most celebrated incendiarist in our judicial annals. After setting fire to the shipping and town of Bristol, and attempting to burn the Dockyard at Plymouth, he was hanged in 1777 for setting fire to the Dockyard at Portsmouth. 500*l.* had been offered for his apprehension. He was hanged on a gibbet sixty-four feet high, formed from the mainmast of a ship, and afterwards in chains.

a strong instance of *construction*,) any barn having hay or corn in it, though it be not parcel of a dwelling-house.

Sir M. Hale's chapter on arson exemplifies the intricacy and inconsistency of the law relating to capital punishment that formerly sprung out of the lately abolished doctrine of Clergy. Burning a barn with *corn* in it had no clergy; *secus* if it contained *hay*. After many vacillations it was settled that accessories before the fact had not clergy, *secus* those after it. Hale specifies *six* epochs of the law regarding clergy in arson (as if *burning* was a practice familiar to the church); breaking through his ordinary reserve to say, "the law *seems* to make this *absurdity*, that the Principal in arson shall have the benefit of clergy, if in orders; but the Accessories before, though in orders, are excluded." Lord Bacon exemplifies the expediency of a Code by reference to the statutes concerning arson: "There is such an accumulation of statutes concerning one matter, and they so cross and intricate, as the certainty of law is lost in the heap; as your Majesty had experience last day upon the point, whether the *incendiary* of Newmarket should have the benefit of his clergy." The Newmarket case is thus noticed in the old metrical version of Coke's Reports:

> *Poulter.*—For burning houses, Principal
> No clergy hath, but Accessories all.

Arson, according to Coke and Hale, must be *wilful* and *malicious*. These authors do not define the term malicious, as applied to this crime, which is commonly, not universally, perpetrated from vindictive motives, or malice in *fact*. But the absence of spite to the owner is no answer to a charge of arson, nor is the assignment of a motive essential to a conviction. Hence then, as in homicide, recourse is had to the technical term *malice* in *law*. The term *wilful* is, also, used technically; it involves many of the questions concerning *constructive* wilfulness in the chapter on homicide; the felonious shooting at a peacock, may, by a

perambulation of motive, accidentally turn into incendiarism; but not any minor unlawfulness, whether *malum in se*, or *malum prohibitum*.[1]

Malicious burnings have been extended by statute, so as to include setting fire to stacks of *sixteen* different descriptions anywhere in the kingdom, to crops, standing or cut down, trees, heath, coal-mines, ships, farm-buildings, railway-stations, and to various descriptions of outhouses; to most injuries by fire to real property, and a few to personal property. The punishments for these offences were, till recently, very severe; as, by a statute of George II., it was made felony without benefit of clergy, to "set fire to any house, barn, or outhouse, or to any hovel, cock, mow or stack of corn, straw, hay, or wood;" a strong instance, as Mr Eden observes, of the "vague, unfeeling, undistinguishing carelessness with which penal laws are composed, even in the most polished times."

The arson of Sir M. Hale must have been of the house of *another*, if, at least, it were not in a town: the law has been extended so as to reach cases where persons burn their own houses or ships, with a view to defrauding insurers; or burn houses in which they have reversionary interests as landlords, or otherwise; but, it has been held, that a married woman cannot be indicted for setting fire to the house of her husband with intent to injure *him*, man and wife being *one*. The Roman practice of a person burning his own house in order to receive presents from those who are looking after his fortune, has not been rife in this country: the details are related with much humour by Juvenal, and Martial writes:

> Empta domus fuerat tibi, Tongiliane, ducenis,
> Abstulit hanc nimium casus in urbe frequens.
> Collatum est decies. Rogo, "Non potes ipse videri
> Incendisse tuam, Tongiliane, domum?"

[1] By a statute of George III. a servant *negligently* setting fire to a house, outhouse, or other building may be fined 100*l.* by two Justices, and, in default, sentenced to eighteen months imprisonment, with hard labour!

The punishment of arson is not now generally capital, but subject to an extreme punishment of transportation for life. However, among the few capital punishments now retained in English law, are the "*setting fire*[1] to any dwelling-house, any person being therein," and the "setting fire to any ship or vessel, either with intent to murder any person, or whereby the life of any person shall be endangered."

In judging of the expediency of capital punishment in cases of arson, there must be considered not merely the mischief of the offence, which is often of a very deep die, but the probability of convictions. Juries are much averse to convicting in all capital cases, but especially in those unattended with direct personal violence. And, in prosecutions for arson, the evidence is particularly liable to doubt from the secret and rapid manner of perpetrating the offence; and the proof of it often depending on the testimony of persons who have had held out to them rewards. The *old* Common Law, according to Britton, as Hale informs us, punished persons guilty of arson with being burnt to death, on the principle which he states, "Issent que ils soient punies per mesme le chose dont ils pecherent."

SECTION V.

Forgery.

Forgery is an offence, the extent and importance of which is derived from a high state of civilisation. In this country, in the reign of queen Elizabeth, considerable progress in refinement had been made with regard to written securities and evidences; but down to the reign of Charles II. when Sir M. Hale wrote,

[1] The expression *setting fire* has been substituted generally for the Common Law phrase of *burning;* but, according to Hale, arson might be of *part* of a house. The Nottingham rioters were convicted and executed for burning about two yards of a floor of Colwick Hall: the whole of the valuable furniture was consumed, but that, in law, did not *savour* of the *domus*. By the *old* Common Law, burning a

a rude statute of that Queen concerning forgery, was all the provision made against its perpetration. The Statute of Frauds passed about the period of Hale's death, and several modern statutes in extension of it, greatly enlarged the use of written instruments in wills and contracts. Paper credit, the transactions of enlarged commerce, the institution of national funds, giving birth to a variety of modern securities and modes of authenticating the genuineness of writings, have augmented the facilities, the temptations, and the mischiefs of forgery. The statutes which have been passed on the subject of forgery might serve as a chronological catalogue of the written securities successively in use from the date of the first statute. We find, for instance, first, statutes of Richard II. and Henry VI. concerning forgery of records, the statutes of Elizabeth, that in the text, and one concerning *passes* of soldiers and mariners; after more than a century, two statutes of William III. five of Anne, eight of George I. ten of George II. which were quadrupled in the reign of George III. relating chiefly to new kinds of written securities, as they became of importance.

The legal instruments protected by the statute of Elizabeth, are deeds, charters, writings sealed, wills affecting estates of freehold or inheritance, charters, deeds or writings respecting terms for years, or annuities, obligations, bills obligatory, acquittances, releases or discharges. The punishment for the first offence, was payment to the party grieved of double costs and damages, pillory, loss of *two* ears in case the forgery concerned the freehold, otherwise of *one*, nostrils slit and seared with a hot iron, imprisonment, and forfeiture of profits of lands during life: for the second offence, the crime was made felony

stack of corn, or a cart or waggon of coals, was arson. The *middle* Common Law, it has been seen, was defective in provisions against the arson of other species of property than houses; so, also, as regards attempts at arson; and likewise malicious (*i. e.* not fraudulent) injuries otherwise than by burning, to various kinds of real and personal property, as demolishing houses or machinery, destroying trees, hurts to cattle. These defects have been supplied by statute.

without benefit of clergy or (what was material before the reign of James I.) sanctuary.

Among Ireland's literary forgeries is the following document:

"One moneth from the date hereof, I doe promyse to paye to my good and worthye freynde, John Hemynge, the sume of five pounds and five shillings, as a recompense for hys greate trouble in settling and doinge much for me at the Globe Theatre, as also for hys trouble in going downe for me to Stratford. Witness my hand.

WM. SHAKSPERE.

September the nynth, 1589."

Malone has adduced a variety of arguments shewing that the above note was a forgery. In regard to which, as concerns the present subject, it appears that, in the time of Shakspere, personal securities were either bonds, or bills of debt, or bills obligatory. All these instruments were required to be sealed, but bonds contained a penalty and condition, which the other instruments did not. There is mention in an old report, of a bill of debt under seal, acknowledging the having received, and engaging to re-deliver, a *Bible*.

Foreign bills of exchange not under seal, are, in Maline's *Lex Mercatoria*, published in 1622, described as a curiosity; and the transfer of them to *bearer* is spoken of as a "laudable custome not practised in England." Inland bills not between merchants are mentioned as being recent by Ch. J. Treby, in the year 1696. Goldsmiths' notes, the origin of promissory notes, are supposed to have originated about the year 1673, soon after Charles II. had shut up the exchequer, and impounded about 1,400,000*l.* of money, belonging to the goldsmiths. The principal epoch in the history of paper credit is the establishment of the Bank of England, in 1694; but the bills of the Bank, though transferable, contrary to the rule of the Common Law, were, nevertheless, agreeably to their first charter, originally under seal. Exchequer bills were issued in 1696. The final triumph

of Paper Credit over the prejudices of our great lawyers was achieved by legalizing the transfer of promissory notes, in the reign of queen Anne.[1]

The terms of the statute of Elizabeth with regard to the modes of forging;—"forging, making, assenting to be forged or made," would not embrace a multitude of modern forgeries. Recent statutes add the words, "counterfeiting, erasing, or altering." An important branch of the modern offence, not adverted to by the statute of Elizabeth, is that of "offering, uttering, disposing, or putting off" forged instruments. In a few instances it has been made criminal to have in possession instruments or paper manifestly intended to be used for the purpose of forgery.

With regard to the *punishment* of forgery. Imprisonment during life, pillory, slitting of a nose, cutting off two ears, or even one, cruelties which do not appear to have roused the humanity of Sir M. Hale, would be opposed to the policy, and intolerable to the feelings of the present age. So late, however, as 1731, one Crook, *alias* Sir Peter Stranger, stood in the pillory at Charing Cross for forging a deed, and, after he had stood an hour, a chair was brought to the scaffold, in which he was placed, and the hangman, with a pruning knife, cut off both his ears, and, with a pair of scissors, slit both his nostrils, all which he bore with much patience; but when his right nostril was seared with a hot iron, the pain was so violent he could not bear it; whereupon his left nostril was not seared; he was carried bleeding to a neighbouring tavern, where, after his wounds had been dressed by a surgeon, he was, the chronicler states, "as merry at dinner with his friends, as if nothing had happened."

The punishment of death, which, in the time of Sir M. Hale,

[1] Pope appears to have participated in the prejudices of Lord Holt on this subject, as, perhaps, may be inferred from his apostrophe to Paper Credit in his Essay on the *Use of Riches*, and of which the only consequence he appears to have anticipated was the lending corruption lighter wings to fly, in the place of jars of oil, bales of cloth, and bellowing oxen.

was inflicted only for a second offence, afterwards became the ordinary punishment for forgery: it was supposed to be essential to the preservation of our commercial prosperity. Public opinion has, within living memory, undergone a remarkable change upon this subject, to which the evidence taken by the Criminal Law Commission has materially contributed. It was made manifest, from the examinations of the best informed persons, that forgery had become one of the most unrestrained of offences, in consequence of the joint endeavours to save the lives of forgers, by prosecutors, witnesses, jurymen, and judges.

Public attention was much excited, in the reign of George III., by the trials and executions for forgery of two brothers of the name of Perreau, and of Dr Dodd. The two Perreaus were executed at Tyburn in 1776. Before the Report on the defence of prisoners by the Criminal Law Commission, and the Act consequent thereon, it was not permitted to prisoners to have speeches spoken for them by counsel, but written addresses were sometimes prepared for them: Cumberland prepared that used on their trial by the Perreaus, of the excellency of which Garrick, who was present, spoke in enthusiastic terms. Dr Johnson wrote an appeal for mercy on behalf of Dr Dodd. Dodd was found guilty of forging a bond for the payment of £4,200 in the name of Lord Chesterfield, to whom he had been tutor; unexampled efforts were made to obtain a pardon. He left his poetical *Prison Thoughts* in MS. with a preface finished by a break, which, Southey observes, is more impressive than the most finished rhetoric. "The thinking will easily pardon all inaccuracies, as I am neither able nor willing to read over these melancholy lines with a curious and critical eye. They are imperfect, but the language of the heart; and, had I time and inclination, might, and should be improved;[1] but——"

[1] When Horne Tooke, on his trial for high treason, was asked, "How will you be tried?" He answered, "I would be tried by God and my country, but——." In the annals of forgery, one Price, alias Patch, was a conspicuous character. He hanged himself in prison, in the year 1796, by means of two gimblets and a sixpenny

It is not creditable to the intelligence of Sir W. Jones, that he expresses his approbation of the punishment of *nailing ears to the pillory* in a charge to the grand jury of Calcutta respecting a forgery. He observes that the punishment, "though painful at the time and perpetually ignominious, neither cruelly mangles the human frame, nor deprives the offender, should he repent and be industrious, of gaining a subsistence by honest labour." It may be thought, that a person perpetually ignominious would have difficulty in gaining a subsistence by honest labour, and would, probably, be lost to all sense of shame.

The punishment of the pillory for every species of offence, has been exploded for the above reasons, and because it leaves to the whim of a rabble, whether the person pilloried shall be afforded a triumph over the laws, or shall forfeit his life, of both of which extremes there have been several remarkable instances. One of the *blood-money* gang, in 1732, who stood in the pillory at Seven Dials, was dreadfully pelted during the hour that he was exposed, and at the end of that time the mob tore him down, and trampled him to death. In 1758, an undersheriff was sentenced to two months imprisonment and a fine of £30 for favouring Dr Shebbeare, a popular libeller, in the pillory. Shebbeare's head and hands were not confined, or placed through holes, save that he sometimes rested his arms through the holes of the pillory: he was attended by a servant in livery, who held an umbrella over his head during the exposition. The annals of the pillory afford many conspicuous examples, and one *hymn* addressed to it by one of its most celebrated victims, De Foe. Of the punish-

cord, which his son had brought to him for the purpose, and his body was buried in a cross-road: he kept a lottery-office in King Street, Covent Garden: he manufactured bank notes in a wholesale way, which he circulated under various disguises; the paper, watermarks, and plates, were all his own manufacture. His aunt, who had assisted him in his forgeries, was addicted to the same practices after his death. Bochsa, the celebrated composer on the harp, was condemned, in contumacy, for numerous forgeries by the Court of Assize at Paris (amongst other names forged, that of Wellington) in 1817, and sentenced to twelve years of forced labour, to be branded with the letter F, and to be fined 4,000 franks. In England, at that period, he would have been "equalled in fate" with Orpheus.

ment of pillory for the particular offence of forgery, one of the most remarkable examples, is that of Ward, mentioned in Pope's "Moral Essays." He was first expelled the House of Commons, of which he was a member, in the year 1727, and when he stood in the pillory for forgery, he was worth above £200,000.

As to the cutting off of ears for various offences, the most memorable case is that of Prynne (whose ears were twice cut), Bastwick and Burton. Burton preached to his congregation during the remainder of his life, without ears. These cruelties of the Star Chamber have rendered the punishment of ear-cutting odious in England to the latest posterity;[1] they were avenged by the "two-handed engine" in Lycidas.

Recently before, and probably, at the time when Hale wrote, the nailing of ears to the pillory would seem to have been a very common occurrence; Lord Bacon makes it the subject of one of his Apothegms; he writes, "A witty rogue coming into a lace-shop, said, he had occasion for some lace; choice whereof being shewn him, he, at last, pitched upon one pattern, and asked them how much they would have for so much as would reach from ear to ear, for so much he had occasion for. They told him, for so much: so, some few words passing between them, he at last agreed, and told down his money for it, and began to

[1] Dr Bastwick's wife took his ears away from the pillory in a handkerchief. Prynne's are said to have been sewn together, and the disfigurement to have been partially cured. When he was brought a second time before the Star Chamber, Lord Chief Justice Finch, looking earnestly at Mr Prynne, said, "I had thought Mr Prynne had no ears, but, methinks, he has ears;" which caused many of the lords to take a stricter view of him, and, for their satisfaction, the usher of the Court was commanded to turn up his hair and shew his ears; upon the sight whereof the lords were displeased, that no more had been cut off. To which Prynne replied, "My Lords, there is never a one of your honours but would be sorry to have his ears as mine are." Lord Keeper: "In good faith, he is somewhat saucy." Ben Jonson's mother had prepared a strong poison for herself and her son to take, if he had lost his ears for writing a play supposed to reflect on the Scotch, for which he was imprisoned; she produced it at a supper given in celebration of her son's pardon. Sir J. Mackintosh has justly stigmatised, in his history, Pope's heartless line on De Foe's ears,

Earless, on high, stood unabashed De Foe.

measure on his own head, thus saying, 'One ear is here, and the other is *nailed to the pillory* at Bristol, and I fear that you have not so much of this lace by you at present as will perfect my bargain: therefore this piece of lace shall suffice at present in part of payment, and provide the rest with all expedition.'"

With respect to the remaining punishment for forgery mentioned by Hale, that of imprisonment for *life*, it is to be observed, that in the offences in which, at the commencement of the present reign, capital punishment was mitigated, the alternative of transportation is imprisonment of from two to four years. In the year 1836 Lord Wharncliffe passed the following examination before the Criminal Law Commissioners on the subject of imprisonment for *life*:—

"Assuming that it is expedient to increase the severity of secondary punishments, do not you think, in this country, it would be very unlikely that you would be able to inflict imprisonment for life?—Very.—It would be inconsistent with the manners of the people?—Yes.—Do not you think it would often happen, that juries would convict, though they knew that the punishment was imprisonment for life, when they would not find a capital verdict?—I am afraid that is true. Juries ought not to look at the punishment; they ought to consider whether the fact they are to try is proved, and whether the man is guilty or not guilty. Still their feelings are enlisted, and they will act on them. One thing to be said against imprisonment for life is, that you cannot make it a certain punishment, for, do what you will, men imprisoned for life will be for ever trying to get a remission, and compassion will arise; the circumstances and feelings at the moment of the commission of the crime or conviction will be lost sight of, and, after a certain time, the chances are that he will have his sentence remitted."

CHAPTER VIII.

REPEALED FELONIES.

A CATALOGUE of felonies by Statute antecedent to the reign of Charles II. is given by Sir M. Hale in chronological order, and with more brief remarks than in treating of felonies by the Common Law. Such felonies in Sir M. Hale's list as are in force with modifications in the present day, have been considered under previous separate heads. Of the rest, it has not been thought necessary to advert particularly to statutable felonies repealed before Sir M. Hale wrote, as, for instance, hunting in the king's forests with painted faces, or the selling of a horse to a Scotchman, or the putting in payment of *galli-halfpence*, *sufkins*, and *dodkins*. But it may illustrate the social progress of the nation in the lapse of two centuries, to select for notice a few of the felonies comprised in Hale's list, which, to use his own expression, had not been *laid flat* before his time, but have been *laid flat* since.

Sir M. Hale's catalogue would appear to present much too favourable a view of English criminal Jurisprudence in the time of Charles II. for it is confined to *felonies*, and does not include a multitude of misdemeanours, whereby religious liberty was suppressed, trade discouraged, domestic comfort infringed, and even diet and apparel prescribed, under the terror of fines, imprisonments, and ignominious punishments. Sir M. Hale's list of repealed felonies includes only such legal extravagances as, in his day, stained the courts of justice with blood.

There is an immediate prospect of nearly every Criminal Statute mentioned by Sir M. Hale being expunged, or trans-

posed in part into a new Consolidatory Act; nevertheless, even those statutes which have been wholly repealed since Hale's time, may, for various purposes, continue to be consulted with advantage. Their use for the comprehension and construction of such ancient laws as are still in force may not be entirely annihilated; whilst they will never cease to be edifying, as constituting some of the most authentic and interesting memorials of national history and jurisprudence: they abound with instructive, if not successful, experiments of legislation, and they develop the causes why Laws, not less than man's other works, are subject to the *Ruins of Time*.

The felonies unrepealed in the time of Sir M. Hale, and now extinct, which it is proposed to consider, relate to I. Vagrancy. II. Recusancy. III. Heresy. IV. Witchcraft. V. The Philosopher's Stone. VI. Egyptians. VII. Compassings not Treason. VIII. Trade and Commerce.

SECTION I.

Vagrancy.

The preceding pages may be thought to afford evidence, that Sir M. Hale was subject to the infirmity, which has been so largely developed in some modern judges, of blindness to the defects of the law, however repugnant to reason, and revolting to humanity, but which had been recommended to his mind by ancient authority, and familiarised by the habits of a long life. In his tracts, however, wherein he was not delivering oracles, nor fettered by Sir E. Coke's maxim, that *Neminem oportet esse sapientiorem legibus*, full scope is given to that wisdom and that philanthropy of which glimmerings only occur in the History of the Pleas of the Crown. The truth of these observations may appear from a comparison of his History with his admirable "Discourse touching Provision for the Poor."

In Sir M. Hale's preface to his "Discourse touching Provision for the Poor," he observes, "We have very severe laws in England against *begging*, the very giver being, in some cases, subject to a penalty. But they take little effect; and, indeed, as the case stands with us, it is no reason they should. For what man that is of ability can have the conscience to deny an alms, or to bring a *wanderer* to the punishments inflicted by the statutes of Elizabeth and James, when he cannot choose but know that there is not that due course provided, or, at least, used, that persons necessitous, and able to work, may have it. Indeed, were there a clear means practised for employing poor persons, it were an uncharitable action to relieve them in a course of idleness.

"We have also very severe laws against theft, possibly more severe than most other nations, yea than the offence itself simply considered deserves. And there is little to be said in defence of the severity of the law herein, but the multitude of offenders, and the design of the law rather to terrify than to punish. But it is most apparent that the law is frustrated of its design herein; for, though more suffer at one sessions at Newgate for stealing and breaking houses and picking of pockets, and such other larcenies out of the protection of clergy, than suffer in some countries for all offences in three years, yet the gaols are never the emptier. Necessity and poverty, and want of a due provision for the employment of indigent persons, and the custom of a loose and idle life, daily supply with advantage the number of those who are taken off by the Sentence of the Law.

"So that the prudence of prevention, as it is more *christian*, so it will be more effectual than the prudence of remedy. The prevention of poverty, idleness, and a loose and disorderly *education*, even of poor children, would do more good to this kingdom than all the gibbets, and cauterizations, and whipping-posts, and gaols in this kingdom, and would render these kinds of disciplines less necessary, and less frequent."

In the History of the Pleas of the Crown, we are only furnished with the details of the ancient severities of the Law applicable to *Vagrancy*. The acerbity of the laws on the subject which are mentioned by Sir M. Hale is to be attributed, in some measure, to historical circumstances. At the early period of the Tudor Dynasty, the Barons, whose power had been greatly diminished by the wars of the Roses, ceased to support little armies of retainers. The lands that had been cultivated by their adherents were converted into sheepwalks; and the inhabitants were, in consequence, often driven from their dwellings under circumstances described by Sir T. More closely resembling those of Goldsmith's *Deserted Village*, and to which he ascribes their vagrancy and begging, their prisons and their gibbets: "Quoquo modo emigrant miseri, viri, mulieres, mariti, uxores, orbi, viduæ, parentes cum parvis liberis: emigrant, inquam, e notis et assuetis laribus, nec inveniunt quo se recipiant, supellectilem omnem haud magno vendibilem, etiam si manere possit emptorem, quum extrudi necesse est, minimo venundant: id quum brevi errando insumpserint, quid restat aliud denique, quam uti *furentur* et *pendeant* juste scilicet, aut *vagentur* atque *mendicent*, quamquam tum quoque conjiciantur in *carcerem*, quod otiosi obambulent, quorum opera nemo est qui conducat, quum illi cupidissime offerant?" To this state of the country are to be referred many quaint passages in Latimer's sermons, and early statutes passed for diminishing the enormous size of flocks of sheep. And thus Sir T. More writes in his facetious vein: "Oves vestræ quæ tam mites esse, tamque exiguo solent ali, nunc tam edaces atque indomiti esse cœperunt, ut homines devorent ipsos; agros, domos, oppida vastent ac depopulentur."

Again, in consequence of the dissolution of the Monasteries, fifty thousand monks were converted into pensioners. And from the same cause, as particularly by the dissolution of a

hundred and ten hospitals, an immense addition was made to the mass of the vagrant poor. A contemporary writer, speaking of beggars, says, that "they are trussed up apace." The celebrated Cardan, in his *Geniture* of Edward VI., writes, "How Henry VIII. executing his laws very severely against such *idle* persons, I meane great theeves, pettie theeves, and roges, did hang up three score and twelve thousand of them in his time." In such times, and later, it was a corresponding charitable trust to have bequeathed a legacy for tolling St Sepulchre's bell on the morning of executions, and for singing midnight exhortations under the windows of condemned malefactors.

The category of *vagrants* was very extensive in the time of James I. At the period when Jonson put on his learned sock, and Shakspere graced the well-trod stage, and both "held the mirror up to nature," Sir E. Coke, in his capacity of Recorder of Norwich, on the occasion of the Bankside Company having opened a theatre in that city during the summer, thus charged a grand jury: "I will request that you carefully put in execution the statute against *vagrants;* since the making whereof I have found fewer thieves, and the gaol less pestered than before. The abuse of *stage-players*, wherewith I find the country much troubled, may easily be reformed, they having no commission to play in any place without leave; and, therefore, if by your willingness they be not entertained, you may soon be rid of them." Yet Alleyn, another of the players whom Sir E. Coke would have *branded*, has left behind him, in Dulwich College, a memorial more honourable to his fame than any afforded by the proud alcove of Holkham. Had Coke frequented the Blackfriars Theatre, he might have learnt from Hamlet, that it was better to have a bad epitaph than the ill report of those "brief chronicles of the time," the players; agreeably to which, Coke's infamous speech to Raleigh on his trial, "I'll *thou* thee, *thou* traitor!" will live the life

of the English drama, in Sir Toby's dictation to Sir Andrew Aguecheek of the terms of a challenge, "If thou *thou'st* him some thrice, it shall not be amiss."

According to the present law, vagrants are divided into, 1. *idle* and *disorderly* persons, 2. *rogues* and *vagabonds*, 3. *incorrigible rogues:* the extreme punishment for *incorrigibles* is imprisonment with hard labour for a year, and whipping, but not of females.

Much more severe was the punishment of vagrants in the time of Hale. The law was then regulated by a statute of Elizabeth[1] and a statute of James (continued by statutes of Charles I.), which gave to justices an election to inflict the penalties contained in the statute of Elizabeth, or others that were specified. By the statutes of Elizabeth and James, vagrants might be condemned *perpetually* to the "*galleys* of this realm," might be branded on the shoulder with a Roman R; and, under various circumstances, were to suffer death as felons without benefit of clergy; though *corruption* of *blood* was saved, as if in mockery.

The practice of *branding* seems to have been derived from the Civil Law. The sufferers were, at Rome, called *Literati*. The emperor Theophilus caused *twelve* verses to be inscribed on the foreheads of two monks; and it is recorded, "Quod implevit Eumolpus frontem Gytonis ingentibus literis, et notum fugitivorum epigramma per totam faciem literali manu ducit." Martial has an epigram on a slave who had saved his master's life, notwithstanding that, by the cruelty of the same master, he was, at the time, a *Fronte notatus*. The most memorable instance of branding in this country is that of the letters S. L. for *Seditious Libeller*, branded on the cheeks of Prynne at the instigation of

[1] By a statute of Edward VI. vagrants were made *slaves* (*eo nomine*) of any person presenting them to the justices, and were branded on their forehead and cheeks with the letter S. By a statute of Elizabeth, every strolling beggar of the age of fourteen was to be burnt through the ear with a hot iron the compass of an *inch*.

Archbishop Laud. On returning to prison after the infliction of this punishment, Prynne wrote his *Stigmata Laudis:*

S. L.
STIGMATA LAUDIS.
Stigmata maxillis referens insignia *Laudis*
Exultans remeo, victima grata Deo.

An important testimony to the impolicy of stigmatical punishments is afforded by the preamble of a statute of Anne, repealing one for branding "on the most visible part of the cheek nearest the nose." It recites that such branding of cheeks "hath been found by experience not to have had the desired effect of deterring offenders from the further committing such crimes and offences; but, on the contrary, such offenders being rendered thereby unfit to be entrusted in any honest and lawful way, became the more desperate."

SECTION II.

Recusancy.

When Bunyan was sentenced at Bedford to an imprisonment which lasted for twelve years, and which afforded the inducement and the leisure for composing that allegory of allegories, the Pilgrim's Progress, the Chairman of the justices pronounced the following judgment: "You must be had back to prison, and there be for three months following; and, at three months' end, if you do not submit to go to church to hear divine service and leave your preaching, you must be banished the realm. And, if, after such a day as shall be appointed you to be gone, you shall be found in this realm, or be found to come over again without special license from the king, you must stretch by the neck for it, I tell you plainly."

It has been observed, by Lord Campbell, of the Chairman's speech, that "arbitrary as the laws then were, there was no clause in any statute that would support this sentence." The

Chairman, however, may be thought to have only paraphrased a statute of Elizabeth which Sir M. Hale details as "upon great consideration of all the judges resolved to be in force" when he wrote, and by which a person convicted of offences such as Bunyan would appear, from conscience' sake, to have been guilty, "shall be committed to prison, there to remain, without bail or mainprise, till he shall conform, and yield to come to some church or chapel, and hear divine service according to the Queen's laws, and make open submission, and declaration of his conformity. And, if such person shall not within *three months*, being required by the bishop of the diocese, or justice of the peace of the county where he is convicted, come to some parish-church to hear divine service, he shall *abjure the realm*. And, if he shall refuse to abjure, or, having abjured, shall not go, or else shall return without the queen's license, it is *felony without benefit of clergy*." It may appear, therefore, that the sentence was conformable to law, and that the penalties of the statute were not visited upon Bunyan to their utmost extent; but still with severity enough to kindle the indignation of every lover of religious liberty.

Although Sir M. Hale makes no remark on the intolerance and severity of this statute, he indicates that he was not so zealous as some of his brethren in enforcing it. He observes, "Although many have been hastily convicted, under the statute, upon general indictments of not coming to church, and being at an unlawful conventicle, yet never was any convict *before me* for this offence; because either these circumstances were not laid in the indictment, or not effectually proved:" Baxter thus writes with reference to this subject: "The town having great need of help for their souls, I preached between the public sermons in my house, taking the people with me to the church (to common prayer and sermon) morning and evening. Sir M. Hale told me, that he thought that my course did the church much service, and would carry it so respectfully to me at my

door, that all the people might perceive his approbation. But Dr Reeves (the rector) would not bear it, but complained of me; and the Bishop of London caused one Mr Rosse, and a Mr Philips, two justices of the peace, to send their warrant to apprehend me. I told Sir M. Hale of the warrant, but asked him no counsel, nor he gave me none; but with tears shewed his sorrow; the only time that ever I saw him weep."[1]

In the reign of James I. the fines and compositions of recusancy constituted a valuable *farm*, which was leased; it actually yielded 6000*l.* a year, and was said to be capable of increase to 35,000*l.* There is a correspondence extant respecting the purchase by Prince Henry from his father of the lease of this farm on the terms of paying an annual rent of 1000*l.* beyond the current receipts on an average of years. In a letter from a Bishop of Lichfield, cited by Strype, he complains that people courted excommunication, in order that they might be forbid access to church by the sentence of the ecclesiastical court, and so have a lawful excuse for not going there.

In the year 1817, at the Spring Assizes for Bedford, Sir Montagu Burgoyne was prosecuted for having been absent from his parish-church for several months: the action was defeated by proof of the defendant having been indisposed. In the Report of Prison Inspectors to the House of Lords in 1841, it appeared that, in 1839, ten persons were in prison for recusancy in not attending their parish-churches. A mother was prosecuted by her own son.

The persecution of papists and dissenters was carried to a climax when Sir M. Hale wrote, and when Bunyan suffered.

[1] Lord Campbell relates, that upon Bunyan's wife seeking redress from the Judges of Assize, who were the *furious* Twisden, and Hale, the former, according to Bunyan's own account, "snapt her up." But Hale said, "Alas, poor woman!" and added, "There is no course for you, but to apply to the King for a pardon, or to sue out a *writ of error;* and the indictment or subsequent proceedings being shewn to be contrary to law, the sentence shall be reversed, and your husband shall be set at liberty;" a piece of information little calculated to have extricated the *tinker* Bunyan from the "Slough of Despond."

In a copy of verses in the *Musæ Anglicanæ*, on the subject of the dispersion of a *Conventicle*, the author describes with more humour than toleration, and with much power of latinity, the congregation at a Conventicle, and the sermon of the badly haircut *semi-sacerdos*, together with the interruption of it by a constable, concluding in a spirit very congenial to the laws, but not to liberality or humanity:

> Diffugiunt fratres, et, pallida turba, sorores.
> Huc illuc sparsos (proh formidabile nomen!)
> Constabellus agit: nunc hos, nunc occupat illos
> A dextrâ lævâque, et chartis nomina mandat.
> Pars aurum numerat, meritas pars altera pœnas
> Persolvunt, clausi tenebris, et carcere cæco.

SECTION III.

Heresy.[1]

The writ *De hæretico comburendo* is mentioned by Sir M. Hale without horror at its inhumanity, or censure upon it as an engine of religious intolerance. It was repealed the year after his death. Its repeal does not appear to have resulted from the liberal principles advocated by Whitelocke in his speech, under the Commonwealth, against putting Naylor to death for blasphemy. It has, with greater probability, been attributed to the fears of a nation at a popish plot, and a popish successor to the throne, whom it was found impracticable to *exclude*.

[1] Sir M. Hale has a very long chapter on heretics. He divides them into three classes:—1. Simplex hæreticus. 2. Hæreticus contumax. 3. Hæreticus relapsus. The first statute against heretics, or *Lollards*, as they were originally called, occurs in the reign of Richard II., which Coke and Hale called a *pretended* statute, the Commons not having assented to it. Hale says that the next statute, in the reign of Henry IV. was upon the petition of the Commons, but, on his own shewing, the Act goes far beyond the Petition. Hale says that a statute of Elizabeth which first gave a definition, though a very loose one, of heresy, restored the issuing of the writ *De hæretico comburendo;* but this Act says nothing about the writ. Hobbes wrote an elaborate tract to prove that the writ had been repealed by the repeal of the statute of Henry IV.: he appears to have been in some apprehension of being burnt for his *Leviathan*.

The following ancient narrative is given of the execution of Lord Cobham, 1418, under this writ: "Then was he laid upon a hurdle, and so drawn forth into St Giles' field. Then he was hung up by a chain of iron, and so consumed alive in the fire. How the priests that time fared and cursed, requiring the people not to pray for him, but to judge him damned in hell, it were too long to write." An interesting memorial of a fiery martyrdom in England, is preserved on a shapeless stone at Hadleigh, in Suffolk, called the *Martyr's Stone*, decked with the following uncouth rhyme:

1555.

D. Tayler, in defending that was good,
At this place left his blode.

In Queen Mary's reign the number who suffered martyrdom by fire has been variously estimated from 284 to 800. Lord Burleigh estimates it at 290, and Mr Hallam inclines to the lower computation. James I. was the last sovereign who practically put in force, and that on two occasions, the horrible writ *De hæretico comburendo.*

A beautiful analogy is discovered by Sir E. Coke between the writ *De leproso amovendo* and that *De hæretico comburendo*, heresy being according to him a *leprosy* of the soul. It has been suggested that the Canonists judged that as heretics would be burnt in another world, it was proper to imitate Divine punishment, as nearly as possible, or *cy-pres*. That an *animus comburendi* even against political adversaries was not extinct in the time of Hale may appear from a poem in the *Musæ Anglicanæ* of the date of 1683, on the *Oxford Decree* for burning books, and in which the author is desirous of seeing Milton quivering in an *auto-da-fe:*

Quanquam O si simili, quicunque hæc scripserit author
Fato succubuisset, eodemque arserit igne!
In medio videas, flammâ crepitante, cremari
Miltonum, terris, cœloque inamabile nomen.

SECTION IV.

Witchcraft.

On the subject of witchcraft, Sir M. Hale states at length the statute of James, who had felt himself aggrieved by witches detaining him with contrary winds when he made his romantic expedition to Denmark in quest of his Queen. The statute comprises five branches that were capital for the first offence, as, for example, to *feed* an evil spirit, or suckle imps, and five more that were capital for the second offence, as, for example, charms to provoke unlawful love. In the play of *Ignoramus*, acted before king James at Cambridge, there are various allusions to the popular superstition concerning witches, and the language of an indictment for witchcraft is put into the mouth of *Ignoramus*, who accuses *Polla:* "Tu equitas in aere super broomas et baculos;" and, in reference to an ancient notion mentioned by Shakspere,[1] and in Hudibras, he says, "Sed si possum trahere sanguinem de eâ primum, non curo: adventurabo; non audeo; immo audeo."

A statute of Elizabeth against witches had preceded that of James. In a sermon preached by Jewel before the Queen, the bishop says, "witches and sorcerers within these last few years are marvellously increased within your Grace's realm. These eyes have seen most evident and manifest marks of their wickedness. Your Grace's subjects pine away even unto the death; their colour fadeth, their flesh rotteth, their speech is benumbed, their senses are bereft. Wherefore, your poor subjects' most humble petition to your highness is, that the laws touching such malefactors may be put into execution: for the shoal of them is great, their doing horrible, their malice intolerable, the examples most miserable. And I pray God they never practise

[1] Talbot, in *Henry VI.* says to the Maid of Orleans—

"Blood will I draw of thee; thou art a witch."

further than upon a *subject!*" King James, in pursuance of his retaliation against the Lapland witches and their sisterhood, writes that he undertook his work on Dæmonology on account of the "fearful abounding of those slaves of the Devil, witches and enchanters." Lord Bacon, in his Natural History, relates, without comment, that "the ointment which witches use is reported to be made from the fat of children digged out of their graves;" a superstition similar to that noticed by Shakspere:

> Finger of birth-strangled babe,
> Ditch-delivered by a drab,
> Make the gruel thick and slab.

The belief of witches, and a general notion of its being fit to punish them with death, is prevalent in the East Indies. In Macnaghten's Adawlut Reports, several cases occur of trials relating to witchcraft. In the case of Rungooah and six others in 1821, the prisoners were convicted in the Nizamut Adawlut of murdering a woman on suspicion of being a witch; a regular trial of the deceased for witchcraft appeared to have taken place by the inhabitants of her village. In Ingjeet Sing's case, in 1822, the prisoner was the Head of a village; he had a sick child whose illness he imputed to the incantations of the prosecutor's wife, he therefore confined the woman in the stocks; a few days afterwards she was found hanging by her neck to a tree. There are no less than ten decisions in the first five volumes of Nizamut Adawlut Reports, concerning charges of murder for killing persons on the alleged ground of being witches or sorcerers. In one of the cases, Churrun the prisoner murdered the deceased under the impression that he had transformed himself into a tiger, and carried off the prisoner's daughter. The prisoner was sentenced only to imprisonment for seven years. This was in 1833.

On the subject of evidence, Sir M. Hale observes, that very young people under twelve years of age are sometimes

examined without oath, "which, possibly, being fortified with concurrent evidences, may be of some weight, as in cases of *witchcraft*, rape, and such crimes as are practised upon children." Dalton, a high legal authority, often quoted with respect by Coke and Hale, lays down the following rules respecting evidence on prosecutions for witchcraft: "Spectral evidence, *i. e.* the afflicted parties thinking they see the persons who torment them, may be given in evidence: insensible parts and teats are signs of witchcraft. The devil's mark is like a flea-bite; imps may be kept in pots or other vessels, and the pots and places in which they are kept stink detestably, and, therefore, such stinking places in a house are signs that imps are kept." An inability to read the Lord's prayer forwards has been supposed an infallible test of witchcraft. It is a curious part of the history of prosecutions for this offence, that many old women have been terrified into confessions of their familiarity with the Devil.

At a trial of two witches hanged at Lincoln for bewitching a child of the Earl of Rutland, (the child's monument is preserved,) part of the evidence was that one of the alleged witches rubbed her cat with a handkerchief belonging to the child, and bade her "fly and go;" to which the cat answered "*mew*." On the trial of the witches of Warboies, at Huntingdon, (on which occasion the prosecutor gave a considerable sum to Queens' College, Cambridge, for an annual sermon against witchcraft,) it was part of the evidence against the prisoners, that one of the bewitched persons *dreamt of a cat*. King James was of opinion that the reason of there being more witches than wizards, was, because the Serpent, after the seduction of Eve, found himself "homelier" with the female sex. The lively Harrington accounted for that supposed phenomenon to the king, by suggesting that the devil was naturally partial to old women, because it is written that "he walketh in dry places."

The celebrated trial before Sir M. Hale of two old women for witchcraft, took place at Bury, in the year 1665. Rose Callender and Amy Duny, widows, were tried before him for bewitching seven people, and assuming for the purpose various shapes, as those of a bee, and a mouse: but collateral evidence was given of bewitching two carts, a chimney, and a firkin of fish. The provocation alleged for the malice of the supposed witches, was the refusal of some herrings, very much like that resented by Shakspere's witch, "A sailor's wife had chestnuts in her lap, and mounched, and mounched, and mounched. Give me! quoth I. Aroint thee, witch, the rump-fed ronyon cries— I'll do, I'll do, I'll do."

Among other absurdities at this trial, an experiment was tried of the supposed witches being made to touch the persons bewitched, whereupon they would suddenly shriek out and open their hands, which were before clenched, that would not happen on the touch of any other person; and again they were blinded by their own aprons, and yet the touching took the same effect as before. Upon an ingenious person suggesting that there might be a fallacy in the experiment, Lord Cornwallis, Mr Serjt. Keeling, and some other gentlemen in court were deputed to examine one of the distempered women together with one of the supposed witches in the further part of the hall: an apron was put before the eyes of the woman said to be bewitched, and then another person, not one of the accused, touched the woman's hand, "which produced the same effects as the touch of the witch did in court." Whereupon the reporter (though, evidently, a believer in witchcraft) adds, "the gentlemen returned, openly protesting that they did believe the whole transaction of this business was a mere imposture." In the course of the trial, Sir M. Hale asked (what would be an extraordinary question in the present day) Sir J. Brown, author of the *Vulgar Errors*, what he thought of the transaction? who gave his opinion, that the children were bewitched; thus

countenancing the most pernicious of that class of errors which he wrote a book to explode.

Sir M. Hale declined repeating the evidence to the jury, "lest he should wrong one side or other," but observed, that there was no doubt of there being such creatures as witches, according to the testimony of the Scriptures and the laws of all nations, and particularly the Act of Parliament of King James.

The prisoners were convicted on Thursday afternoon, March 13, 1665. The next morning, the three children that had been bewitched, came to Sir M. Hale's lodging, "who all of them spake perfectly, and were in as good health as ever they were." And their friends were asked at what time they were restored to their speech and health? whereupon "Mr Pacy did affirm that, within less than half an hour after the witches were convicted, they were all of them restored, and slept well that night, feeling no pain; only Susan Callender felt a pain like pricking of pins in her stomach." The two old women were executed on Monday, the following 17th March. On the next Sunday, Sir M. Hale wrote a "Meditation (afterwards published) upon the mercy of God in preserving us from the malice and power of Evil Angels," in which, says Lord Campbell, he refers, with extreme complacency, to the trial over which he had presided at Bury.

It can scarcely be admitted as a palliation of Sir M. Hale's conduct with regard to the Bury witches, that he acted in conformity with law, and in an age comparatively unenlightened. For his conclusion upon the evidence in the case cannot be reconciled with ordinary unprejudiced judgment. And besides the opinions of philosophers like Hobbes, his contemporaries on the bench were not all equally disposed to judaize.

A history of opinions for and against witchcraft, with notices of many books on the subject, is given in the *Retrospective Review*. There is an able examination of the

evidence in the case of the Bury witches, among other interesting particulars concerning witchcraft, in Hutchinson on Witchcraft; an author who wrote in 1720, (sixteen years before the repealing statute); he was a minister in Bury, and chaplain in ordinary to the king. Roger North writes of Lord Keeper Guilford, "In trials of some criminals, whose cases proved very obscure or doubtful, especially if they were capital, he was infinitely scrutinous; but never more puzzled than when a popular cry was at the heel of a business; for then he had his jury to deal with, and, if he did not tread upon eggs, they would conclude sinistrously. And for this reason he dreaded the trying of a witch. It is seldom that a poor old witch is brought to trial on that account, but there is, at the heels of her, a popular rage that does little less than demand her to be put to death. And, if a judge is so clear and open, as to declare against that impious vulgar opinion, that the devil has power to torment and kill innocent children, or that he is pleased to divert himself with the good people's cheese, butter, pigs, and geese, the countrymen (the triers) cry this judge hath no religion, for he doth not believe in witches; and so, to shew that they have some, hang the poor wretches."

After mentioning several cases of witch-trials, Roger North relates the particulars of the trial of a wizard for bewitching a girl thirteen years old, who, when he was brought near her, vomited *straight* pins, which could not be so well couched in the mouth as crooked ones, which were usually vomited in such cases. It was shewn that the girl, in doubling herself under a pretended fit, took the pins with her mouth out of the end of her stomacher. On Lord Guilford going out of court after this trial, an *hideous* old woman cried, "God bless your lordship! forty years ago they would have hanged me for a witch, but they could not, and now they would have hanged my poor son."

Near the locality of Sir M. Hale's witches, at Wattisham, in Suffolk, in the year 1762, it chanced that six children of one

family died, in quick succession, of a sudden and mysterious illness, their feet having first mortified and dropped off. The popular belief in the neighbourhood was firm that the children had been the victims of sorcery; but Professor Henslow, who resides near Wattisham, and who has given much attention to the traditions of their case, has shewn, in his Essay on the Diseases of Wheat, that, in all probability, their deaths were owing to the imprudent use of the ergot of rye.

Lord Holt tried ten cases for witchcraft, in all of which the prisoners were acquitted. Before him was, also, in 1703, tried a case, the converse of that tried by Sir M. Hale; one Hathaway was tried for pretending that a woman had bewitched him, and caused him to fast, among other injuries, and that having a presentiment that if he drew the witch's blood, he should recover, he scratched her face, and recovered on the spot. For attempting the woman's life, by an imputation of witchcraft, he was punished with pillory, fine, and imprisonment, as an impostor.

In the reign of George II. all prosecutions for enchantment, sorcery, or conjuration, were abolished by statute. Fifteen years after the passing of that law, in 1751, three persons were tried at Hertford, for drawing Ruth Osborne in a pond as a witch. A notice had been published in the following terms, "This is to give notice, that, on Monday next, a man and woman are to be publicly ducked at Tring, in this county, for their wicked crimes." The pond was two foot and a half in depth, and the not sinking was considered conclusive proof of witchcraft. One of the prisoners was executed, and afterwards hanged in chains. The multitudes who assembled to see the execution stood at a distance, and muttered that it was a hard case to hang a man for freeing the country of a witch. Eight years afterwards, in 1759, at Wingrove in Hertfordshire, an old woman of the name of Susannah Hannokes, was in peril of drowning for bewitching a spinning-wheel, but was saved by challenging to be weighed against the Bible. She was accordingly weighed, nearly naked,

in one scale, and the parish Bible in the other, all in the parish-church; she owed her life to her preponderance. So late as 1825, a man, sixty seven years old, "swam for a wizard," in the presence of several hundred of persons, at the parish of Wickham Skeith, in Suffolk.

Disgraceful as the popular superstition concerning witches has proved to our judicial annals, it has embellished our national literature in numerous instances; it still holds possession of our stage in Macbeth, and in the exclamation of Richard III.,

> Look how I am bewitched! behold, mine arm
> Is, like a blasted saplin, wither'd up!

SECTION V.

The Philosopher's Stone.[1]

A statute of Henry IV. enacts "That none from thenceforth shall use to multiply gold or silver, nor use the craft of multiplication, and, if any do, he shall incur the pain of felony in this case."

Sir E. Coke exhibits a precedent of a royal licence to *multiply*, with a *non obstante* of this statute; the license is "ad investigandum prosequendum et perficiendum quandam preciocissimam medicinam, quintam essentiam, lapidem philosophorum nuncupatum, necnon potestatem faciendi et exercendi transmutationes metallorum in verum aurum et argentum, *non obstante, etc.*" Several writs of protection granted to alchemists are found in Rymer. Edward III. and Henry VI. are both said

[1] The early chemists had three dreams, the transmutation of metals into gold, an elixir of immortality, and an universal solvent. Many of the jugglings of the alchemists have been exposed in modern works, as in the *Chemistry of Creation*. For example, sometimes a crucible was artfully scooped out at the bottom, a small mass of gold having been put in, and covered over, so as to be rendered invisible by a little paste: when the heat of the furnace had driven off the volatile substances forming the pretended mixture, the glittering yellow metal would then be discovered lying at the bottom. The Royal Society, to which scientific chemistry in this country was eminently indebted, was founded in Hale's time, 1662; it was, at first, exposed to much obloquy, as appears from Cowley's laudatory Ode.

to have been alchemists, and the motto of the *noble*, "Jesus autem transiens per medium illorum ibat," is supposed by some to have had reference to the mysteries of alchemy, the art of which Edward III. was said to have purchased from the famous Raymond Lully.

It was found that several ingenious persons were afraid to make experiments in smelting and refining metals, or to smelt or refine them at all, for fear of incurring the penalties of this Act, which, after the lapse of three centuries, including the lifetime of Hale, was repealed by a statute of William III.

Sir E. Coke in commenting on this statute, which, he notices, is the shortest he remembers, takes occasion to observe, that metals are six in number, and all proceed from sulphur and quicksilver, "as from their father and mother;" and he mentions "from his own observation," the occupations of which the end is beggary, the foremost of which are the alchemist and the poetaster. Not favouring the stage, he does not advert to Ben Jonson's celebrated play of the Alchemist, but he tells us, that, for "discovering the secrets of the craft" of multiplication, it is worth reading a poem of about the date of the statute, Chaucer's "Tale of the Channons Yeoman."

SECTION VI.

6. *Egyptians.*[1]

Sir M. Hale mentions the statutes of Philip and Mary, and of Elizabeth, whereby "all persons above the age of fourteen years, that shall be found in the company of vagabonds commonly called, or calling themselves Egyptians, or counterfeiting or disguising themselves, by their apparel, speech, or behaviour, like them, although they are persons born within the king's dominions, if they continue one month, are felons

[1] That handkerchief
Did an *Egyptian* to my mother give.—*Othello.*

and ousted of clergy." These statutes are repealed, but were in force until the 25th of George III. Sir S. Romilly designates the Act of Elizabeth concerning Egyptians, as "the most barbarous statute that ever disgraced our Criminal Code." Sir M. Hale's only observation upon these statutes should be noticed, viz. "I have not known these statutes *much* put in execution, *only* about twenty years since, at the Assizes at Bury, about thirteen were condemned and executed for this offence."

It is remarkable, that, whilst this sanguinary law was in force against Egyptians, Ben Jonson's *Masque of Gypsies* was performed, greatly to the satisfaction of King James and his Court, three times, at Burleigh-on-the-Hill, Belvoir, and Windsor. The *Masque* contains many allusions to Ptolemy and Cleopatra, and the chief incidents are those of thieving and fortune-telling, including some very flattering prognostics, from inspection of the hands of the king and prince Charles. Villiers, Duke of Buckingham, the king's favourite, performed the character of the Captain of the Gypsies.

SECTION VII.

Compassings not Treason.

A singular statute of Henry VII. is stated by Sir M. Hale as in force in his time; from the preamble to which it appears that it was passed on the spur of some occasion, for it recites "as now of late, such a thing was like to have ensued." It further recites that "great inconveniences might ensue if such ungodly demeaning should not be straightly punished before that actual deed were done." The Act affects sworn servants of the king, whose names are put in the chequer roll of the royal household, under the degree of a lord; it makes a capital offence any "conspiracy, compassing, confederacy or imagination" to

destroy or murder the "king or any lord of this realm, or any other person sworn to the king's council, steward, treasurer, or comptroller of the king's house." The trial is, first, by a species of grand jury, consisting of the steward, treasurer, and comptroller, or one of them, with twelve *sad* men of the chequer roll; and, if they find cause, then the offender shall be tried by other twelve *sad* men of the household, and shall have no challenge, except for malice. Sir M. Hale writes that the offence cannot be tried before the King's Bench, or any other tribunal than that specified in the Act; and he makes a *quære* whether the trial must not take place within the king's house? He says nothing as to the wide extension of the doctrine of compassing and imagining; or of the anomalous character of the tribunal.

So blind have been the judges in all ages to the defects of the law, and so prone to extol its blemishes, that we find Sir E. Coke thus applauding this extraordinary Act: "And as king William Rufus was slain, in the New Forest, by the glance of an arrow, so, the overthrow of the king hath followed by glances, and consequents, when the *bow* of destruction hath been aimed at the overthrow of those who were in great authority, near about, and dear to the king, not daring in direct manner to aim at the king himself. Therefore, the first conclusion is, that, when the compassing of such as were the king's true subjects was had, the destruction of the king was thereby imagined."

Burke, in his speech on Economical Reform, has given a lively description of the Royal Household in former times: he says, "Our old establishments were formed on the principle of purveyance, and a receipt in kind. In former days, when the household was vast, and the supply scanty and precarious, the royal purveyors, sallying forth under their Gothic portcullis, to purchase provision with power and prerogative instead of money, brought home the plunder of a hundred markets, and all that could be seized from a flying and hiding country,

and deposited their spoil in a hundred caverns, with each its keeper. Then every commodity, received in its rawest condition, went through all the process which fitted it for use. This inconvenient receipt produced an economy suited only to itself. It multiplied offices beyond all measure,—buttery, pantry, and all that rabble of places, which, though profitable to the holders, and expensive to the state, are almost too mean to mention."

The purveyors mentioned by Burke gave occasion to twenty-six statutes; by one of which their name, to avoid the odium attaching to it, was changed to that of *achators:* "Que le heignous nome de purveyor soit change en nome d'achatour." Burke contended that the numerous offices of the royal household which originated in exploded powers of the prerogative were preserved for the sake of influence; and he instanced a measure of economical reform which had been thwarted, in consequence of its militating with the perquisites of the *Turnspit*[1] of the royal kitchen. The household is disadvantageously known by its dilatoriness in paying to Ben Jonson his annual hogshead of sack due to him as Poet Laureat. In his epigram to the Household, after threatening, *inter alia*, to "make the very *green-cloth* look *blue*," he concludes—

> "For in the genius of a *Poet's* verse
> The King's fame lives. Go now deny his Tierce."

SECTION VIII.

Trade and Commerce.

On the subject of the balance of trade, Sir M. Hale writes, "By the statute 2 H. 4. c. 15, all merchants and strangers and others that sell merchandize here, shall lay out the money

[1] The turning on the spit was in the last century performed by manual labour. In 1710, an idiot son of the Duke of Queensbury seized a little boy who was turning the spit in the kitchen, took the meat from the fire, spitted the body of his victim, and, on the domestics returning home after a public-spectacle which they had left the house to witness, was found by them in the act of devouring it half roasted.

thereby arising in other merchandizes of England, to carry the same, without carrying any gold or silver in coin, plate, or mass out of this realm, upon pain of forfeiting all the same, saving always their reasonable expences. *This Act is still in force.*" It would appear to have been under colour of this act that Erasmus's little all was taken from his purse by the custom-house officers at Dover, "quæ cum erat exigua, sed mihi maxima, quum nihil superesset."

According to the principle of this statute, public wealth was supposed to consist in gold and silver, and it was believed that those metals could be brought into a country which had no auriferous or argentiferous mines, only by the balance of trade, in other words, by an excess of exports over imports; and that to heap up gold and silver was the best of all means for enriching a nation. Thus Lord Bacon advises Villiers, "Let care be taken that exportation exceed importation, for then the *balance* of *trade* must of necessity be returned in coin and monies." These exploded opinions, however, were not universally entertained even in Sir M. Hale's day. Dudley North, his contemporary, used to maintain that no nation could want money for the use of ordinary commerce, or superabound in it; and that trade is "not distributed, as government, by nations, but is one throughout the whole world."

By a statute of Elizabeth, mentioned by Sir M. Hale as in force, and characterised by Blackstone as one of the most "*useful*" acts on the subject, the exporter of sheep, lambs, or rams, was, for the first offence, to forfeit all his goods, to suffer a year's imprisonment, and then to have his left hand cut off in a market-town, on a market-day, to be there nailed up, and for the second offence to be adjudged a felon and suffer death.[1]

[1] The judges did not always require a statute for enforcing false political economy; they made the Common Law serve their purpose. Sir E. Coke writes, in his third *Institute*, "It is against the *Common Law of England* to sell corn in sheafs, before it is threshed and measured, for that by such sale the market, in effect, is forestalled." *Owling*, or the transporting of wool by night, is said, by Blackstone, to have been an offence at *Common Law*.

Adam Smith remarks upon this statute, and one of Charles II. making it felony to export wool, that, "for the honour of national humanity, it is to be hoped that neither of these statutes were ever executed." The object of them he conceives to have been that of preventing the breed of our sheep from being propagated in foreign countries. An erroneous opinion was prevalent that fine cloth could be manufactured only from English wool; and thus the legislature was persuaded to sacrifice the interests of the growers of wool to that of the manufacturers of cloth: hence the wool was deteriorated, and the temptation to smuggling was made irresistible by the difference of prices in the home and foreign markets.

Of a piece with this enactment for the encouragement of the manufacture of wool, was another statute of Elizabeth, whereby it was provided, that "all persons above the age of seven years shall wear, upon sabbaths and holidays, upon their heads a cap of wool, knit, thicked and dressed in England, upon pain to forfeit, for every day not wearing, three shillings and fourpence." And by a much more modern law, burials in woollen were enjoined; the memory of which foolish piece of legislation is perpetuated by Pope, in the last words of his Narcissa:—

> Odious, in *woollen!* 'twould a saint provoke!
> Were the last words that poor Narcissa spoke.

Thus the Lord Chancellor's *woolsack* ought to serve as a perpetual *memento* to its occupier, admonishing him, by the example of many unwise and cruel laws touching *wool*, that he listen not to sinister counsels for frustrating or retarding the codification and amendment of the Criminal Law, but that he be influenced rather by the reflection of Sir M. Hale, with which the present work sets out, and concludes, that "Time is the wisest thing under heaven."

APPENDIX.

THIS Appendix contains:—

I. An account of the Manuscripts of the History of the Pleas of the Crown.

II. Unpublished passages, with remarks, concerning the case of the Apprentices.

III. The like, concerning Treasonable Words.

IV. The like, concerning Kings within the Statute of Treasons.

The Author acknowledges the valuable assistance which he has received on several points from Mr Spilsbury, the very intelligent Librarian of the Society of Lincoln's Inn.

I.

MSS. OF THE HISTORY OF THE PLEAS OF THE CROWN.

THE earliest notice that the author has found of any MS. of the History of the Pleas of the Crown, is in Sir M. Hale's own will, wherein he bequeaths to his grandson, Gabriel, "in case he should follow the study of the common lawes of England," an interesting collection of printed law-books; and then, after bequeathing to the Society of Lincoln's-Inn certain MSS. specified in a schedule annexed to the will, he proceeds: "Item, I give to my grandchild, Gabriel Hale, when he shall attain the age of twenty-one years, in case he shall follow the study of the Common Law, all the rest of my books and reports of the Common Laws of England, as well printed as manuscript, not before herein bequeathed, and all my books of the statutes of England, Scotland, and Ireland, not before herein bequeathed, and, particularly, the copy now transcribed by Mr Allen, of my great manuscript collection of the new or written law, digested under titles or heads; my abridgments of Dyer, Henry the Sixth, the Book of Assizes, my *Great Collections* touching ports and customs, and *pleas of the crown*, and liberties; those I will shall remain under the safe custody of my executors without dissipation, or lending them out until my grandchild Gabriel come to his age of one and twenty years, if he live so long, and then to be delivered to him, if he study the law; and if he die before that time, or do not apply himself to the study of the law, then I give the same to his brother, Matthew Hale." The rest of Sir M. Hale's books, and his mathematical and magnetical instruments, are to "remain as a kind of heirloom" in his family, upon whom a settlement is made for that purpose. The will is dated the third of February, 1675, eighteen days before Sir M. Hale resigned the office of Chief Justice, and it was republished with a codicil, dated the second of November, 1676. Sir M. Hale died on Christmas day, 1676; Matthew and Gabriel, the legatees of the books, were the surviving sons of Sir M. Hale's eldest son; the male line of the family became extinct in 1784.

The next piece of evidence is a license by Chief Justice Rainsford, (Hale's successor) to print the Summary of the Pleas of the Crown in these terms: "I license this book to be printed by William Shrewsbury. RI. RAINSFORD.

"18th Mart. 1677."

An edition of the Summary (not purporting to be other than the first) is in the Cambridge University Library, bearing date 1685. It contains the license, and also a preface, wherein it is stated, that the MS. had been furnished to the booksellers by a friend of Sir M. Hale, "whose care he had desired in the publication of his writings after his death." The writer of the Preface mentions that Sir M. Hale "hath written a large work upon this subject, entituled, *An History of the Pleas of the Crown*, wherein he shews what the law anciently was in these matters, what alterations have, from time to time, been made in it, and what it is in this day. He wrote it on purpose to be printed, finished it, and had it *transcribed* for the press in his lifetime, and had *revised part* of it after it was transcribed; but whether, or when it will be published, is uncertain." It is added, that a surreptitious and faulty edition of the Summary had been previously published. In Bridgman's *Legal Bibliography*, it is stated that the Summary was first printed in 1678.

Next, we find an entry in the Journal of the House of Commons in the following terms:—

"*Lunæ*, 29° *die Novemb.* 1680.

"Ordered, that the Executors of Sir Matthew Hale, late Lord Chief Justice of the Court of King's Bench, be desired to print the MSS. relating to the Crown Law, and that a Committee be appointed to take care in the printing thereof, and it is referred to—

SIR W. JONES,	MR SACHEVERELL,
SERJ. MAYNARD,	MR PELHAM,
SIR F. WINNINGTON,	MR FOLEY."

Mr Emlyn, the editor of the first printed edition of the History of the Pleas of the Crown, writes concerning this order: "but that Parliament being soon after dissolved, this design dropt." The Parliament was prorogued in the ensuing January; the next and last Parliament of Charles II. which met in March 1681, lasted only six days.

The next piece of testimony is that of Bishop Burnet, in his Life of Sir M. Hale, of which there is an edition (not purporting to be other than the first) in the Cambridge University Library, bearing

date 1682. Burnet mentions, in the preface to his book, that, when first requested to write the life of Hale, he was engaged upon his own *History of the Reformation*, and, therefore, was obliged to postpone the biography for a season. Burnet writes that "after the king was murdered Hale laid by all his collections of the Pleas of the Crown, and, that they might not fall into ill hands, he hid them behind the wainscotting of his study," for he said "there was no more occasion to use them, till the king should be again restored to his right; and so, upon his Majesty's restoration, he took them out, and went on in his design to perfect that great work." This anecdote is probably as untrue as some other particulars in the Life of Hale are unquestionably. In a subsequent passage Burnet states, that Hale "had made the Pleas of the Crown one of his chief studies, and by much search, and by long observation, had composed that great work concerning them formerly mentioned."

Baxter's *Notes* on the latter days of the life of Sir M. Hale, were written two years before the publication of Burnet's life, though they were not published till after it had appeared. An edition in the Cambridge University Library (not purporting to be other than the first) bears date 1682; all that appears in it about Hale's legal MSS. is that on one occasion Baxter was shewn them by Hale, and that they consisted of thirty-two folio volumes, and that Hale told him that "the amanuensis work that wrote them cost a thousand pounds."

No further public reference to the History of the Pleas of the Crown has been found by the author for half a century, until a printed edition of the History was published by Mr Emlyn, who writes that the preparing of it for the press had been committed to his care by Sir Joseph Jekyll, Master of the Rolls. This edition bears date 1736.

Mr Emlyn gives a particular account of the MSS. of the History of the Pleas of the Crown, which corresponds with what has above been cited from the Preface to the Summary. He states that Sir M. Hale's original MS. "consisted of one thick folio volume, all in Hale's handwriting," and that, besides this, there was extant a *transcript* bound up in seven thin volumes in folio." The transcript, Emlyn continues, was "revised by Hale as far as chapter twenty-seven in the first part, viz. about the middle of the third volume of the transcript, as appears from many interlineations and additions in his own hand: the corrections in the remaining part are in another (very modern) hand, and, in some places, not very agreeable to the scope of the argument; even in the part revised by Hale, there are, in some

places, leaves taken out, and others inserted in their room in a different hand, unauthenticated by Hale, and sometimes quite disturbing the coherence and connexion of the discourse." Two editions of the History of the Pleas of the Crown have been published since that by Emlyn, one in 1778, and the last in 1800. It is believed that they are only reprints of Emlyn's edition, with annotations.

The credit of Emlyn's edition was impugned by Sir M. Foster in the first edition of his Discourses. Being misled, by the obscurity of Emlyn's statements, to suppose that the original volume only had been published, and no part of the corrections in the transcript, Sir M. Foster complains that Sir M. Hale's "last thoughts had been suppressed." And to this circumstance he attributes "any mistakes, inconsistencies, or needless repetitions that the reader may have observed in the History." He treats the original MS. as a "foul draught, which was, probably, laid aside, as foul draughts commonly are, unless they are destroyed, which, perhaps, may be the better way." He cites Burnet's *Life*, as the testimony of one who, doubtless, had his information from those who best knew, and who has placed the *seven volumes* in a catalogue of Hale's MSS. published very soon after his death, without the least mention of *the thick folio volume*. The entry in Burnet's catalogue is, "*Placita Coronæ*, 7 Vol. Fol." Sir M. Foster adds, "I hope these short observations on the unkind treatment the learned judge hath met with from his publisher may serve as my own apology for the present publication." If the world is indebted for the publication of Sir M. Foster's admirable Discourses on Crown Law for this opinion, which, it will be seen, he afterwards retracted, we may truly say of him, as of Mucius Scævola—

Si non errasset fecerat ille minus.

In an advertisement that appeared soon after the publication of the first edition of Sir M. Foster's Discourses, that distinguished judge announces, that since the publication of his Discourses, he had been favoured with a perusal of Hale's original MS., and of the *transcript*, and he apologizes for his *over-hasty* observations founded on the supposition that, in Mr Emlyn's edition, the transcript had been wholly laid aside. He mentions that he finds "all the passages which are authenticated by Sir M. Hale's corrections and additions, are inserted in the printed book, except two." These two relate to Constructive Treason, and to Kings within the Statute of Treasons; they have not, as far the author is aware, been hitherto published; they are printed in the succeeding numbers of this Appendix. Sir

M. Foster thus leaves his imputed "mistakes, inconsistencies, and needless repetitions" upon Sir M. Hale's own shoulders.

Sir M. Foster concludes his second thoughts on the MSS. with an "N.B. The original MS. with the transcript in seven volumes, will, for the satisfaction of the curious, be lodged in the British Museum for a few months."

It is a vulgar error, not unsanctioned by very high authority, that Sir M. Hale bequeathed *all* his manuscripts to the Society of Lincoln's Inn; a notion which is refuted by inspection of the schedule contained in his will, which specifies what was, in fact, bequeathed to that Society. The terms of the bequest would have precluded the deposit of the MSS. for months in the British Museum, for the MSS. bequeathed to the Society of Lincoln's Inn are forbidden to be "exposed to every man's view." Neither the original MS. nor the transcript are now, nor, it is believed, ever have been, in the possession of the Society of Lincoln's Inn.

The next piece of evidence concerning the original MS. and its transcript are the following notes in Mr Hargrave's handwriting among his collection in the British Museum. On the first leaf (a fly-leaf) of the MS. is written, "Historia plitorum Coron:" and beneath it, "The above is Lord Hale's handwriting. F. H." Afterwards there follows, in Mr Hargrave's handwriting, "The History of the Pleas of the Crown, in seven volumes, folio, on paper."

"This, and the six succeeding volumes, are a transcript of Lord Hale's History of the Pleas of the Crown, from the original MS. in his own handwriting. The printed book was from the latter, with such corrections as appear in this transcript to be in the handwriting of Lord Hale. In respect to these corrections, Mr Emlyn, the editor of the printed work, considered this transcript as the original, finished and perfected. I bought this transcript in seven small folio volumes of Mr Deighton, the bookseller; and he bought them of the personal representatives of the late Mr Lockyer Davies. What is now become of the volume containing the original MS. I have not yet heard.

"My friend, Mr Brown, of Liverpool, since the date of the above-written memorandum, accidentally met with the original MS. of Lord Hale's History of the Pleas of the Crown, at a shop for books, near Mr Brooke's in Bell Yard, Temple Bar, Fleet Street, and bought it for the trifling sum of 10*s.* 6*d.* F. H."

Mr Brown, the last known possessor of a gem above price, was Deputy Town Clerk of Liverpool, and died in the year 1807. Diligent

inquiries have, on more than one occasion, been made after his personal representatives, but without success. The transcript, with insertions and corrections in Sir M. Hale's handwriting, is deposited with the Hargrave Collection of MSS., among the literary treasures of the British Museum.

A few more circumstances connected with the MSS. of the History of the Pleas of the Crown may be considered as pertinent to the subject. It stands as a clause in Sir M. Hale's will, "I do expressly declare that I will have nothing of my own writing printed after my death, but only such as I shall, in my lifetime, deliver out to be printed." Burnet says that Hale inserted this clause in fear of the State Licence garbling his MSS. Emlyn brings forward an argument from Hale's codicil, besides other reasons in favour of a *constructive* licence by Hale to print his history. The question is now of no practical importance, and certainly the clause in the will has been more honoured in its breach, than by its observance. Sir M. Hale himself took a similar liberty with Selden's will, whereby, much to the executor's honour, and the testator's fame, the University of Oxford counts Selden's library among the choicest treasures of its Bodleian.

With regard to the condition of the transcript, it appears, from the testimony of an eye-witness, that Sir M. Hale in writing was accustomed, as he expressed it to a friend, "to tap his thoughts and let them run," and that they commonly ran as fast as his hand, which was a very ready one, could trace them; and this course he would continue for hours together, giving to what he wrote the appearance of extempore meditations. This statement corresponds with what Sir M. Hale observes of the order of his cases (as is mentioned in the first chapter of this work) that he wrote them down "promiscuously, and as they occurred to his memory." The author of the Preface to the Summary mentions, moreover, that Sir M. Hale "frequently at the end of his chapters or sections used to leave more or less blank paper, and, when other matter occurred, more than could be inserted in those places, did many times write the rest in some other place, where he found most room for it, and, for the most part, without any note of reference to it." Mr Emlyn says that he is sensible that in printing the History he must have been guilty of "many slips and omissions," for which he apologises, by anticipation, on the ground of the "*difficulty* of the manuscript."

There are two numberings of the pages, one at the bottom, another at the top in the right hand corner. The paging at the top begins afresh with each volume of the MS.; but the paging at the bottom indicates an original division of the transcript into two

volumes; the pages being continuous (with the exceptions of interruptions) through the first and second volumes of the transcript according to its present division, as from p. 1 to p. 441, and, in like manner, through the five succeeding volumes, from p. 1 to p. 830.

The MS. bears the appearance, that, after the transcript had been made and paged, and during the process of correction, many leaves had been inserted in different places under Sir M. Hale's direction, as, for instance, between the folios paged 160 and 161 eighteen leaves are introduced, about half of which are in Hale's handwriting, and the remainder in the hand of the transcriber, with Hale's corrections. At the beginning of the third volume, ten leaves (not numbered) in Hale's handwriting entirely are inserted before folio 1. Additions have been made by Sir M. Hale on the reverse of the original leaves, which are sometimes copied by the transcriber on leaves subsequently inserted. The transcript appears to have been re-bound once or oftener, which may account for the present position of some of the leaves that are misplaced.

It may, perhaps, be assumed, on the authority of Emlyn, Foster, and Hargrave, and also from the invitation to the legal world to inspect the two manuscripts which had been deposited for the purpose in the British Museum, that there is no reasonable doubt as to the particular portions of the revised transcript which are in Hale's handwriting, nor of those, although they be corrections and insertions, which are neither under his hand, nor written by his authority. This part of the evidence might, however, have been made more conclusive by showing that the corrections and interlineations said by Emlyn to be in a *very modern* hand, contained references to statutes or decisions that have been made subsequently to Hale's death.

It does not appear that Emlyn collated the unrevised part of the transcript with the original MS.; though it would seem that the printed book is taken as far as the 27th chapter from the revised transcript; but, beyond that, it is not clear from Emlyn's statement whether it follows the transcript (for which course there was a strong temptation, in point of facility) or the original MS. which is lost. If Emlyn adopted the whole of the transcript, omitting the corrections and interlineations which he judged to be very modern, we possess now the part of the History of the Pleas of the Crown, from the 27th chapter, on the faith of Hale's amanuensis; if Emlyn reverted back to the original MS. when the transcript was no longer authenticated by Sir M. Hale's corrections, it is not impossible, from what has been above said of Sir M. Hale's method of composition, that he may have fallen into many mistakes, at least of collocation.

It may, perhaps, be assumed that Sir M. Hale did not contemplate any further revision of the part of his History as far as the 27th chapter; though even as to this point, it will be seen that some doubt may be entertained as to his having definitively settled the manner of leaving his report of the important case of the Apprentices, concerning the constructive levying of war. It may be conjectured from the insertions of pages, copious interlineations, and frequent corrections made by Sir M. Hale as far as the 27th chapter, that the subsequent chapters of the original MS. would, probably, have been extensively modified, had his life been spared to complete his *limæ labor*.

In one respect, particularly, no part of the transcript may appear to be finished, inasmuch as Mr Emlyn, speaking generally of the transcript, states, that "our author, not having had leisure to consult the books themselves, has frequently copied from the misprinted quotations in the margin of Lord Coke's third volume of his Institutes." It may be presumed that it was Sir M. Hale's intention to have investigated those authorities, and not have relied implicitly even upon Coke's statement of them. No one would, in candour, suspect Sir M. Hale of endeavouring to raise an unfair opinion of his own industry, or of giving an undue weight to his own opinions, by a cloud of references copied, with all their blunders, from another's book.

We have, thus, in a MS. deposited in the British Museum, Hale's History of the Pleas of the Crown revised as far as his 27th chapter, leaving one hundred and twenty-three chapters unrevised; or three hundred and fifty-four revised and expurgated pages, in print, out of eleven hundred and twenty-two without emendation; in short, two volumes and a half of MS. containing later thoughts out of seven of earlier thoughts. The intrinsic evidence, however, stamps the whole work which we have in print, as substantially exhibiting Sir M. Hale's genuine remains.

The legal world have felt too sensibly the convenience of an appeal to a work of such transcendent authority as the History of the Pleas of the Crown, in the absence of any established Code of Criminal Law, to have been very scrupulous concerning its authenticity, or the relative authority of its component parts. With regard to any difference between chapters actually revised by Sir M. Hale, and such as were on the point of being so, no comparison, it is believed, has ever been made in legal arguments or judgments. It may, perhaps, have been thought, that Sir M. Hale so illimitably transcends other authors on the Criminal Law, that any disparity between himself revised and unrevised, may, after the manner of mathematicians, be neglected as evanescent.

II.

CASE OF THE APPRENTICES.

THREE leaves of the transcript are occupied by some interesting matters, hitherto, it is believed, unpublished, relative to the Case of the *Apprentices*, which Lord Campbell designated as a "fantastic trick played" (by eleven judges) "before high heaven, to make the angels weep."

The *first* of the three *leaves* contains the indictment and special verdict. The indictment is a curious specimen of legal latinity and its abbreviations, of which it may be sufficient to give the following specimen of the most material part. The Indictment states that the prisoners "cum multitudine gentium jur. pred. ignot. ad num'um quingent. psonar. modo guerrino armat. et arrait. viz. gladiis hastis Ang. vocat. halfe-pikes bipennis Ang. vocat. halberts tormentis longis baculis et fustibus et aliis armis tam invasiois qm defensiois illicite et pditorie ad tunc et ibm congregat. et assemblat. guerram publicam contra dcum dnum Regem pditorie paraver. ordinaver. et levaver."

After the latin indictment follows the special verdict. This is much more full than that in Emlyn's printed book, as noticed above p. 72; and it corresponds *verbatim* with the special verdict in Messenger's case which is printed in Kelyng's Reports. It does not contain the words *more guerrino* which occur in Hale's statement of the special verdict in Emlyn's printed book; these words, it will have been noticed occur, in the indictment.

It has been mentioned in the text, p. 73, that, besides this special verdict against Messenger and Bazeley, *three* more special verdicts are detailed in Kelyng's Reports against other apprentices for the same transaction; and it is stated by Kelyng that besides Messenger and Bazely in the first verdict, Colvin in the second verdict, and Lymerick in the fourth verdict, were also executed.

The *second leaf*, following that which contains the indictment and verdict, commences with the following insertions in Sir M. Hale's handwriting.

"All the judges were assembled upon this speciall verdit at the Cheife Justice Keelings chamb and by the advise of them all, except one who for the reasons he then gave was not satisfyed, Judgm̄t

was given against divers of the offendors as in the former pages it appeares.

"But upon this Inditemt & verdit it appeares that there was not only a multitude of psons assembled to the purpose in the verdit, but, 1 that they were modo guerrino arraiati & armati. 2 That they had all the appearances of a warr viz. armes offensive & defensive, a Captain with his sword drawn & brandishing it as an Ensigne. 3 That they actually resisted & beat down the Kings Civill officer the Constable. 4 That they offerd an actuall force to the kings military officers."

There is nothing further contained in the second leaf; but the *third* interpolated *leaf* begins and ends with the identical passage contained in the previous leaf. Sir M. Foster thinks that this *third* leaf bears the transcriber's copy of what is in Sir M. Hale's own handwriting on the *second* interpolated leaf.

The mention of the special verdict, and of Sir M. Hale's reasons for dissenting from the opinions of the majority of the judges, as they appear in Emlyn's printed book, are not to be found in the transcript. But it is remarkable, that the first volume of the transcript breaks off abruptly at the very point where the mention of the case of the Apprentices occurs in Emlyn's book, and that the second volume of the transcript begins with the end of a sentence that occurs in the printed book just after what appears concerning the Case of the Apprentices is concluded, viz. with the words, "*n'est pas treason.*" The bottom paging of the first volume of the transcript proceeds as far as p. 137, then there follow six pages in the same volume not numbered at the bottom; and the *second* volume of the transcript commences with the bottom paging of 146; thus, pages 144 and 145 are missing. Moreover, the bottom of p. 143, admitting space for a line or two, is torn away. Now it is particularly deserving of observation that the small part torn away from page 143 follows directly the words "this is treason Co. P. C. p. 9" in the printed book, which words immediately precede, in that book, the statement of the Case of the Apprentices. Again, the bottom of p. 143, the whole of page 144 and part of 145 would, most probably, judging from the space occupied in Emlyn's printed book, have been filled by the statement of that Case, and the observations upon it as printed.

Sir M. Foster observes briefly on the omitted passage in question, that it "mentions shortly divers reasons in support of the opinion of the majority of the judges in the case of Messenger and others." Several arguments may occur in support of this view of the subject; whilst, on the other hand, arguments are not wanting to support the

view, that Sir M. Hale's last resolution was to cancel what now appears in the printed book concerning the Case of the Apprentices; to bow more deferentially to the decision; and to adopt the exaggerated averments in the indictment and special verdict with a significant "*But*"; implying thereby, that the case of the Apprentices ought to be no precedent for future cases which might not present the like martial characteristics; thus, instead of carping at the decision, rendering it, as far as he was able, innocuous.

It may appear, according to the latter view of the transcript, that Hale's notice of the case in the original MS. did, on reflection, seem to him as setting up his own opinion against those of the majority of the judges. The case of the Apprentices would, however, never have been cited in modern times, but for the respectful homage paid to it by Hale, even as it is mentioned in the printed book. On this point of Hale's reverence for adjudged precedent, an extract from Mr Hallam's Constitutional History, may be considered a *pièce justicative* of the Author's remarks on the subject in his first chapter and in that on treason.

"Many decisions in cases of treason before the Revolution were made by men so servile and corrupt, they violate so grossly all natural right, and all reasonable interpretation of law, that it has generally been accounted among the most important benefits of that event, to have restored a purer administration of criminal justice. But though the memory of those who pronounced those decisions is stigmatized, their authority, so far from being abrogated, has influenced later and better men. It is rather an unfortunate circumstance, that precedents which, from the character of the times when they occurred, would lose, at present, all respect, having been transferred into text books, and formed, perhaps, the sole basis of subseqent decisions, are still, in not a few points, the invisible foundation of our law. No lawyer, I conceive, prosecuting for high treason in this age, would rely on the case of the Duke of Norfolk under Elizabeth, or that of Williams under James I. or that of Benstead under Charles I. but he would certainly not fail to dwell on the authorities of Sir E. Coke and Sir M. Hale. Yet these eminent men, and especially the latter, aware that our law is mainly built on adjudged precedent, and not daring to reject that which they would not have themselves asserted, will be found to have rather timidly exercised their judgment in the construction of this statute, yielding a deference to former authority, which we have transferred to their own."

The London Apprentices have received several severe chastisements, as in the reign of Henry VIII. on May Day, 1517, called

thence *Ill* May Day, and of which the memory is said to be preserved in the name of the London Parish, St Andrew *Undershaft*. The Apprentices took occasion of the festival, for attacking the Spanish followers of Queen Catherine, who, they conceived, hurt their trade. A Ballad composed on that occasion may be seen in the fourth volume of Hone's Year Book; the following lines occur.

And hundreds hanged by martial law,
On sign posts at their masters' doors,
By which the rest were kept in awe
And frighted from such loud uproars.
And others which the fact repented
(Two thousand 'Prentices at least)
Were all unto the King presented,
As mayor and magistrates thought best.

With two and two, together tied,
Through Temple Bar and Strand they go,
To Westminster, there to be tried,
With ropes about their necks also.
But such a cry in every street,
Till then was never heard or known,
By mothers for their children sweet,
Unhappily thus overthrown.

III.

TREASONABLE WORDS.

THE transcript contains a provision of a statute of Elizabeth which has not been printed, with regard to treasonable words. In Emlyn's printed edition is found as follows:—"Calculating of the king's nativity, or thereby, or by witchcraft, &c. seeking to know, and, by express words, writing, &c. publishing and declaring how long the king shall live, or who shall succeed him, or advisedly or maliciously to that intent uttering any prophecies, seems not a compassing of the king's death within the statute of 25 Edward III., but was made a felony during the life of Queen Elizabeth by 23 Eliz. cap. 1, and, before that, was only punishable by fine and ransom."

The MS., after the word *prophecies*, has the following: "*or shall maliciously by words, writing, or printing, wish, will, or desire the death and deprivation of the king, or anything directly to the same effect, seems not,*" &c. (as above).

This paragraph is repeated, on a subsequent page, without the omitted words, just as it appears in print. If the omission be not accidental, the words were probably left out lest the fear of the punishment of treason should be taken off from seditious tongues.

Cases might be put in which the omitted words followed by "it *seems* that they are not within the statute of treason," might be material for the life of a prisoner under trial for high treason. For an "*it seems*" of Sir M. Hale is weightier in law than any other's *procul dubio*. The omitted words are important, for Hale and Foster agree in opinion that the making of an offence treason or felony by temporary Acts or Acts since repealed, is a cogent argument that it is not included in the Statute of Treasons. Sir M. Foster writes, "I must say that Sir M. Hale's reasons founded on temporary Acts, or Acts since repealed, which make the speaking the words therein set forth felony or misdemeanour are unanswerable. For, if these words, seditious to the last degree, had been deemed overt acts of treason, the Legislature could not, with any sort of consistency, have treated them as felony or misdemeanour."

IV.

KINGS WITHIN THE STATUTE OF TREASONS.

THE following passages on the subject of Kings within the Statute of Treasons, appear in the transcript in Sir M. Hale's handwriting, and, it is believed, have not hitherto been published:—

"A King that by consent of Parlemt takes another in Consortium Imperij yet remaines a King within this act. Wee neuer had any instance thereof in this kingdom but in that of H. 2. who took his son into a kind of subordinate regality so that there was Rex pater & Rex filius. But it is to be obserued that H. 2. did not divest himself of the Soveraignty as some haue thought but reserued to himself the lige homage and allegeance of his Subjects yea & of his Son also: and although his son were a king yet he was a king but subordinate to his father. And therefore although he might be in some respects a king in relation to the subjects that theyr conspiring of his death might be a treason yet he was but a subject in respect of his father and his attempt to eject the father from the kingdom was treason vid. supra cap.

" But this comunication of Soveraignty by the King could not be done without consent of Parlmt. For as a King cannot wholly resigne or dismisse himself of his kingly office without consent of Parlmt so neither could he without such consent divide the Soveraignty. It was a wise expression of Queen Elizabeth when she was vrged to marry, she replyed she was marryed to her kingdom: there is a sacred bond between the king & his kingdom that cannot be dissolued without the free & mutuall consent of both in Parliament.

" And therefore when King John resigned up his kingdom to the Pope and took it again as a Feudatory of the Pope, under a yearly pension of 1000 marks as some historians report And in the 40th. yeare of King Edward 3d. the Pope wrote to the King for the areres of the pension The matter being comunicated to Parliament rot Parl. 40. E. 3. n. 8. for theyr advise gave this wise & just answer. Les Prelates Ducs Countes Barons & cōons en sur ce plein deliberation responderent & disoient dun accord q le dit Roy John ne nul autre purra metter lui ne son royalm ne son people in tiel subjection sans assent de eux Et come appeirt p divers evidences qe si ceo feust fait ceo feust fait sans lour assent et encountre son serement en sa coronation. Et outre c' les Ducs Countes Barons Grants & Coons accorderont & granteront q̄ in case le Pape se afforceroit ou riens attempteroit p pces ou en autre manner de fait de constreiner le Roy ou ses subjects de p faire ć qest dit q̄ il voil claimer celle pty q̄ ils resisteront & countrasteront oue tout lour puissance.

" The Prelates though it seems they wanted courage to joine in the ptestaton of resistance yet they joined with the temporall Lords & Comons in the declaraton of theyr judgment against the surrender of King John. In forren kingdoms there haue been instances of voluntary Cessions or resignations wch possibly may be warranted by theyr seuorall Constitutions but by the lawes of England the King cannot resigne his Soveraignty without his free consent & the consent of Parlemt. The resignations that were made by E. 2. & R. 2. were extorted by force violence & oppression to give a countenance to those usurpations that succeeded them, and were acts of high disloyalty and injustice, and not to be mentioned without detestation.

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" A King de facto but not de jure such as were H. 4. H. 5. H. 6. being in the sole & actuall possession of the Kingly style & governmt is a king within this act.

" And in such case the right heyre of the Crown sitting still in a priuate capacity is not a king within this act till he obtain the exercise of the Soveraigne power. This was the case of Edmund Earl of

March and Richard Duke of York who successiuely were the right heyres of the Crown after the death of King R. 2, as being discended from Lionel Duke of Clarence the third son of E. 3. whereas H. 4. was discended from John of Gaunt 4th son of E. 3 and younger brother of the Duke of Clarence as appeares at large by the Stt. of 1. E. 4. and the book of 4 E. 4. where the act is printed.

"In 39 H. 6. Richard Duke of York made out this title to the Crown by his claym in Parlemt wch title notwithstanding the objections offrēd against it was allowed & acknowledged vid rot Parl. 39. H. 6. n. 15. et sequentibus but it ended in a composition that H. 6. should hold the Crown during his life and that after his death it should come to Richard Duke of York. Although the Duke of York was recognized right heyre to the Crown yet in as much as by accord in Parlement H. 6. was to hold it during his life and the Duke during that time was as it were suspended from the actuall exercise of the kingly government the Duke was not a king within this act during that time nor was he the king's eldest son within the succeeding clause And therefore in the same Parlemt Roll n 24 there was a speciall clause in that composition that compassing of the death of R. Duke of York now made heyr apparent to the Crown should be high treason.

"This accord was broken by the meanes of the Queen and Richard Duke of York slain, whereupon his son & heyre E. 4. the true heyr to the Crown assumed the Crown upon the 4th of March wch was the first day of his reigne. If the right heyr of the Crown be in the actuall exercise of the Soveraignty suppose in one part of the kingdom and an Usurper be in the actuall exercise of the Soveraignty in another yet the law judgeth him in possession of the Crown that hath the true right and the other is in truth not so much as a king de facto but a disturber only & therefore not a king within this act. This was the case between E. 4. and H. 6. although Edward 4 took upon him the Soveraignty and was declared king in London upon 4 Martii 1460. Yet H. 6 was in the Northern pts & treated as a king and raised a great army wch being subdued by King E. 4. in the latter end of May in the bloody battle of Towton-field then and not till then had E. 4. the totall & quiet possession of the Crown and in November following held a Parlemt wherein his title is declared and the comencemt of his reign enacted to be 4 Martii before and H. 4 H. 5 H. 6 declared Usurpers during this intervall from 4 Martii to June H. 6 was used as king and yet was not so much as a king de facto E. 4 the right heyr being likewise in possession of the regality. The like was between Q. Mary and the Lady Jane Dudley

who was pclaimed Queen at London by pretence of nomination by E. 6 but held not that title aboue ten daies, for the same time Q. Mary openly laid claim to the Crown and was also pclamed Queen so that both being de facto in possession of the Crown the law adged possession in her that had the right vizt. Q. Mary and therefore by an act of Parlement 1 Mar. cap. 3 it is enacted that Recognizances dated anno 1 Regine Jane shall be allowed as good w^ch needed not have been if she had been Regina de facto though an Usurper because judiciall acts are not diminutions of the regall revenue 9 E. 4, 15. 11.

"And if any shall say that if H. 6 or Q. Jane had gotten the victory & possession of the Crown that possibly as much would have been asserted by them & theyr participants against E. 4 & Q. Mary this is an objection of no value for I doe not take my measures herein from events w^ch are various & uncertain but according to the true right of matters pursuant to the lawes of England as neere as I can.

"It remaines to be considered how treasons comitted against an Usurper or Rex de facto & non de jure shall be punished after the regresse & obtention of the Crown by the right heyr.

"If there be a treason comitted against the Usurper w^ch referres not to the competition of the true heyre as counterfeiting the coyn or seal of the Usurp or compassing his death by treachery these treasons haue been punished notwithstanding the regress of the right heyre & in his time 9 E. 4. 1. 4. E. 4. 20 for these are indeed offences that are rather against the interest of kingly Governmt. than for the interest of the Usurper But if the treasons be such acts as were done in the right & assistance of the right heyre to the Crown these are purged by the regress & obtention of the Crown by the right heyre.

"But if for such assistance the pties assisting were attaint of treason by act of Parlemt. or Judgmt in the time of the Usurping Rex de facto they cannot be avoided but by a repeal in Parlemt though the attainder of the king himself be annulled ipso facto by his assumption of the regall gouernment. 1 H. 7. 4. And therefore when in that short regresse of H. 6 into the actuall possession of the crown 9 & 10 E. 4, H. 6 held a Parliament 8 Novemb 9 E. 4. and therin restored most of his own party that were attainted by Parliament 1 E. 4 and procured acts of attainder against the most considerable assisters of E. 4. This Parliament of H. 6 and all the proceedinges therin and all exemplifications of any act therein passed was wholly repealed and adnulled Rot. Parl. 17 E. 4. n. 34. And so vacated that there remaine no footesteps of record of that Parlemt but only of the writt of sumons."

It may be collected that the most important doctrine laid down by Sir M. Hale, in the passages from his MS. under the present head, is, that no King can resign or dismiss himself from his kingly office, without his own free consent, and the consent of Parliament; treating the resignations of Edward II. and Richard II. as extorted, and not to be mentioned without detestation. It may be conjectured that the *abdication* of a king for himself and his posterity, especially where that abdication was not even extorted, but merely inferential and fictitious, would have been equally regarded by him as an abomination; James II. and his descendants, having been ostensibly construed out of the throne with less of logic than Kings Edward and Richard. Sir M. Hale does not canvass the reasons publicly and officially asserted by Parliaments in justification of the deposals of Edward II. and Richard III.; and it may, perhaps, be inferred, as we know that it was in fact inferred, by the adherents of the House of Stuart, from similar passages in Emlyn's printed book, that he would not have recognised the right of a Nation, under any emergency whatever, of expelling a King against his will, and excluding his posterity from the succession;—a right which may be dishonored, but cannot be invalidated by the compromising diction under which it may have been cloaked. In Sir M. Hale's time, during the debates on the Exclusion Bill, an opinion seems to have been prevalent, that not even the King and Parliament could intercept, against his will, the *right* of succession supposed to be indefeasibly vested in a Catholic Duke of York. A wholesome antidote for doctrines so destructive of civil liberty, and for several of Sir M. Hale's remarks of a similar tendency on *right heyrs*, and on incidents in the war of the Roses will be found in Sir M. Foster's Fourth Discourse, entitled, "Some Passages in the writings of Lord Chief Justice Hale, relative to the principles on which the Revolution, and the present happy Establishment are founded;" in Mr Hallam's observations on the principles of the Revolution in his Constitutional History, especially on the use of the term *abdication;* and in Mr Allen's treatise on the Prerogative, particularly his remarks on the ancient practice of *Diffidation*, the speech of Trussell the procurator of Parliament, to Edward II. and that of Thirning to Richard II. the latter concluding, according to the entry of it (for it was a thing not done in a corner) on the Roll of Parliament. "And that non of all thes States and Poeple from this time forward ne bere zowe feythe ne do zowe obeisance os to ther Kyng."

THE END.