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repealed Act of 1536, which was thus referred to in the revived Act of 1536, can be used to explain the Act of 1540.¹ The prohibited degrees, as thus defined, were set forth by authority in 1563;² and, except in so far as they have been modified by the statute of 1907, which allows marriage with a deceased wife's sister,³ they are still part of the law.

(5) *Jurisdiction over wills and grants of administration.*

The most important statute dealing with this jurisdiction was the statute of 1529,⁴ which is the foundation of the present law as to the persons to whom the court must make grants of administration. With this subject I have already dealt.⁵ I have also dealt with the statute 1601, which enacted that if administration were granted to some man of straw, who thereupon conveyed away the goods in fraud of the creditors of the estate, all who took the goods under these circumstances should be chargeable as executors de son tort.⁶

Criminal Law and Procedure ^{English law in the 16th and Early 17th Centuries}

The events of this century left their mark upon the criminal law. The new position of independence and sovereignty over all its members, which the state had assumed as a result of the Reformation settlement, made some large additions to the law of treason very necessary; while the social, industrial, and economic changes were equally necessarily accompanied by additions to the lists of felonies and misdemeanours. At the same time other statutory changes took place in certain rules and institutions closely connected with the administration of the criminal law. I shall deal with these changes in the criminal law and in matters cognate thereto under the following heads: (1) Treason; (2) Felony; (3) Misdemeanour; (4) Topics connected with the criminal law and procedure.

(1) *Treason.*

The statutory additions made to the law of treason during this period may, as Stephen has pointed out,⁷ be (with a few unimportant exceptions⁸) grouped under three main categories:—

¹ *The Queen v. Chadwick* (1847) 11 Q.B. 205; *Brook v. Brook* (1861) 11 H.L.C. at p. 225 *per* Lord Cranworth; at p. 244 *per* Lord Wensleydale.

² See Coke, *Second Instit.* 683-687.

⁴ 21 Henry VIII. c. 5.

⁶ 43 Elizabeth c. 8; vol. iii 557; for executors de son tort see *ibid* 571-572.

⁷ H.C.L. ii 263.

⁸ These exceptions were as follows: 22 Henry VIII. c. 9—passed in consequence of the attempt of the bishop of Rochester's cook to poison him—made poisoning treason punishable with boiling to death; but by 1 Edward VI. c. 12 § 12 it was enacted that poisoning should be treated like any other murder; 31 Henry VIII. c. 8

³ Edward VII. c. 47.

⁵ Vol. iii 560.

Firstly, the statutes making it treason to interfere with the order of succession to the throne as established from time to time by statute; secondly, the statutes making it treason to recognize the authority of the pope, or to do certain other acts hostile to the new religious settlement; and, thirdly, expansions of the act of Edward III., which, as we have seen, has, throughout our history, continued to be the principal statute upon this subject.¹ The statutes coming within the first two categories are not of the same general importance as those coming within the third category, though many of them have lived long on the statute book.² They were, as Stephen has said,³ the necessary consequences of the war between England and the Pope which was being waged in the reigns of Henry VIII., Edward VI., and Elizabeth; and they necessarily ceased to be of much practical importance when the issue of that war was settled. On the other hand, the statutes coming within the third category have very materially influenced our law of treason as it exists to-day. I shall therefore, in the first place, summarize shortly the statutes of comparatively temporary importance, and, in the second place, deal rather more fully with the statutes of more permanent interest.

(i) *The statutes of temporary importance.*

(a) *Statutes relating to the succession.* The desire to obtain an undisputed male heir to the throne was, as we have seen, one of the causes of Henry VIII.'s chequered matrimonial career.⁴ His various marriages were followed by statutes which resettled the succession, and made certain acts done in contravention of these statutory settlements treason. In 1533⁵ Henry's marriage with Catherine was declared void, and his marriage with Anne was declared valid. It was enacted that any persons who by writing, printing, or other overt act did anything to slander the

§ 6 made it treason to go beyond the sea to avoid the penalties for the breach of a royal proclamation issued under the authority of the statute; 33 Henry VIII. c. 21 § 8 made it treason for an unchaste woman to marry the king without revealing the fact, and § 10 made incontinence of the queen or wife of the Prince of Wales treason in the parties and accessories to the act; 1, 2 Philip and Mary c. 9 to pray for the queen's death was made treason; *ibid* c. 10 § 5 attempts against Philip, while acting as guardian of any child of the marriage between him and Mary after Mary's death, were made treason.

¹ Vol. iii 287.

² Thus many of the statutes of Elizabeth's reign designed to support the Reformation settlement, below 495-496, were not repealed till the last century.

³ H.C.L. ii 257, 258—"If it is admitted and fully realized that the controversy between the king and the pope in Henry VIII.'s time was simply a war carried on between rival powers claiming jurisdiction of an analogous though distinct kind over the same population, it can hardly be said that the legal weapons used were other than those which on such an occasion must be used if the war was to be effective and thoroughgoing."

⁴ Above 32.

⁵ 25 Henry VIII. c. 22.

king's marriage, or the persons upon whom by the Act the crown was settled, should be guilty of treason; that if they did anything of this kind by words only they should be guilty of misprision of treason; and that a refusal to take an oath to observe the Act should be misprision of treason.¹ If the king died leaving infant children they were to be in the guardianship of their mother and a council, and all who opposed the mother and the council were to be guilty of treason. In 1536² the statute which annulled the marriage with Anne and settled the crown on the issue of the king and Jane Seymour containing similar but more stringent provisions. All who by words, writing, or overt acts did anything to the prejudice of the king's present marriage or of any future marriage, or who adjudged his former marriages valid, or who refused to answer interrogatories, or to take the oath required by the Act, were declared guilty of treason. Moreover it was provided that if any of the king's heirs or children claimed the crown contrary to the line of descent limited in the Act, they should be guilty of treason. In 1540³ the statute which annulled the marriage with Anne of Cleves made it treasonable to assert its validity. In 1543⁴ the statute which finally settled the crown, and gave the king power to limit the succession by his will on the failure of his issue, again made it treasonable to attempt anything contrary to the settlement so made; and in 1547⁵ a provision, similar to that contained in the statute of 1536, made it treasonable for the king's heirs or successors to attempt to alter the line of succession as provided by the statute of 1543.

(b) *Statutes relating to the Reformation settlement.* The first of these statutes was passed in 1533-1534⁶—in the same year as the Act of Supremacy. It provided that any one who maliciously published by words or writing that the king was an heretic, schismatic, tyrant, infidel, or usurper, or any one who by words or writing practised or attempted to deprive the king, queen, or their heirs of their titles, names, or royal estates, should be guilty of treason. In 1536⁷ the statute entitled "An Act extinguishing the authority of the Bishop of Rome," provided certain forms of oaths renouncing the Pope's authority and maintaining the royal supremacy, and enacted that a refusal to take

¹ Coke, Third Instit. c. 3 says that misprision is committed, "when one knoweth of any treason or felony and concealeth it;" but the offence of misprision of treason was extended to cover many other acts by this and other statutes; see vol. iii 389 n. 1.

² 28 Henry VIII. c. 7.

³ 35 Henry VIII. c. 1.

⁴ 26 Henry VIII. c. 13;

for the history of the bills (beginning in 1530-1531) which eventually became this Act see I. D. Thornley, Royal Hist. Soc. Tr. (3rd Series) xi 88-104.

⁷ 28 Henry VIII. c. 10.

⁵ 32 Henry VIII. c. 25.

⁶ 1 Edward VI. c. 12 § 8.

these oaths when commanded to do so should be treason. A statute of 1543-1544¹ set out the king's style and made it treason to imagine or attempt to deprive the king, queen, or his heirs of "their titles, styles, names, degrees, royal estate, or regal power" annexed to the crown of England.

In 1547² all the statutes relating to treason, and, as we shall see, to felony³ passed in Henry VIII.'s reign were, with some exceptions, repealed. But the repealing statute in substance re-enacted some of their provisions. Thus, asserting by writing, printing, or other overt act that the king was not supreme head of the church was again made treason; and asserting this by words was made treason on a third conviction.⁴ In 1551-1552 a similar provision was made against asserting that the king was a heretic or usurper.⁵ At the beginning of Mary's reign all the legislation of the last two reigns was again repealed,⁶ and the statute of Edward III. was again left as the sole statute in force.

In Elizabeth's reign the reversion to the Reformation settlement of Henry VIII. necessitated a renewal of legislation directed against the Pope and the Roman Catholics. A statute of 1558⁷ made it treasonable to affirm by writing, printing, or overt act that the queen ought not to be queen, or that any other person was entitled to the throne. To affirm this by words was made treason on a second conviction. In 1571 Pius V.'s bull of deposition and the activity of the Jesuits made further measures necessary. A statute passed in that year⁸ made it treasonable (i) to publish, declare, hold opinion, or say that the queen ought not to be queen, or that any other person ought to be queen of England; (ii) to say that the queen was a heretic, schismatic, tyrant, infidel, or usurper; (iii) to affirm that anyone had a right to the throne after the queen's death contrary to any royal proclamation forbidding this; (iv) to deny, during the queen's life, that the common law, or that this or any other statute could limit the descent of the crown. Another statute of the same year made it treason to obtain or use any papal bull, or to give or receive absolution under the authority of these bulls.⁹ In 1580-1581¹⁰ it was provided that all persons pretending to have power to absolve subjects from their obedience to the queen, or who practise to withdraw them to the Romish religion, or to promise obedience to any foreign potentate, and all subjects so absolved, or withdrawn, or promising obedience as aforesaid,

¹ 35 Henry VIII. c. 3.

² Below 504, 506.

³ 1 Mary Sess. 1 c. 1.

⁴ 13 Elizabeth c. 1.

⁵ 23 Elizabeth c. 1; see also 1 James I. c. 4, § 14.

⁶ §§ 5 and 6.

⁷ 1 Edward VI. c. 12.

⁸ 5, 6 Edward VI. c. 11.

⁹ 1 Elizabeth c. 5.

¹⁰ *Ibid* 2.

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should be guilty of treason. In 1584-1585¹ all Jesuits were ordered to leave the kingdom within forty days, and all who remained longer or who came into the kingdom were declared to be traitors. All subjects who were being educated abroad in any Jesuit seminary were declared guilty of treason if they did not return and take the oath of supremacy within six months after a proclamation ordering them to do so.

(ii) *The statutes of more permanent interest.*

We have seen that at the end of Henry VIII.'s and Edward VI.'s reign the legislature reverted to the statute of Edward III. But it was often found necessary again to enlarge the scope of that statute. In fact its provisions were quite inadequate to protect the government of the state against attempts to subvert it. It is therefore to these statutory enlargements of some of its provisions that we must look for one important element which has gone to the making of our modern law of treason.

The clauses of Edward III.'s statute, which were designed to guard against attempts to subvert the government of the state, were those which made it treason to compass or imagine the death of the king, to levy war against the king, or to be adherent to his enemies.² It is clear, as Stephen says,³ that these clauses were worded too narrowly if they were to be construed literally. They made no provision (a) against conspiracies to depose, imprison, or otherwise to harm the king, or (b) against conspiracies to levy war or to create internal disorder. Therefore from Henry VIII.'s to Elizabeth's reign a series of statutes was enacted designed to remedy these defects.

(a) The statute of 1533,⁴ in addition to the provisions already mentioned, made it treasonable by writing, printing, or other external act to do or cause to be done anything to the peril of the king, or to the disturbance or interruption of his enjoyment of the crown, or of the succession as settled by the Act. Committing these offences by words only amounted to misprision of treason. A statute of 1533-1534⁵ was more severe. Under that statute it was made treasonable, "to wish will or desire by words or writing, or by any craft to imagine invent practise or attempt any bodily harm to the king queen or their heirs," or, as we have seen, any deprivation of their dignity, title, or royal estate. There were similar provisions in the statute of 1536;⁶ and, as we

¹ 57 Elizabeth c. 2.

² For this statute see vol. ii 449-450; vol. iii 291; for other mediæval legislation see vol. ii 450; vol. iii 292.

³ H.C.L. ii 263.

⁴ 26 Henry VIII. c. 13.

⁵ 25 Henry VIII. c. 22 § 5.

⁶ 28 Henry VIII. c. 7.

have seen, the statute of 1543-1544, which settled the royal style, made any imagination or attempt to deprive the king or his heirs of his title or style as settled by the Act treason.¹ These statutes having been repealed in 1547,² it was provided by the repealing statute that to compass or imagine by writing, printing or other overt act the deposition of the king should be treason, and that to do so by open and express words should be treason if the offence were repeated a third time.³ This statute was repealed in 1553;⁴ but by statutes of 1554 and 1558 substantially similar provisions were made.⁵ In 1571 came a still more stringent enactment.⁶ It was provided that anyone who by printing, writing or words should compass or imagine any bodily harm to the queen, or the levying of war against her within or without the realm, or the invasion of the realm by foreigners, should be guilty of treason.

(b) The foregoing statutes clearly brought within the law of treason conspiracies to levy war which had for their object the deposition or coercion of the sovereign. Conspiracies to levy war were in fact specifically mentioned in the Act of 1571. But they did not touch riots, or conspiracies to raise riots, which did not aim directly at the sovereign. Such riots were dealt with by a statute of 1549-1550.⁷ It provided that if twelve or more persons assembled together to make a riot with the object of killing or imprisoning a privy councillor or of unlawfully altering the laws established by Parliament, and if they remained together for one hour after a summons to disperse, they should be guilty of treason; and that if forty or more persons assembled together for two hours or more for the purpose of doing certain kinds of damage (e.g. destroying inclosures), or any traitorous rebellious or felonious act, those so assembling and their wives and servants assisting them without compulsion, should likewise be guilty of treason. This Act was repealed in 1553.⁸ By statutes of that year and in 1558 it was in substance re-enacted, but the offences were reduced from treason to felony.⁹ Other acts of hostility to the king were brought within the scope of the law of treason by provisions in the statutes of 1534, 1551-1552, and 1572 against the detaining of fortresses, and ships or munitions of war, after orders given to surrender them.¹⁰

¹ 35 Henry VIII. c. 3; above 495.

² §§ 5 and 6.

³ 1, 2 Philip and Mary c. 10; 1 Elizabeth c. 5.

⁴ 13 Elizabeth c. 1.

⁵ Mary Sess. 1 c. 1.

⁶ 1 Mary Sess. 2 c. 12; revived by 1 Elizabeth c. 16 which expired in 1603.

⁷ 26 Henry VIII. c. 16; 5, 6 Edward VI. c. 11; 14 Elizabeth c. 1 § 2; the last named Act also made it treason to destroy the queen's ships and to bar any haven;

⁸ 1 Edward VI. c. 12.

⁹ 1 Mary Sess. 1 c. 1.

¹⁰ 3, 4 Edward VI. c. 5.

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This series of statutes extending certain of the clauses of Edward III.'s statute ceases early in Elizabeth's reign. This, as we shall see, can be accounted for by the fact that a substitute had been found for this legislation in the large construction which the lawyers, encouraged by the example of the legislature and actuated by the same motives of public policy as those which inspired it, were prepared to put upon these clauses of Edward's statute. But with the growth of this doctrine of constructive treason I shall deal in the second Part of this Book.¹

We have seen that the statute of Edward III. included under the crime of treason certain offences which, unlike those of which I have been speaking, were not political in character.² Some of these were extended by statutes of this century. Statutes of Henry VII.'s and Mary's reigns made it treason to counterfeit foreign coin current in the kingdom.³ In 1554 it was made treason to import foreign counterfeit coin.⁴ In 1562 a statute of Henry V., which made the clipping of coin treason, was revived,⁵ and its stringency was increased in 1575-1576.⁶ In 1572 counterfeiting foreign coin not current in the realm was declared to be misprision of treason.⁷ Similarly the clause of Edward III.'s statute as to forgery of the Great Seal was extended to forgery of the king's sign manual, privy signet, or privy seal.⁸ But the legislature sometimes recognized that such species of treason were offences of a character different from the treasons which were directed against the king and state. Some of these statutes provided that conviction for coinage offences created by them should not work corruption of blood;⁹ and conversely the provisions made by statutes of Edward VI. and Mary to secure a fair trial of the prisoner were sometimes excluded.¹⁰

Of these provisions made to secure a fair trial of the prisoner

§ 1 of the Act made it felony to conspire to take, detain, burn, or destroy any of the queen's castles or fortresses if such conspiracy were evidenced by words acts or writings.

¹ Vol. viii 307-322; it may be noted that in 1554 in Throckmorton's Case (1554) 1 S.T. 869 the judges were quite prepared to give a large construction to Edward III.'s statute, see Stanford's dictum at p. 889, and Bromley C.J.'s ruling and Throckmorton's reply at pp. 891-892.

² Vol. ii 449; vol. iii 289.

³ 4 Henry VII. c. 19; 1 Mary Sess. 2 c. 6.

⁴ 1, 2 Philip and Mary c. 11.

⁵ Elizabeth c. 11, reviving 4 Henry V. c. 6.

⁶ 18 Elizabeth c. 1.

⁷ 14 Elizabeth c. 3; the offence of counterfeiting farthing tokens contrary to the king's proclamation was a less serious offence of which the Star Chamber took cognizance in pursuance of its general jurisdiction to enforce proclamations, see Atty.-Gen. v. Taylor and Stevenson (1631) Rushworth vol. ii Pt. II. App. 33-34; Atty.-Gen. v. Hammond (1632) *ibid* 41; Crane v. Hawks (1635) *ibid* 69-70.

⁸ 27 Henry VIII. c. 2, expressly saved in the repealing act 1 Edward VI. c. 12; 1 Mary Sess. 2 c. 6.

⁹ E.g. 5 Elizabeth c. 11; 18 Elizabeth c. 1.

¹⁰ E.g. 1, 2 Philip and Mary c. 10 § 12 and c. 11.

there were two. Firstly, for the treasons which could be committed by spoken words a short period of limitation was in many cases provided.¹ Secondly, the more important was a clause in the statute of 1551-1552 which enacted that a charge of treason should be substantiated by two accusers.² Throughout the latter part of the sixteenth and seventeenth centuries it was an unsettled question whether or not this clause was repealed by a clause in the statute of 1554,³ which provided that all trials for treason should be according to the due order and course of the common law and not otherwise. Coke, by drawing a very artificial distinction between the witnesses to the indictment and the witnesses at the trial, held that the statute of 1551-1552 was still in force;⁴ and this ruling seems to have been followed in 1660.⁵ But later it was questioned;⁶ and, it would seem from Hale's somewhat reluctant opinion in the first volume of his *Pleas of the Crown*,⁷ rightly questioned. It is true that he is content to follow Coke's opinion in another passage in the second volume;⁸ but the legislature, by requiring specifically two witnesses for many of the new statutory treasons, showed that it did not rely upon this view of the law.⁹ Nevertheless the rule was adhered to on the occasion of Strafford's impeachment,¹⁰ in the case of Whitbread and Fenwick in 1678,¹¹ and in all treason trials after the Revolution.¹² To clear up the doubt the legislature provided in 1696 that the testimony of two witnesses was essential.¹³

Two other enactments of 1541-1542 and 1572, relating to the procedure on a trial for treason and to the consequences of a conviction, were designed to strengthen the hands of the government. Certain of the clauses of the first of these statutes were

¹ 1 Edward VI. c. 12 § 19; 5, 6 Edward VI. c. 11 § 7; 1, 2 Philip and Mary c. 10 § 10; 1 Elizabeth c. 5 § 8; 13 Elizabeth c. 1 § 8.

² 5, 6 Edward VI. c. 11 § 9; see generally Wigmore, *Evidence* iii 2712-2717 § 2036.

³ 1, 2 Philip and Mary c. 10 § 6. ⁴ Third Inst. 25-27.

⁵ Kelying 9; though Bridgeman C.J. and other judges dissented, *ibid* 18.

⁶ *Ibid* 49-50; it is there pointed out that Coke's authorities do not bear him out, "and there are many other things in his posthumous works, especially in his pleas of the Crown concerning treasons, and in his jurisdiction of the courts concerning Parliaments, which lie under a suspicion whether they received no alteration, they coming out in the time of that which is called the Long Parliament;" as it is there said it is difficult to see how it can be held that the plain words of the later statute do not repeal the earlier; and the judges seem to have been of this opinion in 1555, Dyer 131b; and they were certainly of this opinion on Raleigh's trial in 1603, 2 S.T. 15.

⁷ Hale, P.C. i 298-300.

⁸ *Ibid* ii 286.

⁹ 1 Elizabeth c. 5 § 10; 13 Elizabeth c. 1 § 9; the fact that the statute of 1554 itself required two witnesses for the treasons created by that Act seems to me to be conclusive as to the view of its framers.

¹⁰ (1640) 3 S.T. at pp. 1450, 1463, 1479.

¹¹ 7 S.T. 119, 120.

¹² Foster, *Discourses* 237; for his argument that this was the right view see *ibid* 237-240.

¹³ 7 William III. c. 3 § 2.

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both short-lived and savage. They provided that insanity supervening after the commission of treason should be no impediment to the trial, and should not excuse from punishment.¹ These clauses were repealed by the statute of 1554 which provided that all trials for treason should be according to the course of the common law.² But two other clauses of this statute, which provided for the forfeiture "as well of uses rights entries conditions, as possessions remainders reversions and all other things" without office or inquisition found,³ survived till 1870.⁴ The second of these statutes dealt with conspiracies to liberate those charged with or convicted of treason. It provided that a conspiracy to liberate such persons before indictment should be misprision of treason, that a similar conspiracy after indictment should be felony, and that after attainder it should be treason.⁵

The only statute of this period which made any relaxation in the severity of the substantive law of treason as defined by Edward III.'s statute was the famous statute of 1494.⁶ It enacted that faithful service to a king *de facto* should not render the person doing such service liable to the penalties of treason, on the restoration of the king *de jure*. Though passed to meet the political needs of the moment,⁷ it has been more permanent than any of the other statutes of this period on the subject of treason. It is the only one of them which still forms part of our present law.

(2) *Felony.*

The extensions of the sphere of felony during this period took two forms. In the first place some of the older felonies were

¹ 33 Henry VIII. c. 20 §§ 1-3; these clauses gave power to try in their absence persons who had become insane after they had committed treason.

² 1, 2 Philip and Mary c. 10 § 6; Coke, Third Instit. 6; Hale, P.C. i 35.

³ §§ 3 and 4; the Act also amplified 26 Henry VIII. c. 13 which provided for the forfeiture of entailed lands as against the traitor and his heirs; see Dowtie's Case (1584) 3 Co. Rep. at f. 10b; Hale, P.C. i 240 seqq.; but it was repealed by 34, 35 Henry VIII. c. 20 in respect of estates tail granted by the Crown; however, a later Act of 5, 6 Edward VI. c. 11 § 6 had the effect of making land held by a tenant in tail of the gift of the crown liable for forfeiture, and so repealed the clause of 34, 35 Henry VIII. c. 20 which had prevented this result, Hale, P.C. i 243-244; for the effect of the clauses of 33 Henry VIII. c. 20 on powers of appointment see Sugden, Powers (8th Ed.) 182-186; vol. vii 177-180. Note that lands held by a corporation sole were only forfeited for treason during the life of the traitor; the Acts which dissolved the monasteries, 27 Henry VIII. c. 28 § 3, and 31 Henry VIII. c. 13 § 4, made the forfeiture perpetual; but the common law was restored by 5, 6 Edward VI. c. 11 § 12; see I. D. Thornley, Royal Hist. Soc. Tr. (3rd Series) xi 117-119.

⁴ 33, 34 Victoria c. 23.

⁵ 14 Elizabeth c. 2.

⁶ 11 Henry VII. c. 1; cf. vol. iii 468.

⁷ Stephen, H.C.L. ii 254-255; this is shown by the proviso to the statute "that no person or persons shall take any benefit or advantage by this Act which shall hereafter decline from his or their allegiance;" this proviso is, as Hale says, P.C. i 274, "dark and dubious;" if strictly construed it would go far to deprive the Act of all but a temporary importance, except as to persons born during an usurpation; see Kelyng at p. 14, and Vane's Trial 6 S.T. at pp. 152, 175, 178-179.

extended in scope, and in the second place a large number of new felonies were created. I shall deal with the legislation on this subject under these two heads:—

(i) *Extensions of the older felonies.*

In 1604 the statute of stabbing,¹ said to have been passed in consequence of the affrays between Englishmen and Scotchmen at James I.'s court,² enacted that if a man stabbed another who had no weapon drawn or had not first struck at the stabber, and the person stabbed died within six months, the stabber should be guilty of murder. As Stephen has pointed out, the development of the law as to the circumstances under which homicide is committed with "malice prepense," and so is murder, has superseded the necessity for the statute.³

In 1623-1624 the scope of murder was further extended by a statute which made a mother who concealed the death of her bastard child liable to the punishment for murder.⁴

In the offences against property several extensions were made. We have seen that a statute of 1527 created the offence of larceny by a bailee if the bailee was a servant. It enacted that if servants, not being apprentices or under the age of eighteen, embezzled goods entrusted to them of the value of 40s. or upwards, they should be guilty of felony.⁵ This Statute was repealed by the Act of 1553 which repealed the Acts of Henry VIII.'s reign creating new felonies;⁶ but it was revived and made perpetual by an Act of 1562-1563.⁷ In 1589 persons who embezzled munitions of war to the value of 20s. or upwards, which had been entrusted to them, were likewise declared to be guilty of felony.⁸

In 1562-1563 a much-needed consolidation and extension of the law as to forgery was effected.⁹ We have seen that in the Middle Ages the scope of forgery had been very narrow. Besides the kinds of forgery which were treason, the only forgery punishable at common law was the reliance on a false document in a court of law.¹⁰ A statute of Henry V.'s reign had given a civil remedy to those whose title to real estate had been disturbed by

¹ 2 James I. c. 8.

² Stephen, H.C.L. iii 47.

³ Ibid 48-49; for this development see vol. viii 303, 435-437.

⁴ 21 James I. c. 27.

⁵ 21 Henry VIII. c. 7; vol. iii 365; 27 Henry VIII. c. 17 deprived those guilty of this offence of clergy and sanctuary.

⁶ 1 Mary st. 1 c. 2 § 3; 27 Henry VIII. c. 17 was saved by the repealing act of 1547, 1 Edward VI. c. 12 § 18.

⁷ 5 Elizabeth c. 10.

⁸ 31 Elizabeth c. 4.

⁹ 5 Elizabeth c. 14; see generally on this subject Hale, P.C. i 682-687; Stephen, H.C.L. iii 180-188.

¹⁰ Vol. ii 366; vol. iii 400.

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the production before a law court of forged title deeds, and had enacted that the guilty person should be fined.¹ But beyond this the legislature had done nothing.

The inadequacy of the common law had led to the interference of the court of Star Chamber. It would appear from Hudson's treatise² that, throughout the sixteenth century, it had anticipated the legislature by exercising a general jurisdiction in cases of forgery;³ and no doubt the cases which came before that court helped to call the attention of the legislature to the need for an improvement in the law. The Act of 1562-1563⁴ testified in its preamble to the widespread practice of forging charters, evidences, deeds, and writings, and went on to provide that (i) the forgery of deeds, charters, court rolls, or wills in writing, with intent to disturb the title of any person entitled to an estate of freehold; or (ii) the giving in evidence in any action of such forged documents knowing them to be forged; should render the person guilty of these practices liable to be sued at common law or before the Star Chamber by the person injured, and also liable to be punished by the forfeiture of the rents and profits of the land for his life, by perpetual imprisonment, and by the pillory, branding, and loss of ears. Similar but less severe penalties were provided for those who forged deeds with intent to claim a lease for years or an annuity, or who forged obligations, acquittances, or releases. On a second conviction all these offences were made felony without benefit of clergy.

After this statute was passed the Star Chamber ceased to exercise jurisdiction in all cases where the accused had already been convicted of a first offence,⁵ since it had no power to deal with felony. But in all other cases it exercised concurrent jurisdiction with courts of common law; and it did not cease to exercise its former jurisdiction over cases not touched by the statute⁶—"many

¹ 1 Henry V. c. 3; vol. ii 452.

² Treatise on the Court of Star Chamber Pt. II, § 6, Coll. Jurid. vol. ii; for Hudson and his Treatise see vol. v 164-166.

³ Hudson says, *op. cit.*, "Infinite are the examples of punishments inflicted upon forgeries of all sorts before the statute of 5 Elizabeth;" for an interesting case of 1433 dealt with by the Council see *Danvers v. Broket*, *Select Cases before the Council* (S.S.) 97.

⁴ 5 Elizabeth c. 14; see Coke, *Third Instit.* c. lxxv for an exposition of the statute; the analogous offence of levying fines, suffering recoveries, and acknowledging statutes, recognisances, bails, and judgments in the names of other persons not privy or consenting thereto was made felony by 21 James I. c. 26.

⁵ "In which case (i.e. of a second offence), although forgery be here properly examinable, yet the second forgery, which is felony, may not be here examined to prepare a trial against the life of a man; as it was adjudged *Tr. 1 Fac. inter Reads and Booth* concerning the forging of the deeds of *Sir Thomas Gresham's* lands." Hudson 65.

⁶ "If the offence of forgery be said to have been done against the laws and statutes of this kingdom, the offence may be punished at this day, as it was before the statute; or, if it be within the statute, this court hath power to inflict the punishment of the

are the forgers," says Hudson, "which have been sentenced in this court which were not within this law."¹ This seems to have given rise to the belief that, apart from the Act, forgery was punishable at common law²—a belief which was certainly not historically true. But it was a belief which enabled the common law courts, after the abolition of the court of Star Chamber, to treat as misdemeanours cases of forgery which did not fall within the Act.³ Though the Act and the cases decided under it helped to make the definition of forgery more precise, the wide jurisdiction of the Star Chamber, in this as in other cases,⁴ helped to broaden permanently the outlook of the common law judges, and so to widen the sphere of the criminal law.

(ii) *The new felonies.*

(a) *Riots.*

The statute of 1549-1550 which enacted that those taking part in certain kinds of riotous assemblies, and not dispersing after due notice, should be guilty of treason, enacted also that those taking part in certain other kinds of riotous assemblies, and not dispersing after due notice, should be guilty of felony.⁵ The latter class of assemblies were those which met for the purpose of destroying certain kinds of property;⁶ or of securing the forcible abatement of rent or the price of corn. Moreover it was further enacted that those who summoned, procured, moved, or stirred any such assembly should be guilty of felony.⁷ We have seen that in 1553 the offences which were treason under this Act were made felony.⁸

(b) *Damage to Property.*

Unless damage to property took the form of arson it was not at common law a criminal offence. It was redressible only by the semi-criminal remedy of trespass.⁹ In 1530-1531 breaking

law. But if the bill be laid upon the statute, then must the offence be proved to be within the statute, or else no sentence can be given," Hudson 65.

¹Ibid 70—he gives as instances, a case of 4, 5 Philip and Mary where a sentence was given for forging testimonials; a case of 12 James I. where Harvey, an alderman of Bridgwater, was sentenced for putting the town seal to a certificate of good behaviour without the consent of the mayor and alderman; similarly rasure of writs, and inserting names in blank warrants of sheriffs was punished.

²Ibid 66; and Coke seems to assume this, Third Instit. 168, 169; cf. Bl. Comm. iv 245.

³Viner, Ab. *tit.* Forgery A. § 3, and cases there cited; Comyn. Digest, *tit.* Forgery A. 1.

⁴Vol. v 201, 203, 204, 208, 212.

⁵3, 4 Edward VI. c. 5 § 2.

⁶Breaking the inclosure of any park, or the banks of any fishpond, or conduit, or the destruction of deer, rabbit warrens, dovehouses, fish in ponds, houses, barns, stacks of corn.

⁷§§ 3 and 10.

⁸1 Mary Sess. 2 c. 12; above 497.

⁹Vol. iii 370.

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certain dykes in Norfolk and the Isle of Ely was made felony, and this statute was revived by an Act of 1555.¹ In 1545 it was made felony to burn or cut a frame of timber prepared for making a house; and other forms of damage to person and property were made misdemeanours, for which the offender was liable to a fine of £10, and an action for trespass for treble damages at the suit of the injured party.² The felony created by this Act was repealed by the Acts of 1547 and 1553;³ and the misdemeanours created by the Act were in some respects modified by an Act of 1562-1563.⁴

(c) *Immorality.*

In 1533-1534 the offence of sodomy was made a felony.⁵ This Act having been repealed in 1547, it was again provided in 1548 that the offence should be felony, with the salutary provisos that conviction should not entail corruption of blood, that the period of limitation should be six months, and that no one who might profit by the conviction should be a competent witness against the accused.⁶ This Act was repealed in 1553;⁷ but in 1562-1563 the statute of Henry VIII. was revived and made perpetual.⁸ In 1575-1576 the violation of females under ten years of age was made felony without benefit of clergy.⁹ In 1603 bigamy was made a felony, with a proviso that the Act should not apply if a wife or husband were absent beyond the sea for seven years, or if neither had heard of the other for that time.¹⁰

(d) *Abduction.*

In 1487 it was provided that all who carried off women, who were the heiresses of property, against their will, and all who procured, aided, and abetted the carrying off, or who received the woman so carried off, should be guilty of felony.¹¹ It was provided that the Act should not extend to those who carried off women claiming them as their wards or villeins. In 1597-

¹ 22 Henry VIII. c. 11; 2, 3 Philip and Mary c. 19; Coke, Third Instit. c. xlv.

² 37 Henry VIII. c. 6.

³ 1 Edward VI. c. 12; 1 Mary Sess. 1 c. 1 § 3.

⁴ 5 Elizabeth c. 21; below 506. In 1601 an Act for parts of Cumberland, Westmoreland, Northumberland and the bishopric of Durham made several forms of damage to person and property, particularly common there, felonies without benefit of clergy.

⁵ 25 Henry VIII. c. 6; for the earlier history of this crime, which before this Act was an ecclesiastical offence, see P. and M. ii 554, 555.

⁶ 2, 3 Edward VI. c. 29.

⁷ 1 Mary Sess. 1 c. 1 § 3.

⁸ 5 Elizabeth c. 17.

⁹ 18 Elizabeth c. 7.

¹⁰ 1 James I. c. 11—there was also a proviso in favour of those divorced by the ecclesiastical courts, in cases where those courts had pronounced a degree of nullity, and in cases of marriage before the age of consent; Porter's Case (1637) Cro. Car. 461; Hale, P.C. i 692-694.

¹¹ 3 Henry VII. c. 2.

1598 it was enacted that those convicted under this statute as principals, procurers, or accessories before the fact, should be deprived of benefit of clergy.¹ We shall see that other offences of a similar kind were made misdemeanours by a statute of 1557-1558.²

(e) *Hunting and Game.*³

The legislation on this subject proceeded on many different principles. Sometimes it proceeded on the principle that assemblies for the purpose of hunting and sporting gave opportunities for riot and disorder; sometimes on the principle that hunting and sporting ought to be the privilege of the landowners, and that other classes ought to employ themselves in a manner more suited to their condition in life; and sometimes on the principle that it resulted in the wanton destruction of game. We can see all these principles underlying Richard II.'s statute on this subject;⁴ and they appear clearly enough in the various statutes of this period.

The earliest statute was passed in the first year of Henry VII.'s reign,⁵ and was directed mainly to the suppression of disorder. It was recited that hunting in forests, parks, and warrens in disguise led to rebellions and riots; and it enacted that hunting in disguise or by night should be felony, and that the rescue of such offenders should likewise be felony.

Certain statutes of Henry VIII. created new felonies partly in order to suppress the evils of unlicensed sporting, partly in order to preserve the rights of the king and other landowners. A statute of 1539⁶ made fishing in a private pond by night, and breaking the head of a private pond by night or day, felony; and another statute of the same year⁷ made it felony to steal falcon's eggs in the royal manors, and to fail to restore to the king within twelve days a hawk which had been found. It was also made felony to enter by night or at any time in disguise into any chase or park belonging to the king or his children with intent to steal, slay, or hunt deer or rabbits. The provisions of this statute were modified in 1540.⁸ Killing deer in any park by night or at any time in disguise was made felony if the park was enclosed; but it was provided that all tenants could kill the rabbits on their own land. These statutes of Henry VIII.'s

¹ 39 Elizabeth c. 9.

² 4, 5 Philip and Mary c. 8; below 514.

³ See generally in this subject vol. i 107-108; Stephen, H.C.L. iii 276-282.

⁴ 13 Richard II. st. 1 c. 13; vol. ii 466; Stephen, H.C.L. iii 277.

⁵ 1 Henry VII. c. 8.

⁶ 31 Henry VIII. c. 2.

⁷ Ibid c. 12.

⁸ 32 Henry VIII. c. 11.

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reign were repealed in the first year of Edward VI.'s reign.¹ The two last mentioned were revived in 1549 for three years, but were suffered to expire at the end of that time.²

The statutes which proceeded on the principle that game ought to be preserved, generally made offences against them misdemeanours; and, after Edward VI.'s reign, no statute, except that of Henry's VII.,³ made offences in connection with hunting and sporting a felony. A statute of 1495⁴ imposed penalties on those who took pheasants' or partridges' or hawks' or swans eggs on another's land, and a statute of 1503-1504 was passed to prevent the destruction of deer and herons.⁵ In 1523⁶ penalties were imposed on those who tracked and snared hares in the snow, and in 1540 on those who sold partridges.⁷ In 1562-1563 breaking the heads of ponds, fishing in private waters, breaking into a deer park made with the queen's licence and hunting the deer, and taking the eggs of hawks were made misdemeanours.⁸ In 1581⁹ taking and killing pheasants and partridges by night on another's land, and hunting with spaniels in standing corn without the consent of the owner of the corn were prohibited. There was further legislation in 1603-1604 and 1609-1610 against the destruction of pheasants, partridges, and hares, and as to the penalties for unlawful taking;¹⁰ and against the destruction of deer and rabbits in 1605-1606 and 1609-1610.¹¹

(f) Religion.

Of the offences against religion the first and foremost was heresy. We have seen that in the Middle Ages it was an offence which was punishable by the ecclesiastical courts; but that in this period it was brought under the jurisdiction of the common law courts. I have already said something of its history and of the chief statutes relating to it.¹² In Henry VIII.'s, Edward VI.'s, and Elizabeth's reign the maintenance of the new religious settlement necessitated the creation of a number of new felonies and misdemeanours. Illustrations are the Act of the Six Articles,¹³ an Act of 1547 against those who spoke irreverently of the sacrament,¹⁴ Edward VI.'s Act of Uniformity,¹⁵ Elizabeth's

¹ Edward VI. c. 12.

² Henry VII. c. 8.

³ Henry VII. c. 11.

⁴ Henry VIII. c. 8.

⁵ Elizabeth c. 10.

⁶ 1 James I. c. 27; 7 James I. c. 11; for James's views on the necessity for the preservation of game see Works, 546-547.

⁷ 3 James I. c. 13; 7 James I. c. 13.

⁸ 31 Henry VIII. c. 14.

⁹ 2, 3 Edward VI. c. 1; 5, 6 Edward VI. c. 1.

¹⁰ 3, 4 Edward VI. c. 17.

¹¹ Henry VII. c. 17.

¹² 14, 15 Henry VIII. c. 10.

¹³ Elizabeth c. 21.

¹⁴ Vol. i 616-619.

¹⁵ 1 Edward VI. c. 1.

Acts of Supremacy and Uniformity,¹ and the legislation both of Elizabeth's and James I.'s reigns against Jesuits and other religious sectaries.² In 1605-1606 it was enacted that if any persons left the realm to serve any foreign prince without taking the oath of allegiance, or if any one who had held a commission in the army left the realm with a view to such service, without entering into a bond neither to be reconciled to the pope nor to be party to any plot against the king without revealing it, they should be guilty of felony.³

Perhaps the most curious development in the criminal law relating to religious or quasi-religious offences is to be found in the legislation against sorcery and witchcraft. Here again a set of offences, which had formerly come within the exclusive cognisance of the ecclesiastical courts, was taken over by the state. But to understand the statute law on this topic I must say something of the earlier history of this supposed crime.⁴

A belief in the occult powers of witches, magicians, and sorcerers is common to all primitive peoples.⁵ Such a belief may change its form, but it is not necessarily dispelled by an advancing civilization.⁶ With the advent of Christianity it took the form of a belief that the world was peopled with malignant demons, who, acting under the orders of their master the devil, were actively employed in preventing the extension of Christ's kingdom and in harassing the faithful.⁷ Enactments of the early Christian emperors against magicians were preserved in Justinian's Code, and "did much harm in after ages."⁸ The Bible clearly laid it down that a witch should not be suffered to live;⁹ and the folk laws both of the Anglo-Saxons and of other tribes contained enactments against sorcerers.¹⁰ Charlemagne in the ninth,¹¹ and Cnut¹² in the eleventh century, legislated against them.

In the earlier and darker ages men believed so implicitly in the power of the church and of the individual Christian to overcome these evil beings that comparatively little was heard of

¹ Elizabeth cc. 1 and 2.

² 35 Elizabeth cc. 1 and 2; 1 James I. c. 4; 7 James I. c. 6.

³ James I. c. 4 § 12. The reason assigned is that, "It is found by late experience that such as goe voluntarily out of this realme of England to serve Forraigne Princes, States, or Potentates, are for the most part perverted in their religion and loyalty by Jesuites and fugitives, with whome they doe there converse."

⁴ On this subject see P. and M. ii 550-554; Lecky, *History of Rationalism* i chap. i; Stephen, *H.C.L.* ii 430-436.

⁵ Lecky, i 16, 17.

⁶ *Ibid* 15—no doubt, as Lecky says, the main reason for the perdurance of the old belief was the fact that, "the ancient civilizations were never directed earnestly to the investigation of natural phenomena."

⁷ Lecky, *op. cit.* i 20-26.

⁸ P. and M. ii 551 n. 2; Code ix 18, there cited.

⁹ Exodus xxii 18.

¹⁰ Lecky, *op. cit.* i 41.

¹¹ P. and M. ii 551.

¹² Cnut ii 4, Liebermann 311.

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proceedings for witchcraft and sorcery.¹ "The exact boundary between legitimate and the illegitimate sciences was vague. A little harmless necromancy would be met by blame that was tinged by awe and admiration; bishops and even popes, it was whispered, had trifled with the powers of evil."² It was far otherwise when, with the revival of learning in the twelfth century, men "had learned to doubt but had not yet learned that doubt was innocent," when "the new mental activity had produced a variety of opinions, while the old credulity persuaded men that all but one class of opinions were suggestions of the devil."³ War must be waged against the heresies to which such doubts gave rise; and of these heresies, the practice of witchcraft and sorcery was the most pernicious.⁴

"Sorcery," as Maitland has well said, "is a crime created by the measures taken for its suppression."⁵ As persecution increased, the belief in and the horror excited by it became more intense. The strongest and acutest intellects of the day firmly believed that human beings could and did make compacts with the devil which gave them supernatural powers to inflict harm.⁶ Two other causes contributed to foster this delusion. In the first place the intellectual conditions prevailing in the Middle Ages led men to suppose that all acts and events were immediately governed by the higher powers of good and evil.⁷ Thus all sudden and apparently fortuitous calamities affecting peoples and individuals were ascribed to direct demoniacal interference. It was inevitable therefore that when such calamities occurred a search should be made for the human agents through whose instrumentality the devil worked. In the second place the procedure of the Inquisition, by means of which this search was conducted, made it inevitable that it would not be fruitless. The horrible punishments inflicted for the crime, and the tortures used to extort confessions, easily procured testimony from the heated imaginations of the terrified, the ignorant, and the superstitious. This testimony, coupled with the general sense of insecurity which such epidemic visitations as the Black Death produced, gave rise to a body of evidence as to the existence and

¹ Lecky, *op. cit.* i 37-40—"What may be called the intellectual basis of witchcraft existed to the fullest extent. All those conceptions of diabolical presence; all that predisposition towards the miraculous, which acted so fearfully upon the imaginations of the fifteenth and sixteenth centuries, existed; but the implicit faith, the boundless and triumphant credulity with which the virtue of ecclesiastical rites was accepted, rendered them comparatively innocuous."

² *P. and M.* ii 551.

³ *P. and M.* ii 552.

⁴ Lecky, *op. cit.* i 66, instances such names as Thomas Aquinas and Gerson.

⁵ Above 11-12; *cp.* vol. ii 129-130.

⁶ Lecky, *op. cit.* i 49.

⁷ *Ibid.* 554.

nature of these evil agencies which made it wholly absurd to deny their existence.¹

The realistic imagination of mediæval men soon constructed a definite picture of the extent of the dominions of the devil, of the number ranks and employments of his subjects, and of the methods by which he was accustomed to harm and harass the human race.² In the fourteenth and fifteenth centuries the gradual decay of the beliefs, and the gradual change in the intellectual conceptions which underlay the life and thought of the Middle Ages, united with the growing definiteness in men's knowledge of the manner in which the devil worked, to cause a universal terror, which gradually overcast the horizon of thought, creating a general uneasiness as to the future of the church, and an intense and vivid sense of Satanic presence.³

The old intellectual system passed away in the sixteenth century. Its passing, so far from causing the decay of this superstition, gave it, in the first instance, an added strength. The religious conflicts of the Reformation tended to excite a religious fervour which increased men's consciousness of the consequences of sin, and of the reality of the active machinations of the devil. Heresy and witchcraft must be at all costs suppressed. Thus we find that all over the continent of Europe, in Protestant and Catholic communities alike, the war against witchcraft and sorcery was waged by church and state more fiercely than before. In the sixteenth century, as in the Middle Ages, the keenest intellects of the age gave it their active approval. Bodin wrote a book on the subject, in which he denounced the wickedness and folly of those who doubted the overwhelming evidence of the reality of the crime.⁴

In England the legal writers of the thirteenth century said that the crime could be punished by the king's courts by burning.⁵ But it was generally left to be dealt with by the ecclesiastical courts; and it seems that it was very seldom that cases occurred before any court, lay or ecclesiastical.⁶ In the fifteenth century the witch could be punished under the statutes relating to heresy;⁷ and cases, sometimes apparently of a political nature, were brought before the

¹ Lecky, *op. cit.* i 68, 71.

² See a curious work, entitled *Pseudomonarchia Dæmonum*, of the sixteenth century noted by Lecky, *op. cit.* i 87 n. 1, in which the names of seventy-two princes of the devils are given, and the number of their subjects estimated at 7,405,926; Sprenger's *Malleus Maleficarum* collected the most important mediæval treatises in which the current theories of witchcraft were contained; for the most part they were written by inquisitors, Lecky, *op. cit.* i 68 n. 1.

³ *Ibid.* 59.

⁴ See *ibid.* 87-91 for an account of his book called "*Démonomanie de Sorciers*."

⁵ *Fleta* p. 54; Britton i 42; P. and M. ii 552.

⁶ *Ibid.* 552, 553.

⁷ *Ibid.* 553; 2 Henry IV. c. 15.

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Council.¹ Witchcraft was the principal charge against Joan of Arc; and a similar charge was brought by Cardinal Beaufort against the duchess of Gloucester in 1441.² But there is good reason to think that, even in the fifteenth century, the war against witches was waged less fiercely in England than on the continent. "When there is no torture there can be little witchcraft."³ But in England, as elsewhere, the Reformation called public attention to the need for its suppression. The first statute on the subject was passed in 1541-1542.⁴ It was enacted that it should be felony without benefit of clergy to devise or practise "any invocations or conjurations of spirits witchcrafts inchantments or sorceries," with intent to get or find money or treasure, to waste or consume any person in body member or goods, to provoke unlawful love or any other unlawful act, to find lost or stolen goods; or, in despite of Christ, to pull down crosses. This statute was repealed by the statutes of 1547 and 1553;⁵ but in 1562-1563,⁶ owing perhaps to the exhortations of bishop Jewel, another statute was passed which made it felony to use exercise or practise any invocations or conjurations of evil spirits to or for any purpose, or to cause by witchcraft the death of another. It was made a misdemeanour to cause by witchcraft harm to body member or goods, or unlawful love, or to pretend by this means to discover treasure. This statute was "neither so severe nor so comprehensive as the canon law"⁷ and the continental legislation;⁸ and there do not seem to have been many prosecutions under it.¹⁰ But in the following reign the fanatical belief of James I. in the existence of this crime¹¹ gave rise to more severe legislation and a more active enforcement of the law. An Act of 1603-1604 declared to be felony without

¹ P. and M. ii 553.

² Lecky, *op. cit.* i 101; Stubbs, C.H. iii 136-137; Harcourt, *Court of the Lord High Steward* 380.

³ P. and M. ii 553; cf. the views of James I. on the methods for discovering and trying witches, *Works* 135-136.

⁴ 33 Henry VIII. c. 8; the year before the Council had before it a case of necromancy of a semi-treasonable character, Nicholas vii 12, 30, 38; and in the same year there was a case against a physician who had in his possession "instruments of conjuration," *ibid.* 107.

⁵ Edward VI. c. 12; 1 Mary Sess. 1 c. 1; but it appears that the Council were prepared to deal with such cases—in 1555 four persons were before it on the charge of "calculating and conjuring," *Dasent* v 143.

⁶ Elizabeth c. 16.

⁷ Lecky, *op. cit.* i 102 n. 2, citing Strype, *Annals of the Reformation* i 11.

⁸ P. and M. ii 553.

⁹ Lecky, *op. cit.* i 98-100, 102, 103.

¹⁰ P. and M. ii 554; Lecky, *op. cit.* i 103; in 1564-1565 the Council directed the arrest of Agnes Mondaye and a search in her house for "such thynges as may tende to witchcraft," *Dasent* vii 200, 201; and in 1578-1579 there was an examination of witches at Windsor; they were supposed to have caused death by means of wax images, and it was feared that the Queen was aimed at, *Dasent* xi 22.

¹¹ See his three books on *Dæmonologia*, *Works* 91-136.

benefit of clergy the invocation of evil spirits, the consultation or rewarding of evil spirits, the taking up of dead bodies to employ any part of them for the purposes of witchcraft, and the use of witchcraft to kill or hurt any person. Further, the use of witchcraft to discover treasure, or to provoke unlawful love, or to injure any person's property, was to be punishable on a first conviction with imprisonment, and on a second as felony.¹

Somewhat allied to this legislation was that directed against false and fantastical prophecies. The making of such prophecies was declared to be felony in 1541-1542;² and after the repeal of this statute in 1547,³ such prophecies were made misdemeanours by statutes of 1549 and 1562-1563.⁴ The reason for the enactment of these two latter statutes, and probably of the first-named also, was the fact that these prophecies were made for the purpose of stirring up rebellion.⁵

(g) *Miscellaneous.*

The legislation dealing with the poor law, with the coinage, and with the regulation of industry and commerce gave rise to a certain number of new felonies.⁶ For instance a statute of 1552, re-enacting statutes of Edward IV. and Henry VII.'s reigns, made it felony to export gold and silver.⁷ Egyptians who refused to leave the country within a specified time were declared felons.⁸ Unlicensed begging on a third conviction, and returning to England after having been banished as a dangerous rogue, were similarly treated.⁹ A short-lived statute of 1545 made it felony to make and leave in a public place anonymous writings accusing persons of treason.¹⁰ Statutes of 1554 and 1558 had made it a misdemeanour to speak or write with a malicious intent false and slanderous words of the king or queen.¹¹ In 1580-1581¹² writing

¹ James I. c. 12; we shall see that there were witch trials in the latter half of the seventeenth century; but, though no less a person than Hale, C.B. believed in the existence of witches, this belief was then on the decline, vol. vi c. 8; on the whole subject see Foxcroft, *Life and Letters of Sir G. Savile* ii 493 n. 2.

² 33 Henry VIII. c. 14.

³ 1 Edward VI. c. 12.

⁴ 3, 4 Edward VI. c. 15; 5 Elizabeth c. 15.

⁵ We get a parallel in the legislation of the Roman Empire; Lecky, *op. cit.* i 18, 19, tells us that in the later period of pagan Rome the laws against magic were revived not on religious, but on political grounds—"under the head of magic were comprised some astrological and other methods of foretelling the future; and it was found that these practices had a strong tendency to foster conspiracies against the emperors. The soothsayer often assured persons that they were destined to assume the purple, and in that way stimulated them to rebellion. By casting the horoscope of the reigning emperor, he had ascertained, according to the popular belief, the period in which the government might be assailed with most prospect of success; and had thus proved a constant cause of agitation."

⁶ Above 392 seqq., 331-332, 335

⁷ 7 Edward VI. c. 6.

⁸ 1, 2 Philip and Mary c. 4.

⁹ 14 Elizabeth c. 5; 39, 40 Elizabeth c. 4.

¹⁰ 37 Henry VIII. c. 10.

¹¹ 1, 2 Philip and Mary c. 3; 1 Elizabeth c. 6.

¹² 23 Elizabeth c. 2.

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such words was declared to be felony, and speaking such words was declared to be felony on a second conviction. It was further made felony to cast the queen's nativity, to prophesy the duration of her life, or to foretell the successor to the throne and the changes which would take place on her death. The Act was to last during the life of the Queen, and during its continuance the Acts of 1554 and 1558 were repealed.

(3) *Misdemeanour.*

We have seen that in the latter part of the mediæval period the criminal law was unable to prevent many forms of atrocious wrong to person and property.¹ This was due mainly to two causes. In the first place the weakness of the executive had paralysed the efficient working of the existing rules of the criminal law. In the second place the law itself was defective. No doubt in most cases an injured person could take proceedings for trespass;² and trespass, as we have seen, was a remedy of a quasi-criminal nature.³ But owing to the weakness of the executive the civil aspect of trespass had developed at the expense of its criminal aspect. The injured individual was left to remedy any wrong he had suffered by suing for damages; and owing partly to the manner in which the sheriffs, juries, and other subordinate officers of justice could be corrupted or terrorized, partly to the unscrupulous use which was made of a vicious system of procedure, such a remedy was worse than useless. In the sixteenth century these defects were met in two ways. Firstly by a large extension of the criminal jurisdiction of the Council, and secondly by large statutory extensions of the criminal law. With the contributions made to the growth of the criminal law by the extension of the jurisdiction of the Council I shall deal more fully in a later chapter.⁴ I am here chiefly concerned with the manner in which its sphere was extended by statute.

The statutory extensions of the spheres of treason and felony were accompanied by similar statutory extensions of the sphere of misdemeanour. These statutory extensions emphasized the criminal side of trespass; consequently it is from this century onwards that the term trespass tends to be applied only to wrongs redressible by a civil action, while the term misdemeanour is appropriated to describe wrongs under the degree of treason or felony which are redressible by a criminal prosecution. In some cases of course an injured person could, and still can, elect which manner of proceeding he will adopt. In other cases the sixteenth

¹ Vol. ii 415-416.

² Vol. ii 364-365.

³ Vol. iii 317-318, 370-371.

⁴ Vol. v 167 seqq.

century statutes gave both a civil and a criminal remedy. The legislation as to forgery and damage to property¹ affords examples. But, with the development of the criminal law, it was inevitable that the scope of and principles applicable to the law of tort should become more sharply differentiated from the scope of and the principles applicable to the criminal law. Moreover the development of the law of procedure and pleading tended to widen the difference. The criminal procedure, whether applied to the felonies or to offences under the degree of felony, tended to fall apart from the civil procedure applicable to trespass, and the many offshoots of trespass, which were beginning in this period to show signs of overrunning the whole field of common law jurisdiction. Thus the creation by the legislation of this period of a large number of offences under the degree of felony, which were punishable on indictment by a strictly criminal procedure, gave to the misdemeanour the more precise meaning and the importance which it still possesses in our criminal law. Just as the developments which I have described in the law of treason and felony show that the state had mastered the lawlessness which had reduced it to impotence in the fifteenth century; so, the continuous increase in the number of the misdemeanours created by statute, from the sixteenth century onwards, shows that it was prepared to exercise a constantly increasing control over all departments of the national life through the machinery of the criminal law.

I have already touched upon some of these misdemeanours in describing the additions made to the list of felonies during this period. They are often less heinous forms of the same offence, or, in some cases, the same offence committed for the first time.² Thus we get in the case of the misdemeanours as in the case of the felonies a number of offences connected with the poor law, with vagrants, with the regulation of trade, with the preservation of game, with religion,³ and with the safety of the state.⁴ Similarly Edward VI.'s legislation as to riot, which created new varieties of treason and felony, created also new misdemeanours.⁵ Occasionally the creation of a new statutory misdemeanour emphasized rules laid down by royal proclamation—an illustration is a statute of 1592-1593 which restricted the building of small houses in London and Westminster.⁶ In other cases quite new

¹ 5 Elizabeth c. 14; 37 Henry VIII. c. 6; 3, 4 Edward VI. c. 5 § 6.

² Above 502, 504, 506, 512.

³ Above 510, 511; and see e.g. 3 James I. cc. 4 and 5; 3 Charles I. c. 3.

⁴ See e.g. 7 James I. c. 6, which required a long list of persons to take the oath of allegiance, and provided that those refusing should incur the penalties of a Praemunire.

⁵ 3, 4 Edward VI. c. 5 §§ 6 and 12.

⁶ 35 Elizabeth c. 6: see above 303 for the proclamations on this subject.

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and independent developments of the criminal law were made in this way. With these cases I must deal, as I dealt with the felonies, and consider them under several distinct categories.

(a) *Offences against person and property.*

In 1511-1512¹ an attempt to enter a house in a mask or other disguise, or to make an assault or affray on the highway or elsewhere, was punished by imprisonment; and a penalty was imposed on the vendors of these masks. In 1557-1558² the abduction of heiresses, being minors under sixteen, without their parents' consent, was made punishable with fine or imprisonment; and a long term of imprisonment was imposed on those who in addition violated or married such heiresses. If the heiress consented, her next of kin were to enjoy the profits of her land during her life. In 1541-1542³ to obtain falsely and deceitfully chattels or money by false tokens or counterfeit letters was made punishable by the pillory and other corporal penalties. The statute specially saved the civil remedies of those who had been thus deceived. In 1566 cutpurses and pickpockets, who, as the statute said, had "made among themselves as it were a brotherhood or fraternity of an art or mystery," were deprived of the benefit of clergy.⁴ Several minor forms of damage to property, such as cutting growing corn, robbing orchards, digging up fruit trees, or breaking fences, were made punishable by fine in 1601;⁵ to which list in 1609-1610 was added the burning of moors in certain places at unseasonable times.⁶

(b) *Offences against morals.*

At the end of this period we can trace Puritanical influences in legislation directed against profane swearing,⁷ and against the profanation of the Lord's day either by doing certain kinds of work,⁸ or by meetings of persons for sport out of their own parishes.⁹ But a more important and a more permanent contribution to the law, which is probably to be ascribed in part to the same influences, was made by a set of statutes of the early Stuart period which attempted to suppress the prevalent vice of drunkenness. Some of these statutes attempted to effect their

¹ 3 Henry VIII. c. 9.

² 33 Henry VIII. c. 1.

³ Elizabeth c. 4; cf. Aydelotte, *op. cit.* 94-97.

⁴ Elizabeth c. 7.

⁵ 21 James I. c. 20; for a bill of 1610 which was dropped in the House of Lords see *Hist. MSS. Com.* 3rd Rep. 13.

⁶ 3 Charles I. c. 2.

⁷ 4, 5 Philip and Mary c. 8.

⁸ 7 James I. c. 17.

⁹ 1 Charles I. c. 1.

object directly, and imposed penalties for drunkenness.¹ But most of them followed precedents set by statutes of Henry VII. and Edward VI.'s reigns,² and attempted to effect their object indirectly. They gave the justices of the peace power to suppress ale-houses where drunkenness or disorderly conduct was permitted, and some of them subjected the keepers of these ale-houses to penalties if they permitted drinking contrary to their provisions.³ But this legislation was not found to be satisfactory. The justices were careless and offenders were not punished;⁴ while the device of granting a patent to certain persons to see that the law was enforced⁵ failed owing to the corruption of the patentees⁶ and the opposition of Parliament.⁷ The judges resolved in 1625 that the statutes in force did not prevent any one who wished from opening an ale-house.⁸ The justices could suppress an ale-house which proved to be a nuisance; they could not prevent it from being opened.⁹ It was probably in consequence of this resolution that in 1627 the legislature made a new departure and required all ale-houses to be licensed.¹⁰ It thus inaugurated what was destined to become a very special and a very complicated branch of the law.

(c) *Perjury.*

It is in this period that the offence of perjury begins to assume its modern form, partly through the action of the legislature, and partly through the action of the courts. In order to understand that form it is necessary to say a few words as to its earlier history.

We have seen that the only form of perjury punished by the common law was the perjury of a jury.¹¹ For this the common law provided the writ of attain.¹² Perhaps this limitation of the sphere of the crime was reasonable in the days when juries were as much witnesses to as judges of the facts

¹ 4 James I. c. 5; 7 James I. c. 10; 21 James I. c. 7; 1 Charles I. c. 4; an Act similar to 21 James I. c. 7 was passed in both Houses in 1621, but did not receive the royal assent, *Hist. MSS. Com.* 3rd Rep. 22.

² 11 Henry VII. c. 4; 5, 6 Edward VI. c. 25.

³ 1 James I. c. 9; 7 James I. c. 10; 21 James I. c. 7; 1 Charles I. c. 4.

⁴ Gardiner, *op. cit.* iv 5; see James I.'s Works 566.

⁵ For this device see above 357-359.

⁶ Gardiner, *op. cit.* iv 42.

⁷ *Ibid.* 110.

⁸ Resolutions concerning Inns, Hutton's Rep. 99, 100.

⁹ "How and by what way or means the multitude of inns might be prevented by being suppressed . . . or how the number might be stinted. This point seemed to be difficult, and to contradict the resolution upon the first question (i.e. the resolution that any one might open an inn); and therefore it was agreed that they should advise concerning it; and the best way is, that they be strictly enforced to keep the assise, and not to suffer any to tittle in their inns; and by this way they would desist from their trade," *ibid.* 100.

¹⁰ 3 Charles I. c. 4.

¹¹ Vol. iii 400; P. and M. ii 529-541.

¹² Vol. i 337-339.

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at issue.¹ But, when the jury changed its character, it soon appeared that there was a large gap in the law. It is true that the ecclesiastical courts could punish perjury.² But their jurisdiction was ineffective for two reasons. In the first place they were constantly hampered by writs of prohibition because they often used this jurisdiction, as they used their jurisdiction over *laesio fidei*, to gain cognizance of cases concerning land or contracts to which they were not entitled.³ In the second place, as they naturally regarded the offence from the moral point of view, their treatment of it, even if they had been allowed by the lay courts to deal with it as they pleased, would hardly have resulted in any workable rules of law. It would have suffered from the opposite defect to that from which the common law suffered, because it would have been too wide to be practically effective. The common law was right when it limited the sphere of punishable perjury; but the nature of the limitation required to be recast in the light of the new developments which were taking place in the machinery of the courts. Seeing that the jury were fast ceasing to be witnesses, the procedure by writ of attaint was becoming obviously inapplicable to them. But these juries were led by evidence written or oral. It was upon such evidence that the courts outside the sphere of common law jurisdiction had always acted; and it was assuming an increasing importance in the common law courts. Therefore, just as it had become necessary to deal with the forgery of written evidence,⁴ so it had become necessary to deal with perjured oral evidence. In the case of perjury, as in the case of forgery, the Star Chamber led the way; and therefore the origins of our present law of perjury must, like the origins of our present law of forgery, be sought for partly in the jurisdiction assumed by the Star Chamber and partly in the legislation of this period.

It is clear from the account which Hudson gives of this branch of the jurisdiction of the Star Chamber⁵ that that court assumed power to punish practically all kinds of perjury committed by anyone in the course of legal proceedings. It extended not only to witnesses but also to presentments made and indictments found at courts leet and courts baron,⁶ and possibly also to false oaths made by compurgators.⁷ It did not extend to false oaths made by jurors upon which attaint lay, as this case was sufficiently dealt

¹ Vol. i 339-341.

² P. and M. ii 541; Stephen, H.C.L. iii 243.

³ Y.B. 2 Hy. IV. Trin. pl. 40; cf. Y.B. 2 Hy. IV. Mich. pl. 45.

⁴ Above 501-503.

⁵ Star Chamber, Part II. § vii.

⁶ Hudson 74.

⁷ Ibid 79, "I have heard it often moved, whether a man swearing falsely upon a wager of law, it were punishable in the Star Chamber? And although I have not judged in the point, yet I daresay it is there punishable."

with by the common law.¹ Nor did it extend to a false oath as to the remembrance of a fact;² but apparently it did extend to a false oath as to a person's belief.³ The chief limitation which the court imposed on its jurisdiction arose from a well-founded fear that too great severity might discourage the production of necessary testimony. Just as at the present day the burden of proof in an action for malicious prosecution is made to weigh heavily upon the plaintiff because the prosecution of a criminal is a public duty, so it was felt to be expedient so to mould the law as to perjury that honest witnesses would not be discouraged from coming forward to testify. Thus the court would hear no case of perjury in respect of pending proceedings;⁴ and at one period it hesitated to deal with perjured witnesses when the verdict had passed according to the evidence,⁵ or with allegations of perjury made against witnesses for the crown.⁶ But, when Hudson wrote, both these last two limitations had disappeared. All that was left of them was the rule, against which he protested, that "perjury committed against the life of a man for felony or murder" when the accused was convicted, was not examinable or punishable.⁷

In the earlier part of the century the legislature did little to remedy the inadequacy of the common law. In 1495 it improved the remedy against the perjured jury;⁸ and in the same year it passed two other acts against perjury. The first⁹ provided that, even if the jury were acquitted in the proceedings taken by writ of attain, a further enquiry might be taken as to whether any of the jury had been guilty of corrupt practices; and penalties were imposed upon jurymen so corrupted, and upon the plaintiffs or defendants who had corrupted them. The second¹⁰ was a short-lived act, which gave the chancellor, treasurer,

¹ Hudson 76—"but the imbracery, corruption, and instruction of jurors is here examinable."

² Ibid 81, 82.

³ Ibid 80, "It may be thought strange that a man deposing truth should be punished for perjury, and yet it is most certain; for in the case of *Vernon versus North*, a man was charged by persuasion to have deposed the value of cattle which he never saw; and that was held to be perjury although he deposed the truth."

⁴ Ibid 80; cf. *Lord Beauchamps v. Sir R. Croft* (1569) *Dyer* 285a for a similar decision that an action of scandalum magnatum would not lie for bringing an action for forging deeds against a peer, more especially while the writ was pending.

⁵ Ibid 74—"because . . . bills of perjury grew very frequent against witnesses, in all cases when a verdict was passed, to work a revenge or draw a composition;" however, after the statute of Elizabeth, the common law judges did not act on this principle, and the Star Chamber followed their lead.

⁶ Ibid 77.

⁷ Ibid 81; attempts to remedy this defect in the law by legislation in 1694 and 1701-1702 failed, see *House of Lords MSS.* i no. 860, iv no. 1712; the main reason for their failure seems to have been the fear of discouraging prosecutions; see *R. v. Macdaniel* (1756) 1 *Leach* 44.

⁸ 11 Henry VII. c. 24; supplemented by 23 Henry VIII. c. 3; and made perpetual by 13 Elizabeth c. 25; vol. i. 342.

⁹ 11 Henry VII. c. 21.

¹⁰ Ibid c. 25; it expired in 1504; below 518 and n. 8.

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and justices power to punish perjuries committed by officials, or juries, or by those who gave or submitted evidence before the Council or the Chancery. In 1540¹ various offences connected with litigation were penalized, including subornation of perjury; but it was not till 1562-1563² that the first comprehensive statute was made. It provided penalties for persons guilty of perjury or subornation of perjury in the giving of evidence before the Chancery, the Star Chamber, the court of Requests, or any other court which by the king's commission could hold a plea concerning any land, all courts of record, courts leet, courts baron, hundred courts, courts of ancient demesne, and the Stannary courts. It did not extend to perjured evidence before the ecclesiastical courts; and it saved the existing powers to punish perjury conferred by Henry VII.'s statute upon the chancellor and "others of the Kinges Counsell" which were usually exercised in the Star Chamber, and the powers exercised by the Councils of Wales and the North. In order that the statute might not have the effect of making it difficult for litigants to procure testimony it was provided that all witnesses who, on being duly summoned, failed to appear, should be liable to pay a fine, and to compensate the party to the action thereby damaged.³

After the passing of this statute some difficult questions arose as to the relation between the kinds of perjury which fell within its provisions, and the kinds of perjury, which, though not falling within its provisions, were punishable by the Star Chamber. It would appear from *Onslow's Case*⁴ that, shortly after the passing of the statute, some of the judges were of opinion that the only perjury punishable by any court was perjury which fell within the statute. The saving clause at the end of the statute they treated as meaningless. They pointed out that it could apply only to the Acts of 1487⁵ or 1495;⁶ that the first gave no power to punish perjury, and that the second had expired. But this view did not prevail. Both Hudson⁷ and Coke⁸ agreed in the view, expedient rather than historically sound,⁹ that perjury was an offence known to the common law, which could therefore be

¹ 32 Henry VIII. c. 9.

⁵ Elizabeth c. 9.

² But apparently it was sometimes necessary to get a special summons from the Council to induce witnesses to attend, see Dasesent xxiv 11, 12 (1592-1593).

⁴ (1566) Dyer 242b, 243a.

³ Henry VII. c. 1—Pro Camera Stellata.

⁶ 11 Henry VII. c. 25.

⁷ Star Chamber 72, 73.

⁸ Third Instit. 164, "When you have read the case in Mich. 7 and 8 Eliza. (Onslow's case) you will confess how necessary the reading of ancient authors and records is, and the continual experience in the Star Chamber is against the opinion conceived there. And Mich. 10 Jac. in the Star Chamber, in the case of *Rowland Ap Eliza*, it was resolved that perjury in a witness was punishable by the common law;" It was perhaps thought that the Act of 1495 was revived by the saving clause in Elizabeth's Act.

⁹ Stephen, H.C.L. iii 246.

punished either by the common law courts or by the Star Chamber, even though it did not fall within the provisions of the statute. Thus perjury committed before the ecclesiastical courts, which was specially excepted from the statute of Elizabeth, was punishable certainly by the Star Chamber,¹ and probably also by the common law courts.² The immediate result was that the wide jurisdiction of the Star Chamber continued to be exercised; and the ultimate result was that the principles which the exercise of that jurisdiction had established were imported into the common law.

Thus the offence of perjury, as it existed at the close of this period, was shaped partly by the legislature, partly by the common lawyers, and partly by the Star Chamber. The legislature had definitely penalized certain cases of false swearing. The common lawyers and the Star Chamber had agreed that certain other cases were also punishable. And in determining what other cases were thus punishable we can trace the influence of ideas coming from both these jurisdictions. Thus the rule laid down by Coke that the false oath must be material to the issue³ is probably, as Stephen says, "an adaptation of the old law of attainder."⁴ Attainder did not lie for falsely finding facts not in issue; and therefore, by analogy, a false oath as to facts not material to the issue was not and is not punishable. On the other hand, the fear that too great severity might discourage witnesses, which had tended to limit the jurisdiction of the Star Chamber, was probably the origin of the decisions, that the oath must be administered in the course of a judicial proceeding,⁵ and that no action on the case for damages could be brought by a person who had suffered by a perjury.⁶

¹ Hudson 74—he seems to think that, as all depositions there are *ut credit*, and as the perjury was therefore to be as to the belief, proceedings on it could only be taken in that court.

² Coke admits, Third Instit. 164, that perjury not grounded on the statute is "most commonly" punished in the Star Chamber; but it would seem that he considered that, in theory at least, the common law courts had jurisdiction; it was decided in 1671 that they had, 1 Sid. 454.

³ "Perjury is a crime committed, when a lawful oath is ministered by any that hath authority, to any person, in any judicial proceeding, who sweareth absolutely and falsely in the matter material to the issue, or cause in question," Third Instit. 164; cp. R. v. Griepe (1698) 1 Ld. Raym. 256.

⁴ H.C.L. iii 249.

⁵ Third Instit. 166, "For though an oath be given by him that hath lawful authority and the same is broken, yet if it be not in a judicial proceeding, it is not perjury punishable by the common law or by this Act, because they are general and extra judicial . . . as general oaths given to officers or ministers of justice, citizens, burgesses or the like."

⁶ Dampont v. Sympton (1597) Cro. Eliza. 520—"If this action should be allowed the defendant might be twice punished, viz. by the statute and by the action, which is not reasonable;" Eyres v. Sedgewicke (1621) Cro. Jac. 601.

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(d) Offences connected with officials.

In this, as in the preceding period, there are a certain number of statutes passed to prevent the misdeeds of such officials as sheriffs, and their officers,¹ escheators,² and tax collectors.³ The most significant and the most novel of these statutes is an Act of 1551-1552 for the prevention of the sale of offices.⁴ It is significant of the growth of the modern state and of modern political ideas; and it introduces a principle which was wholly opposed to the feudal confusion of office and property. The Act imposed penalties upon anyone buying and selling, or agreeing to buy or sell, or directly or indirectly taking or agreeing to take any profit, by reason of an appointment to offices connected with the administration of justice, the management of the revenue, the keeping of towns, castles, or fortresses, or clerkships in courts of record. Certain offices in the gift of the chief justices of the king's bench and common pleas and the judges of assize were saved; and we have seen that it was not till the beginning of the last century that the ideal aimed at by the framers of the statute was realized.⁵ But, when all deductions have been made, we cannot but regard it as a piece of legislation which shows that the transition from mediæval to modern ideas was being rapidly accomplished.

(e) Offences connected with the abuse of the procedure of the courts.

There are a few laws directed against the practices which had in the preceding period reduced to impotence the ordinary process of the law. In 1487⁶ the Act "Pro Camera Stellata" was passed to deal with the evils which arose from maintenance, embracery, and giving of liveries; and another Act of the same year was passed to prevent the retainer by other persons of the king's officers and tenants.⁷ In 1495 it was enacted that if the leaders of riots, which, as the Act says, were often made by servants or retainers, did not appear in obedience to a proclamation of the justices of the peace, they should stand convicted;⁸ and in 1503-1504 heavy penalties were imposed on those who kept retainers otherwise than for the purposes of domestic service.⁹ The vigilance and the growing power of the Tudor Council gradually rendered a repetition of these enactments

¹ 11 Henry VII. c. 15; 29 Elizabeth c. 4; 43 Elizabeth c. 6.

² 1 Henry VIII. c. 8.

³ 5, 6 Edward VI. c. 16; see vol. i 250.

⁴ See vol. i 262-264.

⁵ 3 Henry VII. c. 1; vol. i 493-495.

⁶ 11 Henry VII. c. 7.

⁷ 34, 35 Henry VIII. c. 2.

⁸ Ibid c. 12.

⁹ 19 Henry VII. c. 14.

against retainers unnecessary. But the other and less violent methods of abusing legal procedure were still rampant. A statute of 1540¹ imposed fresh penalties on maintenance, champerty, embracery, and, as we have seen, subornation of perjury.² Further, it penalized the buying and selling of any pretended titles to lands, tenants, or hereditaments, unless the vendors had been seised or possessed of an estate in possession in the land, or of an estate in reversion or remainder, or had taken the rents and profits thereof, for a year before the sale.³ But here again the steady pressure exerted by the Council effected an improvement which the long series of mediæval statutes and the efforts of the common lawyers had been unable to effect.⁴ We shall see that this work was assisted by some of the statutes which removed abuses or effected improvements in the procedure of the common law courts.⁵

(4) *Topics connected with criminal law and procedure.*

The legislation of this period made a few modifications in certain topics connected both with the substantive law and with procedure which deserve a brief mention.

The substantive law.

(a) *The hue and cry.*

It was an old and salutary principle of the criminal law that, if a robbery or other felony was committed, the inhabitants of the hundred where it was committed were liable for the damages sustained by the person injured by the crime, unless they raised the hue and cry, and captured the criminal within forty days.⁶ Such a system required the active co-operation of hundred with hundred. But it was found that the neighbouring hundreds were negligent in performing this duty, as they did not stand to lose in the event of failure to catch the criminal.⁷ Apparently also it was the custom to levy the damages from the most solvent inhabitants of the hundred, who had no means of recouping themselves from their fellow-inhabitants.⁸ The result was that criminals were negligently pursued; and the penalty for this neglect of duty fell upon a few individuals arbitrarily selected.

¹ 32 Henry VIII. c. 9.

² Above 518.

³ See *Partridge v. Strange* (1553), *Plowden* 77; and cf. *Jenkins v. Jones* (1882), 9 Q.B.D. 128.

⁴ Vol. i. 334-335; vol. ii. 416, 457-459; vol. v. 201-203.

⁵ Below 524, 534, 535-536.

⁶ Vol. i. 294; vol. iii. 599-604; 13 Edward I. st. 2 cc. 1 and 2; 28 Edward III. c. 11.

⁷ 27 Elizabeth c. 13 preamble.

⁸ *Ibid* § 3.

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It was therefore enacted in 1584-1585¹ that the inhabitants of every hundred, who neglected to make fresh suit, after the hue and cry raised, should be liable for half the damages recoverable against the hundred where the crime had been committed. These damages were to be recovered by action brought in the name of the clerk of the peace of the county. The amount of any damages payable by the hundreds under this statute, or the older statutes imposing liability, was to be raised by a rate made by the justices of the peace, and assessed by the constables. The constables were to pay the money to the justices, who were to pay it over to the persons entitled to be indemnified. If one of several offenders were arrested, no damages were payable; and the party complaining must give notice at the nearest town of his loss as soon as possible, and must sue for compensation within a year.

(b) *Market overt.*

With the rule of the law merchant that a sale of goods in market overt passes the property to a purchaser, even though the vendor had no title to them, I shall deal when I come to consider the development of the law merchant during this period.² We shall see that at this period, if not earlier, it had become a part of the common law. But in the case of stolen goods it was subject to the right of the owner to get a writ of restitution if he had procured the conviction of the thief;³ and the legislature found it necessary to modify the rule in the case of sales of horses, owing to the ease with which a stolen horse could be carried off and disposed of in a distant market. Two Acts of 1555⁴ and 1588-1589,⁵ which are still in force, prescribe certain formalities for the sale of horses in markets, non-compliance with which renders the sale void. Even if these formalities are complied with, the owner of a stolen horse may, if the horse has been sold within six months of the theft, if claim has been made by the owner within the same period, and if proof of ownership has been given within forty days of the claim, recover the horse, on payment to the purchaser of the price at which he bought.

Certain other statutory changes connected with the criminal law I have already mentioned, so that it is only necessary to catalogue them in order to complete this sketch of the changes

¹ 27 Elizabeth c. 13; by 39 Elizabeth c. 25 the hundred of Benherst, within which lay Maidenhead thicket—a place notorious for robberies—was allowed to throw the whole damages on the neighbouring hundreds which had been negligent in pursuit. Gad's Hill had a similar reputation, see (1577) 2 Leo. 12—a case which may have suggested the scene in Henry IV. Pt. I.

² Vol. v 98-99, 105, 110-111.

⁴ 2, 3 Philip and Mary c. 7.

⁵ Vol. ii 361; below 523.

³ 31 Elizabeth c. 12.

made in the substantive part of this branch of the law. We have seen that the changes in the character of the Benefit of Clergy, which ended by making it a complicated series of rules exempting certain persons from punishment for certain felonies, began with the legislation of this period;¹ and that Henry VIII's legislation as to Sanctuary paved the way for the abolition of this institution in 1623-1624.² Statutes of 1535 and 1536³ substituted the common law for the civil law procedure in the cases which fell within the criminal jurisdiction of the court of Admiralty. The decay of the appeal of larceny was completed by the statute which gave to the owner of stolen property a writ of restitution, if the thief was convicted on indictment by the help of the evidence of the owner of the stolen goods or of the person from whom they had been taken.⁴ The efficiency of the criminal law was increased by the statute which allowed those accused of murder to be indicted at once, without waiting to see if the relatives of the murdered man would bring their appeal.⁵ The strictness of the older law, and the advent of more modern notions of criminal liability, are illustrated by the fact that it was thought necessary in 1532-1533 to pass a statute to declare that no forfeiture should be incurred by a person who killed another who was attempting to rob or murder him in his house or on or near the highway, or who was attempting to commit burglary.⁶

Procedure.

The statutory changes connected with criminal procedure can be grouped under the following heads: (i) changes which gave advantages to the crown; (ii) changes which gave advantages to the subject; and (iii) changes which made for the greater efficiency of the law.

(i) *Changes which gave advantages to the crown.*

The first of these changes was brought about by two statutes of Henry VIII's reign which made certain alterations in the procedure on trials for treason. The earlier of these two statutes was passed in 1541-1542.⁷ It set forth the inconvenience of the rule which required persons to be tried in the county in which the offence was committed; and enacted that if, after

¹ Vol. iii 299-302.

² *Ibid* 306-307; 21 James I. c. 28 § 7; for some account of the criminal quarters of Elizabethan London, sometimes mis-called sanctuaries, see Aydelotte, *op. cit.* 82-83; some existed till the end of the seventeenth century, vol. vi 408.

³ 27 Henry VIII. c. 4; 28 Henry VIII. c. 15; vol. i 550; above 260.

⁴ 21 Henry VIII. c. 12; vol. ii 361.

⁵ 3 Henry VII. c. 2; vol. ii 362.

⁶ 24 Henry VIII. c. 5; vol. iii 312.

⁷ 33 Henry VIII. c. 23.

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examination before the Council, a person confessed or was vehemently suspected of treason or murder, he might be tried anywhere within the kingdom. It also enacted that no peremptory challenge should be allowed in trials for treason. This statute was repealed by the clause of the statute of 1554¹ which enacted that all trials for treason should be according to the course of the common law.² The later of these statutes was passed in 1543-1544,³ and is not affected by the statute of 1554.⁴ It recites that doubts had arisen whether treason committed abroad could be tried in England, and enacts that such treasons shall be tried in the King's Bench or before special commissioners in any county in England. It was settled in *Story's Case*⁵ that this statute was not repealed by the statute of 1554, either because such treason, not being triable at common law, was not affected by an Act which provided only for treasons so triable;⁶ or because such treason was triable at common law in any county in England.⁷

The second of these changes is connected with an extension of the procedure by way of criminal information which was effected in 1495.⁸ A statute passed in that year gave power to the judges of Assize and the justices of the peace to bring to trial persons accused of misdemeanours upon an information instead of upon an indictment. This statute is of some importance in the somewhat obscure history of this form of criminal proceeding. I shall deal with the controverted question of its historical significance in that connection.⁹

Under this head we may note the earliest of the Statutes (now represented by the Public Authorities Protection Act) passed to give certain procedural advantages to justices of the peace and other officers of the local government, when sued for acts done in the execution of their office.¹⁰

¹ 1, 2 Philip and Mary c. 10.

² Coke, Third Instit. 27; (1555) Dyer 132a.

³ 35 Henry VIII. c. 2.

⁴ (1555) Dyer 131b.

⁵ (1571) Dyer 298b, following the resolution of 1555, *ibid* 132a.

⁶ "And it seems that notwithstanding this (i.e. 1, 2 Philip and Mary c. 10) the statute 35 Hy. VIII. c. 2 is in force, because no offence of treason committed out of the realm was triable here by the course of the common law, therefore this statute enlarges the power and authority of the trials of the realm in this point; but for treason committed in a foreign country, and triable in B.R. or in any county at the pleasure of the king, by statute 33 Hy. VIII. c. 23, it seems otherwise; because this treason by course of law was triable in the county where the offence was committed," Dyer 132a; cf. *Foster's Case* (1615) 11 Co. Rep. at p. 63a.

⁷ Hale, 1 P.C. 169, 170—"At common law he might have been indicted in any county of England, and especially where the offender's lands lie, if he have any;" cf. *The Case of the Admiralty* (1610) 13 Co. Rep. at p. 54; vol. viii, 308.

⁸ 11 Henry VII. c. 3.

⁹ Vol. ix 241, 244.

¹⁰ 7 James I. c. 5; 21 James I. c. 12.

(ii) *Changes which gave advantages to the subject.*

I have already mentioned the statutes which effected certain improvements in the procedure upon trials for treason,¹ and those dealing with proceedings taken by common informers.² Small changes were also made in favour of sheriffs in relation to proceedings taken upon their accounts with the king,³ in favour of crown tenants who had been vexed by informations of intrusion,⁴ and to remedy certain abuses connected both with the obtaining of process to keep the peace by one subject against another, and with the removal of indictments for riots and other offences into the superior courts.⁵ The only other change of any importance was made by statutes of Henry VIII.'s and Elizabeth's reign,⁶ which abolished the maxim *nullum tempus occurrit regi* in the cases to which they applied. Elizabeth's statute, which replaced that of Henry VIII., fixed two years as a period of limitation for actions, informations, or indictments on penal statutes brought by the king, and one year if these proceedings were brought by a common informer suing either for himself only or for himself and the king.⁷

(iii) *Changes which made for the greater efficiency of the law.*

These changes affected the law as to bail, as to the preliminary examination of the accused, as to venue, and as to formal errors in indictments.

Bail. It may be that in early days those who offered themselves as security for the appearance of an accused person were literally bound body for body.⁸ But in the thirteenth century these sureties were only liable to amercement if they allowed their prisoner to escape.⁹ Later it became usual, either to make the surety promise by recognizance to pay a sum certain in the event of the non-production of the prisoner; or, combining the older idea of the nature of the surety's obligation with the newer means taken to enforce it, both to make him promise by

¹ Above 499.² 21 James I. c. 5.⁴ *Ibid* c. 14.⁵ Above 356-357.⁶ *Ibid* c. 8.

⁷ Henry VIII. c. 3; 31 Elizabeth c. 5; there was an earlier temporary Act, 1 Henry VIII. c. 4, which was probably caused by the vexatious use which Empson and Dudley had made of these proceedings, above 26-27.

⁸ The informer sues "*tam pro domino rege quam pro se ipso*," and hence the proceedings are called "*qui tam*" proceedings, Bl. Comm. iii 160.

⁹ P. and M. ii 587 and authorities there cited; Holmes, Common Law 249, 250; Hale, P.C. ii 125; vol. ii 84, 104. Both Maitland, H.E.L. ii 587 n. 6, and Coke, Fourth Inst. 178, cite the Ancienne Coutume of Normandy in which the sureties are described as "the Duke's living prison;" and Maitland points out that, conversely, a prison is sometimes spoken of as a pledge or surety, citing Select Pleas of the Crown (S.S.) pl. 197.

⁶ P. and M. ii 588.

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recognizance to pay a sum certain in the event of his non-production, and to commit the accused to the surety's custody.¹ If the accused was thus committed to the custody of the surety he was strictly and technically his bail; if the surety merely gave security for his appearance he was said to give mainprizé and to be a mainpernor.²

From an early period the sheriff had a large discretion as to taking or refusing to take bail or mainprize. In the twelfth century it would seem that the only cases in which he could not take bail or mainprize were cases in which an accusation of homicide had been made.³ The writ by which the sheriff could be compelled to release the prisoner on bail or mainprize was the writ *de homine replegiando*;⁴ and, when that writ attained its final form, the list of cases in which bail must be refused had grown by the addition of offences against the forest law, and arrest by the special command of the king.⁵ Further it would appear that the sheriff was given a wide power to refuse bail in cases where by the law of England bail ought to be refused. These cases were taken to include treason, and sometimes any crime punished by death or mutilation.⁶ But the law was in a very uncertain state; and this uncertainty put too much power into the hands of the sheriffs. In 1275 the main foundations of the modern law were fixed by one of the clauses of the Statute of Westminster I.⁷ That statute enumerated the offenders who were not bailable, and the offenders who might be released on bail. The offenders not bailable included outlaws; those who had abjured;⁸ approvers;⁹ those caught with the stolen property upon them; those guilty of prison breach; known thieves; those appealed by approvers; those accused of arson, coining, counterfeiting the king's seal, treason touching the king's person, or of open misdeeds;¹⁰ and excommunicates taken at the bishop's request. The offenders bailable included those indicted of larceny before the sheriffs; those who were but lightly suspected,

¹ This form appears as early as Edward III.'s reign, Fitzherbert, *Ab. tit. Mainprize* pl. 12 and 13.

² Vol. ix 105-106, and authorities there cited; thus Hale (P.C. ii 127), speaking of this more stringent form of liability, says, "It is not only a recognizance in a sum certain, but also a real bail, and they are his keepers, and may be punished by a fine beyond the sum mentioned in the recognizance, if there be cause, and may reseize the prisoner, if they doubt his escape, and bring him before the justice or court, and he shall be committed."

³ P. and M. ii 582, 583.

⁴ P. and M. ii 583.

⁵ Vol. ix 106-107.

⁶ *Ibid* 583.

⁷ 3 Edward I. Stat. 1 c. 15; Coke, *Second Instit.* 185-191; Hale, P.C. ii 127-135; Stephen, H.C.L. i 233-235.

⁸ For Abjuration see vol. iii 303-307.

⁹ For the approver see *ibid* 608-609.

¹⁰ As for instance if A dangerously wounds B, Hale, P.C. ii 134.

or accused only of petty larceny, provided that they had not been previously found guilty of larceny; those accused of being accessory before or after the fact to a felony;¹ those accused of trespass not punishable with loss of life or member; and those appealed by an approver who had subsequently died. In 1444² this statute was supplemented by a provision that the sheriff must, with certain exceptions,³ release on bail all persons in custody by reason of any personal action, or by reason of any indictment for trespass.

When the latter statute was enacted the power to bail was passing to the justices of the peace. It had perhaps been conferred upon them in certain cases by statutes of Edward III.'s reign;⁴ and it was certainly conferred upon them in very general terms by a statute of 1483-1484.⁵ With the accession of the Tudors a stricter control over the manner in which the power was used began to be exercised. A statute of 1487⁶ recited that persons notailable were often bailed, whereby many murderers and felons had escaped; and enacted that the power to bail should be exercised by not less than two justices, one of whom was to be of the *quorum*, and that the prisoners whom they bailed should be certified at the next general sessions of the peace or sessions of gaol delivery. It would appear that this statute had not worked altogether satisfactorily. It was stated in 1554⁷ that one justice, in the name of himself and another who knew nothing of the case, had sometimes by "sinister labour and meanes" set at large notable offenders. Justices were therefore prohibited from bailing any persons notailable by the statute of 1275. Prisoners must be bailed in open sessions, and at least two justices, one being of the *quorum*, must be present at the time of the bailment. A certificate must be made to the next sessions of gaol delivery, and the justices of gaol delivery were given power to fine justices for breach of

¹ For the law as to the conditions under which accessories wereailable see Hale, P.C. ii 135 and the Y.B.B. there cited.

² 23 Henry VI. c. 9.

³ Persons in prison by reason of condemnation, execution, *capias utlagatum* or *excommunicatum*, surety of the peace, those committed by the special command of any justice, and vagabonds refusing to work according to the Statutes of Labourers.

⁴ Edward III. c. 2—the sheriffs are not to let to mainprize those indicted or taken by the keepers of the peace if not mainpernable, and the keepers of the peace may punish them if they do; 34 Edward III. c. 1 § 6 gave power to take security or mainprize for good behaviour; for the history of this clause see E.H.R. xvii 227; neither statute confers the power on the justices very distinctly, but the statute of 1483-1484 certainly assumes that they then had the power to bail those indicted before them, see next note.

⁵ 1 Richard III. c. 3—"that every justice of peace . . . have authority . . . to let such prisoners (i.e. those arrested for suspicion of felony) and persons so arrested, in bail or mainprize, in like form as though the same prisoners or persons were indicted thereof at the same justices in their sessions."

⁶ 3 Henry VII. c. 3.

⁷ 1, 2 Philip and Mary c. 13.

the provisions of the Act. Later statutes were passed to ensure that bailors should be substantial persons,¹ and to make special provision for bail in the case of particular offences; but the statute of 1275 as to offences bailable, and the statute of 1554 as to the procedure by which bail could be obtained, remained the basis of the law on this subject till 1826.²

The preliminary examination of the accused. We shall see that in many continental countries the Reception of Roman law led to the growth of an entirely new form of criminal procedure. For the oral and formal accusation leading up to one of the older modes of proof there was substituted the inquisitorial procedure of the civil and canon law.³ By the first half of the sixteenth century the development of this procedure had, in most continental countries, resulted in the almost complete disappearance of that liberty of defence which under the older procedure had been allowed to the accused.⁴ In England, on the other hand, the development of the jury system had prevented the introduction of this inquisitorial procedure.⁵ Thus, in the sixteenth century, the English criminal procedure still retained many mediæval characteristics which made it far more favourable to the accused than the continental system.⁶ We shall see, however, that some of the continental ideas were introduced, partly through the practice of the Council and Star Chamber, and partly because even the judges of the common law courts were ready to admit that it was not to the interest of the state to give too many advantages to accused persons.⁷ Here I shall deal with the only one of these changes which was introduced by the legislature.

The change which was taking place in the character of the jury was making it quite clear that, in the interests of justice, some sort of preliminary examination of an accused person ought to be established. Juries were ceasing to have a first-hand knowledge of the facts;⁸ and just as the knowledge of the petty jury required to be supplemented by the testimony of witnesses, so the knowledge of the grand jury required to be supplemented by evidence which could only be got by a preliminary examination into the causes for suspecting an accused person.

¹ 21 James I, c. 8 § 3—it recites that persons "commonly called Baylers or Knights of the post" cause themselves to be assessed at high rates in the subsidy books or take upon themselves the names of substantial persons in order that they may be accepted for bail.

² Stephen, H.C.L. i 238.

³ Vol. v 170-176; for the older modes of trial see vol. i 299-312; vol. ii 108-110.

⁴ Vol. v 174.

⁵ Vol. i 304, 317-320; vol. iii 620-622; vol. v 176-177.

⁶ Vol. iii 622; and see vol. ix 222-236 for a sketch of the later history of criminal procedure.

⁷ Vol. v 190-195; vol. ix 223-229.

⁸ Vol. i 335-336; vol. iii 648-650.

In 1554¹ it was enacted that, on an application for bail, the justices should, in all cases where the prisoner was accused of any manslaughter or felony, before they admitted him to bail "take the examination of the said prisoner and information of them that bring him of the fact and circumstances thereof; and the same, or as much thereof as shall be material to prove the felony, shall put in writing." The examination and admission to bail must be certified to the next sessions of gaol delivery. In all cases where a person was indicted for murder or manslaughter before the coroner, the coroner was to put into writing the material evidence given to the jury; and both the justices and the coroner were given power to bind over the witnesses to appear and give evidence at the trial. The difference between the character of the examination, held by the justices and that held by the coroner is remarkable.² It is probably due to the fact that in the former case there was an accusation definitely formulated against some specific person, which must be presented by the grand jury before the prisoner was arraigned; whereas, in the latter case, there was simply an inquiry at large into the facts, resulting in a presentment, on which the accused could be at once arraigned, without the need for any further presentment by the grand jury. The nature of the inquiry and the character of the subsequent proceedings naturally affected the character of the preliminary examination.

The provisions of this statute relating to the preliminary examination before the justices applied only when the prisoner was bailed, because the main object of the statute was to settle the procedure in cases where bail was applied for. But it was clear that some preliminary examination was quite as useful when the prisoner was committed on a charge of manslaughter or felony as when he was bailed. It was therefore enacted in 1555³ that the examination should be made in this case also.

We have seen that these statutes contemplated an inquisitorial examination of the prisoner, not a judicial enquiry into the facts of the case.⁴ They gave, as they were designed to give, the executive some of the advantages against prisoners which were conferred by the inquisitorial procedure of foreign states; and it is not till the reforms of the last century that this examination lost its original character, and became an enquiry of a judicial nature.⁵ Such a procedure may seem strange to our modern ideas. But, in the sixteenth century, it was necessary in order to secure the observance of the law and to protect the state against its enemies.

¹ 1, 2 Philip and Mary c. 13; vol. i 296; above 527-528.

² See vol. i 296 n. 6; and Hale, P.C. ii 61 there cited.

³ 2, 3 Philip and Mary c. 10.

⁴ Vol. i 296.

⁵ *Ibid* 297.

It would be hardly too much to say that the preservation of the mediæval criminal procedure, based upon the presentment of the grand and the trial by a petty jury, and its adaptation to the needs of the modern state, would hardly have been possible if the practice of examining suspected persons, which had been introduced by the Council, had not been thus extended. In this way the powers given to the executive by these statutes have helped to preserve and develop a unique form of criminal procedure, which, even in the sixteenth and seventeenth centuries, maintained a standard of fairness to the accused unattainable by the inquisitorial procedure of continental states. But with this and other characteristic features of the English criminal procedure I shall deal more fully in the following chapter, and in the second Part of this Book.

*Venue.*¹ Trial by jury was a trial by those who lived in the neighbourhood of the place where the crime was committed.² From this two consequences flowed. In the first place the jury must come from this neighbourhood.³ In the second place the accused could only be put on his trial in this neighbourhood. Several inconveniences followed from the latter rule. Criminals are often vagrant persons; and the rule that they could not be tried where they were caught was clearly a hindrance to the administration of justice. In the case of larceny this inconvenience had been partially got over by the rule that if a man stole property and carried it about, he was considered to continue to steal it throughout his wanderings, so that he could be tried at any place where he was caught.⁴ But this subterfuge was not possible in the case of other crimes. In all other cases the prisoner must be brought back to the place where the deed was done. A much more serious consequence of the rigid application of this doctrine was the fact that it prevented many crimes being tried at all. If A wounded B in one county, and B died in another, A could be indicted in neither county, because the jurors of the county where B died could have no knowledge of the wound, and the jurors of the county where the wound was given could have no knowledge of the death. Again if A stole in one county and conveyed the property to an accomplice in another, the accomplice could not be indicted as an accessory if the principal were convicted, because the jurors of the county where the receipt took place could have no knowledge of a conviction in a foreign county.⁵ These two cases were remedied by a statute of 1548,⁶

¹ Stephen, H.C.L. i 276-278.

² Vol. i 312.

³ Ibid 332.

⁴ Hale, P.C. ii 508, citing Y.B. 4 Hy. VII. Pasch. pl. 1.

⁵ See the preamble to 2, 3 Edward VI. c. 24, where these cases are stated.

⁶ 2, 3 Edward VI. c. 24.

which is the ancestor of a long line of statutes¹ passed to remedy an obsolete rule which still troubles the administration of our criminal law.²

Formal errors in indictments. Among the many archaic traits which our criminal law long retained was the extreme precision required in the wording of indictments. This, indeed, was a characteristic of all branches of the law as to pleading.³ But we shall see that in civil cases several statutes had modified the strictness of the old rules.⁴ These statutes did not apply to criminal cases. The legislature was jealous, and at this period rightly jealous, of taking away from an accused person any advantages which were given to him by the common law. The only statutes which in this period were passed to modify the common law rules was a statute of 1545,⁵ which enacted that the omission of the words "vi et armis videlicet baculis cultellis arcubus et sagittis and the like" should not annul an indictment; and a statute of 1605-1606 which provided that indictments for recusancy should not be annulled for want of form.⁶

Looking at these changes in the criminal law and procedure as a whole, we can see that the legislature attempted to adapt it, as it adapted other branches of the law, to the needs of the modern state. But we must admit that it did not attain the same measure of success. As compared with the legislation upon other topics it suffered from the fatal defect of a lack of continuity. Much of the legislation of Henry VIII.'s reign gave, it is true, promise of necessary and radical changes in many parts of the criminal law. But, as was inevitable in a time of revolutionary change, it often erred on the side of severity; and, after his death, a return was made to the law in force before his accession, with all its anomalies and imperfections. Men feared, not altogether unreasonably, to extend unduly the sphere of the criminal law. It was clear, however, that some extensions were necessary; and these extensions were made; but they were made tentatively, experimentally, and without any attempt to modify the mediæval basis upon which the law rested. Thus it comes about that the criminal legislation of this period did not adapt mediæval rules to

¹ Stephen, H.C.L. i 277.

² "A rule which requires eighteen statutory exceptions, and such an evasion as the one mentioned in the case of theft (above 530 n. 4) is obviously indefensible. It is obvious that all courts otherwise competent to try an offence should be competent to try it irrespectively of the place where it was committed, the place of trial being determined by the convenience of the court, the witnesses, and the person accused," *ibid.* 278; even Blackstone thought that the strict rules should be departed from "when the great ends of justice warrant," *Comm.* iii 385.

³ Vol. ii 105-106; vol. iii 616-620, 633-634; vol. ix, 308-315.

⁴ Below 535-536.

⁵ 37 Henry VIII. c. 8.

⁶ 3 James I. c. 4 § 10.

their new environment with anything like the success achieved by the legislation which dealt with other sides of the national life; and, seeing that both the good and bad points of the Tudor legislation have had very permanent results upon the whole course of our legal history, English criminal law long suffered, and still to some extent suffers, from its shortcomings.

In some respects, as we shall see, these deficiencies of the statute law were remedied by the action of the courts. It is true that the list of felonies could only be extended by statute. But we shall see that the action of the common law courts was more successful than the action of the legislature in permanently adapting Edward III.'s statute of treasons to modern needs;¹ and that, in the cases of offences under the degree of felony, the action of the Council and the Star Chamber both created new offences and increased the efficiency with which the law prohibiting these offences, new and old, was enforced.² The common law courts and the Council and Star Chamber worked together to enforce and to supplement the common law and the amending statutes; and their work had a considerable measure of success.

For the development of the law of tort the legislature did nothing, beyond sometimes giving to the party wronged by one of the new statutory misdemeanours an action for damages. This branch of the law was developed partly by the common law courts but chiefly by the Council and the Star Chamber. When the Council and the Star Chamber lost their English jurisdiction the developments which had originated with them were in many cases adopted by the common law courts. Of these developments I shall say something when I deal with the jurisdiction of the Council and Star Chamber,³ and with the history of the technical development of the law of crime and tort in this period and the next.⁴

Civil Procedure

The most important statutory innovation in this branch of the law was the introduction of the principle of the limitation of personal actions in 1623-1624. From then to now the statutes of limitation have operated solely through the law of procedure; with the result that in the case of all actions, other than those coming within the scope of the Real Property Limitation Acts,⁵ the remedy, not the right, is barred. I shall therefore in the first place deal with the statute of 1623-1624, and then with certain other subjects connected with civil procedure.

¹ Vol. viii 307-322.

² Ibid.

³ Vol. v 197-214.

⁴ Vol. viii 336, 361-367, 379, 392-394.

⁵ 3, 4 William IV. c. 27; 37, 38 Victoria c. 57.