

## CHAPTER V

### CRIME AND TORT

**T**HREE sets of influences have shaped the technical development of this branch of the law during this period—the Legislature, the new ideas introduced by the Council and the Star Chamber, and the doctrines of the common law. I have given some account of the first<sup>1</sup> and second<sup>2</sup> of these influences in the first Part of this Book. In this chapter I shall deal mainly with the third of these influences—the doctrines of the common law—and show how these doctrines, as both expanded and modified by the first two of these influences, have created our modern law of crime and tort.

In this, as in the mediæval period,<sup>3</sup> the influence of the Legislature upon the growth of the criminal law has been great. We see it in the creation of new statutory treasons either to meet particular political emergencies, or to supplement the deficiencies of Edward III.'s Statute of Treason. We see it no less in the creation of various new felonies. Some of these were intended to supplement the law of treason by providing a more severe punishment for such offences as riots, seditious libels, or conspiracies. Others were directed to an object which, at this period, was considered to be closely cognate to the suppression of offences akin to treason—the penalizing of dissent from the national church, whether the dissenter was a Roman Catholic, a Protestant, or an atheist. Others created new or extended old offences against person or property. Others were connected with that long series of statutes in which the state had prescribed its policy in relation to industry and commerce.<sup>4</sup> Others were passed to penalize certain forms of immorality, which the weakness of the ecclesiastical courts made it expedient to hand over to the common law. And the activity of the Legislature was not exhausted by the creation of these new treasons and felonies. We have seen that this period is marked by the creation of many new crimes below the degree of felony. These "misdemeanours" are definitely criminal offences, and become gradually quite distinct from those

<sup>1</sup> Vol. iv 492-532; vol. vi. 399-407.

<sup>2</sup> Vol. ii 449-453; vol. iii. 277.

<sup>3</sup> Vol. v 167-214.

<sup>4</sup> Vol. iv 314 seqq.; vol. vi. 313 seqq.

quasi-criminal trespasses which are so striking a feature of the mediæval common law.<sup>1</sup> They are either less serious forms of similar offences which rank as felonies, or they are minor forms of wrongdoing, which are, for the most part, matters to be dealt with by the justices of the peace sitting in their petty or quarter sessions. It was the creation of these misdemeanours which won back to the field of criminal law many forms of wrongdoing, which the emphasis laid in the Middle Ages on the civil aspect of trespass had tended to annex to the field of tort.

But this enlargement of the field of criminal law was not due entirely to the Legislature. It owed at least as much to the new ideas introduced by the Council and the Star Chamber. We have seen that it was through the influence of the procedure of the Star Chamber that the criminal procedure of the common law tended to acquire rules, which, by giving many advantages to the Crown, increased the strength of the criminal law.<sup>2</sup> The Star Chamber also materially helped the development of the law as to riot, and created the law as to the illegality of attempts to commit crimes. It added important new elements to the crime of conspiracy, and it created the crime of libel. It helped to enlarge the ideas of the common law as to fraud; and by its firm action in regard to such offences as maintenance, champerty, and embracery, it helped to make them less serious menaces to the proper administration of the law, and thus to reduce them to the comparatively unimportant position which they hold in modern law.<sup>3</sup>

Both the enlargement of the criminal law by the Legislature, and the new doctrines of the court of Star Chamber, necessarily exercised important effects upon the development of many common law doctrines in the sphere of crime and tort. But in both spheres the common law contributed something of its own. In the sphere of treason we shall see that it added to the law the doctrine of constructive treason; and that this addition, to a large extent, rendered unnecessary those statutory extensions of Edward III.'s statute, which were so frequently made during the sixteenth and seventeenth centuries.<sup>4</sup> In the sphere of felony it developed and filled up the somewhat bare outlines of the mediæval common law as to the essentials of the common law felonies. One or two illustrations of this process will indicate the manner in which the rules of this branch of the modern criminal law were built up on the basis of mediæval principles.

The readiness with which all classes resorted to lethal weapons to assert their rights, or to avenge any insult real or fancied, gave abundant opportunity for elaborating the distinctions between the

<sup>1</sup> Vol. iii 317-318, 370-371.

<sup>2</sup> Ibid 201-203.

<sup>3</sup> Vol. v 188-196.

<sup>4</sup> Below 309-310.

various kinds of *homicide*, and, in particular, the distinction between murder and manslaughter.<sup>1</sup> Thus it was ruled in 1553<sup>2</sup> that, if A set on B intending to kill him, and C suddenly intervened in the combat, and B was killed, though it was murder in A, it was only manslaughter in C; and, it would seem from Plowden's comment, that this ruling settled a point of law which had long been doubtful.<sup>3</sup> In 1612 it was ruled that if a man, being provoked, in hot blood beat another with a weapon not likely to cause death, and it did cause death, he was only guilty of manslaughter;<sup>4</sup> but it was held in 1666 that the fact that there was provocation would not reduce the crime from murder to manslaughter, if the accused had used a weapon likely to cause death,<sup>5</sup> a decision which was approved by Holt, C.J., in 1698.<sup>6</sup> On the question what would amount to a provocation, it was ruled in 1666 that mere words would not be an adequate provocation for homicide; "but if upon ill words both parties suddenly fight, and one kill the other, this is but manslaughter, for it is a combat between two upon sudden heat."<sup>7</sup> But other cases show that this question gave rise to many difficult questions and divisions of judicial opinion.<sup>8</sup> In cases where the death had not followed immediately upon, and was not solely occasioned by, the stroke, the law was inclining to the view that the person who gave the stroke was guilty of homicide;<sup>9</sup> but that a person who, without using physical violence, had occasioned a death by "working on the fancy of another," or by unkind or harsh usage, which was not ordinarily calculated to have this effect, was not guilty.<sup>10</sup> The rules as to

<sup>1</sup> For a more detailed account of the development of the law during this period see Stephen, H.C.L., iii 46-73; for the development of the principles of criminal liability in relation to homicide and other crimes see below 433-446.

<sup>2</sup> Points ruled at the sessions held at Salop, Plowden at p. 100.

<sup>3</sup> "Quod nota bene lector, for I have heard this greatly doubted, viz. if the master lies in wait in the highway to kill a man, and his servants attend upon him, and the master does not make his servants privy to his intent, and afterwards he, for whom the master lies in wait comes, and the master attacks him, and his servants seeing their master fighting, take his part, and all of them kill the man, whether or no this should be murder in the servants. . . . But this is by the above rule of the Court put out of doubt, viz. that it shall only be manslaughter in the servants," *ibid* at p. 101.

<sup>4</sup> John Royley's Case, Cro. Jac. 296.

<sup>5</sup> R. v. Grey Kelyng 64-65.

<sup>6</sup> R. v. Keite, 1 Ld. Raym. at p. 144.

<sup>7</sup> Resolutions preparatory to the trial of Lord Morley, Kelyng 55.

<sup>8</sup> R. v. Huggett (1666) Kelyng 59-62; the whole subject was fully dealt with in the elaborate judgment in R. v. Mawgridge (1707) Kelyng 119 in which all the judges except Trevor, C.J., concurred; R. v. Oneby (1727) 2 Ld. Raym. 1485; see Stephen, H.C.L. iii 70-73.

<sup>9</sup> Hale P.C. i 428-429. "This hastening of the death (by the wound or stroke) is homicide or murder . . . in him that gives the wound or hurt, for he doth not die simply *ex visitatione Dei* . . . and an offender of such a nature shall not apportion his own wrong, and thus I have often heard that learned and wise judge justice Rolfe frequently direct."

<sup>10</sup> "In foro humano it cannot come under the judgment of felony because no external act of violence was offered . . . and hence it was that before the statute of 1 Jac. cap. 12 (vol. iv 510-511) witch-craft or fascination was not felony," *ibid* 429.

what facts would prove that a man had killed another by misadventure<sup>1</sup> or *se defendendo*<sup>2</sup> were being elaborated. Similarly the cases in which homicide was justifiable were restated;<sup>3</sup> and the construction of the statute of 1532,<sup>4</sup> which excused from guilt those who killed persons attempting robbery or murder in or near the highway, or in mansion houses, gave rise to a number of decisions as to the cases which fell within its protection.<sup>5</sup> The suicide of Hales, J., in 1554 gave rise to a restatement of the rule that this form of homicide was murder, because it was of malice propense;<sup>6</sup> but we shall see that it was during this period that the lawyers were beginning to develop certain constructive extensions of this requirement of malice, which in many cases gave it a very artificial meaning, and tended to render very technical the distinctions between the different forms of homicide.<sup>7</sup>

The inconvenience caused by the very narrow ground covered by *larceny*,<sup>8</sup> led the judges to widen it as far as possible, by holding that a very small physical interference with the property would amount to an asportation.<sup>9</sup> The differences of judicial opinion as to whether the appropriation of the bed linen by a lodger in furnished apartments was larceny,<sup>10</sup> led, as we have seen, to a statute which declared that in such a case larceny had been committed;<sup>11</sup> and the relations both of husband and wife, and of the co-owners of property, led to some difficulties where goods were appropriated by a wife or a co-owner.<sup>12</sup> In the case of *robbery* the law was inclined to construe somewhat liberally both the acts which amounted to the taking of property by "putting in fear," and the acts which amounted to "a taking from the person";<sup>13</sup> but the view was strictly adhered to that there must have been a taking, and that the taking must have been effected by violence or putting in fear.<sup>14</sup> It was during this period that the essentials of the offence of *burglary* were precisely ascertained.<sup>15</sup> It was settled, after some conflict of opinion, that there must be an actual break-

<sup>1</sup> Coke, Third Instit. 56; R. v. Levett (1640) Cro. Car. at p. 538.

<sup>2</sup> Hale, P.C. i 479-485.

<sup>3</sup> Vol. iii 312; Foxley's Case (1601) 5 Co. Rep. at ff 109b, 110a.

<sup>4</sup> Vol. iii 312 n. 3.

<sup>5</sup> Hale, P.C. i 487-488.

<sup>6</sup> Hales v. Petit (1563) Plowden at p. 261 *per* Dyer, C.J.

<sup>7</sup> Below 435-437.

<sup>8</sup> Vol. iii 361-366.

<sup>9</sup> Hale, P.C. i 508.

<sup>10</sup> R. v. Raven (1662) Kelyng 24—held not to be larceny; but this decision was doubted, see *ibid* 81-82; Hawkins, P.C. Bk. i c. 33, § 10.

<sup>11</sup> 3 William and Mary c. 9 § 5; vol. vi 402.

<sup>12</sup> Hale, P.C. i 513-514.

<sup>13</sup> *Ibid* i 532-533.

<sup>14</sup> See the case of R. v. Harman (1620), cited Hale, P.C. i 534-535.

<sup>15</sup> *Ibid* 549-550. I stated, vol. iii 369, that for the rule that burglary must be committed at night no earlier authority than a case of Edward VI.'s reign has been cited; but Marowe, Reading, Oxford Studies vii 378, states the rule as an essential part of the offence. It is possible that it was not a perfectly well settled rule when Marowe wrote in 1503—though he states it as such; and that the sixteenth-century statutes, cited vol. iii 369, had something to do with its definite settlement.

ing, and that a mere breaking in law<sup>1</sup> was not sufficient.<sup>2</sup> On the other hand, an entry gained under false pretences in order to commit a felony, was a sufficient breaking,<sup>3</sup> and so was the breaking of an inner door by one who had come in through an open door or window.<sup>4</sup> In the case of *arson* we have seen that it was settled in this period that a man who had burned his own house was not guilty of this crime.<sup>5</sup>

The distinctions between principals in the first and second degree, and between principals and accessories were elucidated by their application to the facts of various cases;<sup>6</sup> and we shall see that the principles of criminal liability established in the Middle Ages were elaborated, and in some respects modified.<sup>7</sup>

The enlargement of the sphere of misdemeanour during this period was due rather to the action of the Legislature<sup>8</sup> and the Star Chamber,<sup>9</sup> than to the action of the common law. But the common law showed a tendency to follow this lead, and to hold that obvious wrongs, which did not amount to felonies, were misdemeanours. Thus in *Holmes's Case* the court held that the offence of burning one's own house, though it did not amount to arson, was a misdemeanour punishable by fine and imprisonment.<sup>10</sup> In this period, however, as in the mediæval period,<sup>11</sup> it is in the sphere of tort, rather than in the sphere of crime, that the common law made its most important contribution to the law as to wrongs under the degree of felony. We have seen that, even in the mediæval period, there were some signs that new developments were beginning in this sphere; and that the means by which these developments will be made will be a liberal use of the action on the case.<sup>12</sup> All through this period this development proceeded rapidly. It followed, firstly, that certain rules applicable to certain specific torts began to be developed, with the result that these torts began to assume their modern characteristics; and, secondly, that the mediæval principles of civil liability began to be added to and modified.

<sup>1</sup> "Everyone that enters into another's house against his will or to commit a felony, tho' the doors be open, doth in law break the house," Hale, P.C. i 551.

<sup>2</sup> "And altho' in the remembrance of some yet alive Sir Nicholas Hide chief justice did hold that a breaking in law was sufficient to make a burglary . . . yet the law is that a bare breaking in law . . . is not sufficient to make a burglary without an actual breaking," *ibid* i 551-552.

<sup>3</sup> Kelyng 42-43; *cp.* R. v. Cassy and Cotter (1666) *ibid* 62-63.

<sup>4</sup> R. v. Cassy and Cotter, Kelyng 62-63; R. v. Johnson (1666) *ibid* 58-59; it was held in the last cited case that if no door had been broken, but only a trunk or box, the offence did not amount to burglary.

<sup>5</sup> Vol. iii 370 n. 7.

<sup>6</sup> (1553) Plowden 97-98; Kelyng 52-53; Hale, P.C. i 615-618; vol. iii 307-310.

<sup>7</sup> Below 433-446.

<sup>8</sup> Vol. v 197-214.

<sup>9</sup> Vol. iii 318, 370-371.

<sup>10</sup> Vol. iv 512-521; vol. vi 402-405.

<sup>11</sup> (1635) Cro. Car. 376.

<sup>12</sup> *Ibid* 406-407, 407-411.

But, in certain cases, the development of the law relating to those wrongs, which hover on the border line of crime and tort, was complicated by the two somewhat different streams of doctrine, which originated in the courts of common law and in the Star Chamber. When the jurisdiction of the Star Chamber was abolished, many of the doctrines which it had developed were taken over by the common law courts. These courts were therefore obliged to co-ordinate and reconcile these divergent streams of doctrine. No doubt the common law was enriched by the reception of these new ideas. But they tended to produce a development of the law which was not altogether harmonious, or altogether convenient; and we shall see that its results are plainly visible to-day in such branches of the law as defamation<sup>1</sup> and conspiracy.<sup>2</sup> In particular, it tended to obscure still further the line between crime and tort. In the Middle Ages and later, the double nature of, and the wide field covered by trespass and its offshoots, effectually prevented any real distinction between tort and crime, based upon the nature of the act done.<sup>3</sup> In this period, the fact that the Star Chamber treated certain acts as criminal, while the common law courts remedied the same or similar acts by a civil action on the case for damages, made it more impossible than ever to draw any distinction on these lines. "If," says Professor Kenny,<sup>4</sup> "we know any particular occurrence to be a crime, it is easy to ascertain whether or not it is also a tort, by asking if it damages any assignable individual. But there is no corresponding test whereby, when we know an occurrence to be a tort, we can readily ascertain whether or not it is also a crime. We cannot go beyond the rough historical generalization that torts have been erected into crimes, whenever the law-making power had come to regard the mere civil remedy for them as being inadequate."

The only certain lines of distinction are to be found in the nature of the remedy given, and the nature of the procedure to enforce that remedy. If the remedy given is compensation, damages, or a penalty enforced by a civil action, the wrong so redressed is a civil wrong. If the remedy given is the punishment of the accused, which is enforced by a prosecution at the suit of the crown, the wrong so redressed is a crime or criminal in its nature.<sup>5</sup> Even this test sometimes fails to establish a clear line of difference.<sup>6</sup>

The need to adjust the doctrines of the mediæval criminal

<sup>1</sup> Below 361-367.

<sup>2</sup> Below 379-384, 392-394.

<sup>3</sup> Vol. iii 317-318, 370-371.

<sup>4</sup> *Outlines of Criminal Law*, 20-21.

<sup>5</sup> See the classification of the various kinds of proceedings which may be taken against wrongdoers in Kenny, *op. cit.* 16-17.

<sup>6</sup> See *Attorney-General v. Bradlaugh* (1885) 14 Q.B.D. 667.

law to their new environment in the modern state; the need to modify, to enlarge, and to elaborate the law of tort and the principles of civil liability, to meet the new demands caused by the more varied and complex life of such a state; and the need to adjust and to harmonize the two similar yet divergent lines of doctrine, which, during the sixteenth and seventeenth centuries, were being simultaneously developed by the common law courts and the Star Chamber—all had their influence on the technical development of many of the rules of the law of crime and tort. One or other of these causes is historically at the root of the most salient of these developments during this period. With these developments I shall deal in this chapter under the following heads:—§ 1. Constructive Treason and other Cognate Offences; § 2. Defamation; § 3. Conspiracy, Malicious Prosecution, and Maintenance; § 4. Legal Doctrines Resulting from the Laws against Religious Nonconformity; § 5. Lines of Future Development; § 6. The principles of Liability.

#### § 1. CONSTRUCTIVE TREASON AND OTHER COGNATE OFFENCES

##### *Constructive Treason*

The three clauses of Edward III.'s Statute of Treason which are designed to protect the safety of the state, are the clauses which make it treason to compass or imagine the king's death, to levy war against the king, and to adhere to his enemies.<sup>1</sup>

The last of these clauses can be briefly dismissed. It has not been extended by construction in the same way as the first two clauses. The only difficulty which has arisen in connection with it has been the difficulty of deciding whether adherence to the king's enemies out of the realm is included in it.<sup>2</sup> This difficulty arises solely from the wording of the clause, which enacts that it shall be treason, "if a man do levy war against our Lord the King in his realm or be adherent to the king's enemies in his realm giving to them aid and comfort in the realm or elsewhere."<sup>3</sup> This clause might be construed to mean that the words "or elsewhere" govern only the words "giving to them aid or comfort," so that adhering to the king's enemies outside the realm is not treason; or it might be construed to mean that the words "or

<sup>1</sup> For this statute see vol. ii 449-450; vol. iii 287-293.

<sup>2</sup> All the authorities on this subject are collected in *R. v Casement* [1917] 1 K.B. 98.

<sup>3</sup> "Si homme leve de guerre contre notre dit Seigneur le Roi en son Roialme ou soit aherdant as enemys notre Seigneur le Roi en le Roialme donant a eux aid ou confort en son Roialme ou per aillours."

elsewhere" govern the whole clause, so that adhering to the king's enemies, and it would seem also the levying of war,<sup>1</sup> outside the kingdom are treason.<sup>2</sup> It would seem from the precedents cited by Hale that, before the statute, adhering to the king's enemies outside the kingdom was treason;<sup>3</sup> and it seems to have been assumed that the statute had not altered the law. This is reasonably clear from a dictum in a case of 1382, in which it was laid down that, if a man adhered to the king's enemies in France, "his adherence shall be tried where his land is, as has been often done of adherents to the enemies of the king in Scotland."<sup>4</sup> If he had no land, Hale thought that he might be tried in any county in England, which is by no means improbable.<sup>5</sup> No doubt there was some difficulty as to the trial of persons who had thus committed treason out of the kingdom, owing to the difficulties arising from the rules of venue.<sup>6</sup> But we have seen that this difficulty was removed by the statute of 1543-1544;<sup>7</sup> and the wording of that statute makes it clear enough that, in the opinion of the Legislature, acts committed abroad might amount to treason.<sup>8</sup> It follows, therefore, that Coke,<sup>9</sup> Hale,<sup>10</sup> and Hawkins<sup>11</sup> were well warranted in holding that adhering to the king's enemies outside the kingdom was an offence which came within the scope of Edward III's statute. Later cases have all laid down the law in the same way;<sup>12</sup> and, after an elaborate review of the authorities, this interpretation was finally established as correct in 1916 in the case of *R. v. Casement*.

It is the first two of these three clauses of the statute, and especially the first, which have been widely extended by judicial construction. I shall deal firstly with the clause as to compassing

<sup>1</sup> There seems to be no authority on the question whether levying of war out of the realm is treason; but the reasoning of *R. v. Casement* [1917] 1 K.B. 98, and the authorities on which that decision is based, clearly apply; on the other hand, Coke, Third Instit. 9, and Hale, P.C. i 130, 154-158, seem to say that the levying of war must be in the realm; and Kenny, Criminal Law 269, takes this view.

<sup>2</sup> *R. v. Casement* [1917] 1 K.B. at p. 122 per Lord Reading, C.J.

<sup>3</sup> Case of Poynter, *Claus.* 7 Ed. III. part 1 m. 9, Hale, P.C. i 166; case of Culwin *Claus.* 7 Ed. III. part 1 m. 15, *ibid* 167-168.

<sup>4</sup> Fitz. Ab. Trial pl. 54—"Si home soit adherent as enemys le roi en Fraunce sa terre est forfeitable, sa adherauns serra trel lou sa terre est come ad este souvent foitz fait des adherauntz as enemys le Roy en Escocce"; the translation is taken from the note to *R. v. Casement* [1917] 1 K.B. 145.

<sup>5</sup> P.C. i 170.

<sup>6</sup> For these rules see vol. v 117-119, 140-143.

<sup>7</sup> 35 Henry VIII. c. 2; vol. iv 524.

<sup>8</sup> See *R. v. Casement* [1917] 1 K.B. at p. 124 per Lord Reading, C.J.

<sup>9</sup> Third Instit. 10-11.

<sup>10</sup> P.C. i. cap. xv.

<sup>11</sup> P.C. Bk. ii. cap. xxv § 46.

<sup>12</sup> See the cases cited in *R. v. Casement* [1917] 1 K.B. at p. 128; the opinion of the law officers in 1775, cited *ibid* at p. 143; *Mulcahy v. R.* (1868) L.R. 3 H. of L. at p. 318; *R. v. Lynch* [1903] 1 K.B. 444; note also that in *R. v. Vaughan* (1696) 13 S.T. at p. 525 Holt, C.J., laid it down quite generally that, "for a subject of England to join with the king's enemies, in pursuit of a design to burn or take any of the king's or his subjects' ships, that is an adherence to the king's enemies."



or imagining the king's death, secondly with the clause as to levying of war against the king, and thirdly with the later history of this branch of the law.

(1) *Compassing or imagining the king's death.*

The act made treason by the statute of Edward III. is not the killing of the king, but the compassing or imagining his death—the intention to kill him.<sup>1</sup> Therefore in 1660 the judges resolved that the regicides should be indicted for compassing; and that the actual murder of the king “should be made use of as one of the overt acts to prove the compassing of his death.”<sup>2</sup> Even in the mediæval period, the judges had seen that the fact that the gist of the offence was an intention to kill the king, could be used to extend its scope; for they had held that the mere speaking of words might be an overt act which evidenced such an intention.<sup>3</sup> They had seen as clearly as their successors that such an intention can be proved only by overt acts, “for the thought of man is not triable”; and that the statute could be extended by inferring an intention to kill from overt acts which were only remotely connected, if they were connected at all, with a formed intention to kill the king. But these cases were not followed. The modern construction of this clause, though it started from somewhat similar premises, was elaborated under a different set of legal and political conditions, and, unlike these mediæval constructions, it resulted in the establishment of a definite body of legal doctrine.

The Tudor kings respected the law; and they were well aware that nothing could be more dangerous to the security of their none too secure throne than any attempt to pervert it. It was for this reason that, during the first sixty or seventy years of the sixteenth century, many statutes were passed to extend the scope of treason,<sup>4</sup> and that very little is heard of any constructive extension of this clause of Edward III.'s statute. Hale, commenting on the statute of 1540-1541, which made certain riots treason, remarks that it shows, “how careful they were in this time not to be overhasty in introducing constructive treasons, and to shew how the opinions of the parliaments of Edward VI., queen Mary, queen Elizabeth went, as to the point of constructive treason, and how careful they were not to go far in extending the statute of 25 E. 3 beyond the letter

<sup>1</sup> Vol. iii 292-293.

<sup>2</sup> “It was resolved that the indictments should be for compassing the death of the late king (the very compassing and imagining the king's death, being the treason within the stat. 25 Ed. 3) and then that we might lay as many overt acts as we would, to prove the compassing of his death: but it was agreed, the actual murder of the king should be precisely laid in the indictment, with the special circumstances as it was done, and should be made use of as one of the overt acts, to prove the compassing of his death,” Kelyng 8.

<sup>3</sup> Vol. iii 293.

<sup>4</sup> Vol. iv 492-498.

thereof."<sup>1</sup> The repeal of the new treasons created by Henry VIII. on the accession of Edward VI., and the repeal of Edward VI.'s statutes on the accession of Mary,<sup>2</sup> show that the creation of new treasons, even by Parliament, was not a popular exploit. It could hardly be expected, therefore, that the courts would undertake their manufacture.

But, though there was always a tendency to revert to the statute of Edward III., it was abundantly clear that that statute was wholly inadequate to protect the state. The Legislatures which repealed Henry VIII.'s and Edward VI.'s statutes were always obliged to re-enact some of the provisions of those statutes.<sup>3</sup> The result was that, by Elizabeth's reign, the nation had begun to grow accustomed to the necessity for an extended law of treason, and to acquiesce in it. This changed attitude was due, not only to the existence of these statutes, but also to two other causes. In the first place, the modern territorial state was now well established. It was coming to be generally recognized that allegiance to the state ought to override all other ties. Hence it was realized that the statute was, as Stephen has said, "worded too narrowly if it was to be construed literally."<sup>4</sup> In the second place, the dangers to the queen's life from the constant Roman Catholic plots, and the certainty that possibly the existence of the English state, and certainly its orderly development, were bound up with her safety, led the nation to acquiesce in any measures that could be devised to preserve it. Hence the constructive extensions of this clause of the statute came to be not only acquiesced in, but even approved as necessary means of defence in a time of national emergency. Under these circumstances, it is not surprising to find that it was in the latter part of the sixteenth century, that the constructive extension of this clause of the statute began to be made.

It would seem that, even before this date, the Legislature was aware that the vagueness of Edward III.'s statute made the exact content of its clauses by no means certain. Hale, while admitting that it was "a fair topical argument," that the offences made treasons by new and temporary Acts were not treasons within Edward III.'s statute, yet points out that it is by no means conclusive; for some of these new treasons turned out to be within that statute; and certain statutes which made offences felonies "have this wary clause, 'the same not being treason within the statute of 25 E. 3.'"<sup>5</sup> The vagueness of the statute helped the

<sup>1</sup> P.C. i 293.

<sup>2</sup> Vol. iv 495.

<sup>3</sup> Ibid.

<sup>4</sup> H.C.L. ii 263.

<sup>5</sup> "That tho' generally it be a fair topical argument, that when offences are made treasons by new and temporary Acts, they were not treasons within the statute of 25 E. 3, for if they were, they needed not to have been enacted to be treason by new statutes, as introductive of new laws in such cases, yet that doth not hold universally true, for some things are enacted to be treason by new, yea, and temporary laws,

judges to extend it; but, as I have already pointed out, the fact that it was the intention to kill the king, and not his murder, which was made treason, was the main reason why this clause could be so extensively construed. As we shall now see, the construction put upon it grew gradually more and more extensive, till it came to include much of the ground covered by the clauses relating to the levying of war against the king and adhering to his enemies.<sup>1</sup>

It is obvious that an intention to kill the king must be proved from overt acts, which show that the person doing them had such an intention. "This compassing, intent, or imagination," says Coke,<sup>2</sup> "though secret is . . . to be discovered by circumstances precedent, concomitant, and subsequent." Now it is clear that it is only from overt acts, which obviously point to a design to kill the king, that an intention to kill him can properly be inferred. But the judges, in considering overt acts alleged to prove this intention, did not limit themselves to overt acts of this kind. They considered the overt acts of the accused "with all endeavour for the safety of the king."<sup>3</sup> Therefore they were led to rule that acts which showed an intention, not to kill him, but to put any kind of restraint or force upon him, might be good evidence of an intention to kill him.

We can see the doctrine in its initial stage in Coke's Third Institute. Treason, he says, must be proved by an overt act, "as if divers do conspire the death of the king, and the manner how, and thereupon provide weapons, powder, poison, assay harness, send letters, etc., or the like, for execution of the conspiracy. Also preparation by some overt act to depose the king or to take the king by force and strong hand, and so imprison him till he hath yielded to certain demands, this is a sufficient overt act to prove the compassing and imagination of the death of the king: for this upon the matter is to make the king a subject, and to dispoil him of his kingly office of royal government. And so it was resolved by all the judges of England, Hil. 1 Jac. Regis, in the case of *Ld. Cobham, Lord Gray, and Watson and Clark, seminary priests*: And so had it been resolved by the justices Hil. 43 Eliz. in the case of the earls *Essex and Southampton*, who intended to go to the court where the queen was, and to have taken her into their power, and to have removed divers of her counsel, and for that end did assemble a multitude of people; this being raised to the end aforesaid was a sufficient overt act for compassing the death of the queen. And so by woeful experience in former times it

which yet were treason by the statute of 25 E. 3, as will appear in the sequel. And therefore the statutes of 1, 2 Ph. and M. cap. 3, 1 E. 6 cap. 12, 23 Eliz. cap. 2, making several offences felony, have this wary clause, *the same not being treason within the statute of 25 E. 3*," Hale, P.C. i 261.

<sup>1</sup> Below 314-318.

<sup>2</sup> Third Instit. 6.

<sup>3</sup> Coke, *ibid* 6.

has fallen out in the cases of Ed. 2, R. 2, H. 6, and E. V. that were taken and imprisoned by their subjects."<sup>1</sup> Similarly, "if a subject conspire with a foreign prince beyond the seas to invade the realm by open hostility, and prepare for the same by some overt act, this is a sufficient overt act for the death of the king."<sup>2</sup> And, if such overt acts were advocated in a published book, the writing and publication of such a book was an overt act of compassing.<sup>3</sup> Further, Coke decided in *R. v. Owen*<sup>4</sup> that saying that the king, being excommunicated by the Pope, may lawfully be deposed and killed by any whatsoever, and that such killing was not murder, was treason. Though, as we shall see, Coke held that merely speaking scandalous words of the king was not treason, he was of opinion that words which, to use Bacon's phrase, "disabled the king's title,"<sup>5</sup> and a fortiori words which incited to his murder, were an overt act which proved the compassing of his death.

Clearly in Coke's day the constructive extension of this clause of the statute had begun. That it had begun was due largely to the political conditions prevailing in England and Europe. Coke's illustrations make this clear. All the acts ruled to be overt acts proving a compassing of the king's death were obviously dangerous to him, and might easily lead to his death; and this was especially true in Elizabeth's reign, when the fate of the Reformation seemed at times almost to depend upon her life. But this constructive extension had not as yet gone very far; and neither Coke nor most of his colleagues were prepared to push it much further. Thus, firstly, Coke was of opinion that mere scandalous words of the king, importing that he was unfit to reign, unless they were words which disabled his title, were not an overt act from which a compassing of his death could be inferred—"it is commonly said that bare words may make a heretick, but not a traytor without an overt act";<sup>6</sup> and this was agreed to be law by all the judges in *Pine's Case* in 1629,<sup>7</sup> after an exhaustive survey of the earlier precedents. Some of the mediæval precedents, it is true, pointed

<sup>1</sup> Third Instit. 12.

<sup>2</sup> Ibid 14.

<sup>3</sup> "Cardinal Poole . . . in his book of the supremacy of the Pope, written about 27 H. 8, incited Charles the Emperor, then preparing against the Turk, to bend his force against his natural sovereign lord and country; the writing of which book was a sufficient overt act within this statute," *ibid* 14.

<sup>4</sup> (1616) 1 Rolle Rep. 185.

<sup>5</sup> Spedding, *Letters and Life of Bacon* v 109.

<sup>6</sup> Third Instit. 14.

<sup>7</sup> Cro. Car. 117—"the speaking of the words before mentioned, though they were as wicked as might be, were not treason. For they resolved that unless it were by some particular statute, no words will be treason; for there is no treason at this day but by the statute 25 Edw. 3 c. 2 for imagining the death of the king etc., and the indictment must be framed upon one of the points in that statute; and the words spoken here can be but evidence to discover the corrupt heart of him that spake them; but of themselves they are not treason, neither can any indictment be framed upon them."

in the opposite direction; and some lawyers, including Bacon,<sup>1</sup> would have liked to follow them. But probably the judges were influenced by the wording of the statutes which had, in the preceding reigns, created new treasons. In many cases treasonable words had been made only a misdemeanour for the first offence, which shows, as Hale points out,<sup>2</sup> that, in the opinion of the Legislature, "words, tho' of an high nature, were not treason, nor an overt act of compassing the king's death." Secondly, though, as we have seen, Coke agreed that treasonable words set down in writing and published were an overt act of treason by compassing the king's death,<sup>3</sup> in *Peacham's Case*<sup>4</sup> neither he, nor many of the other judges, could be persuaded that the writing of treasonable words in a sermon, which was never preached or published, nor intended to be preached or published, was treason.<sup>5</sup> No doubt opinion was divided on this point;<sup>6</sup> but Peacham, though found guilty, was not executed. It would seem that Coke regarded such an unpublished document as being equivalent to mere words, or perhaps, as they were not published, as even less heinous. Thirdly, Coke laid it down that a mere conspiracy to levy war was "no overt act to or manifest proof of the compassing of the death of the king within this Act," on the somewhat inconclusive ground that so to hold would confound the several clauses of the statute.<sup>7</sup>

These limitations upon the constructive extension of this clause of the Act were not wholly logical. They were, as I have said, largely the product of the political conditions of the day; and it is clear that they were distasteful to the crown lawyers of James I.'s reign. Bacon, in his conference with Coke on *Peacham's Case*, contended that "there be four means or manners whereby the death of the king is compassed or imagined. The first by some particular fact or plot. The second by disabling his title; as by affirming that he is not lawful king, or that another ought to be king, or that he is an usurper or a bastard, or the like. The

<sup>1</sup> Spedding, *Letters and Life of Bacon* v 109, 120; cp. vi 92-93.

<sup>2</sup> P.C. i 315; and cp. his comment on 1, 2 Phillip and Mary c. 3 at p. 312.

<sup>3</sup> Above 312 and n. 3.

<sup>4</sup> (1615) Cro. Car. 125; Spedding, *Letters and Life of Bacon* v 127.

<sup>5</sup> "Edward Peacham was indicted of treason for divers treasonable passages in a sermon which was never preached, or intended to be preached, but only set down in writings, and found in his study; he was tried and found guilty, but not executed. Note, that many of the judges were of opinion that it was not treason," Cro. Car. 125.

<sup>6</sup> Thus Chamberlain, writing to Carleton Feb. 20, 1614, says, "the king since his coming hath had the opinion of the judges severally in Peacham's Case, and it is said that most of them concur to find it treason. Yet the lord chief justice is for the contrary," cited Spedding, *op. cit.* v 121 n.; for James's own view that Peacham was guilty of treason see *ibid.* 105-106.

<sup>7</sup> "One of them (i.e. the different treasons set out in the Act) cannot be an overt act for another. As for example: a conspiracy is had to levy war, this (as hath been said and so resolved) is no treason by this Act until it be levied, therefore it is no overt act or manifest proof of the compassing of the death of the king within this Act . . . for this were to confound the several clauses," Third Instit. 14.

third by subjecting his title; as either to pope or people; and thereby making him of an absolute king a conditional king. The fourth by disabling his regiment, and making him appear incapable and indign to reign."<sup>1</sup> Coke's view that mere words coming under the fourth head were not treason, unless accompanied by some other overt act, prevailed.<sup>2</sup> But some of the more general rules laid down by Bacon were, as we shall now see, destined to prevail in the succeeding centuries; and even unpublished writings and mere words were, at the latter part of the seventeenth century, allowed to have a weight which it is difficult to suppose would have been approved by Coke and his fellow judges.

Thus, by the beginning of the seventeenth century, the constructive extension of this clause of the statute had begun. During the latter part of that century it made rapid progress. Firstly, it was laid down in 1663 that a conspiracy to levy war could be regarded as an overt act to prove a compassing of the king's death.<sup>3</sup> Hale approved of this resolution;<sup>4</sup> and he pointed out that some of the sixteenth-century cases were not wholly consistent with Coke's opinion to the contrary.<sup>5</sup> He endeavoured to reconcile Coke's opinion with the new construction of this clause, by drawing a distinction between a mere constructive levying of war<sup>6</sup> and an actual levying of war. He held that a conspiracy to levy what was merely a constructive war was not, and a conspiracy to levy an actual war was, an overt act to prove a compassing of the king's death.<sup>7</sup> This distinction is accepted by Foster,<sup>8</sup> and is undoubtedly good law; but it is doubtful if it really expresses Coke's meaning. The much more probable view is that the constructive interpretation of this clause had been extended between the dates of Coke's and Hale's works. It was both an obvious and an inevitable extension, but it was none the less an extension. Secondly, it was laid down in *R. v. Twyn*<sup>9</sup> that the printing of a book, in which the people were incited to sedition, to rebellion,

<sup>1</sup> Spedding, *Letters and Life of Bacon* v 109.

<sup>2</sup> Above 312.

<sup>3</sup> "It was resolved and agreed by all now as it was before in *Tong's case*, and *Sir H. Vane's case*, that the meeting and consulting to levy war is an overt act to prove the compassing the king's death within the stat. of 25 Ed. 3. Altho' the consulting to levy war is not actual levying within the statute, and so cannot be indicted thereupon, for that treason of levying war, yet if they be indicted for the treason of compassing and imagining the king's death, that consulting to levy war is an overt act to prove that treason, altho' Co. Pl. Cor. 14 delivers an opinion against this," Kelyng 20.

<sup>4</sup> P.C. i 219.

<sup>5</sup> *Ibid* i 220-222; it is clear, for instance, that the line between a conspiracy with a foreign prince to invade this country, which Coke admitted to be a good overt act to prove a compassing of the king's death, and a conspiracy to levy war, is very thin, see *ibid* 122.

<sup>6</sup> For what amounts to a constructive levying of war see below 319-321.

<sup>7</sup> P.C. i 222-223.

<sup>8</sup> *Crown Law* 213.

<sup>9</sup> (1663) Kelyng 22.

and to the killing of the king, was an overt act, which could be used to prove a compassing of his death. This was in conformity with Coke's opinion.<sup>1</sup> But in *Algernon Sidney's Case*<sup>2</sup> this ruling was extended to cover the case of a writing, in which it was in effect alleged that the king was subject to Parliament, and that kings could be deposed.<sup>3</sup> As it was not proved that the paper was published,<sup>4</sup> this goes very near to holding, contrary to Coke's view, and in accordance with actual verdict in *Peacham's Case*, that the mere writing of such a paper was an overt act of compassing the king's death.<sup>5</sup> This ruling could only be justified in one of two ways—either on the unproved assumption that the writing was intended to be published, or, on the stronger ground, that it was so connected with the other overt acts alleged, that the writing, though not published, was evidence to support and explain them.<sup>6</sup> The latter ground was, as we shall see, accepted as good law after the Revolution.<sup>7</sup> Thirdly, shortly after *Pine's Case*,<sup>8</sup> in which, as we have seen, it had been laid down that merely scandalous words spoken of the king did not amount to treason,<sup>9</sup> it had been laid down in *R. v. Crohagan*<sup>10</sup> that, if words purporting an intention to kill the king were accompanied by an overt act, which seemed to imply an intention to put the intention into execution, this would amount to treason. In that case the accused, being at Lisbon, had said, "I will kill the king if I may come to him." He had then come to England, and, when arrested, had spoken scornfully of the king. It was held that he was rightly convicted for compassing the king's death. This case came near to that of *R. v. Owen*;<sup>11</sup> but the court seems to have laid some stress

<sup>1</sup> Above 312 and n. 3.

<sup>2</sup> (1683) 9 S.T. 818.

<sup>3</sup> See the indictment *ibid* at p. 819; and the passages from the book read to the court, *ibid* at pp. 855-858.

<sup>4</sup> Sidney denied that he had ever published anything in his life, *ibid* 878; and no evidence was offered that he intended to publish these papers.

<sup>5</sup> Thus Jeffreys, C.J., said in his summing up, "in the next place I am to tell you, that though some judges have been of opinion that words of themselves are not an overt act; but my lord Hales nor my lord Coke, nor any other of the sages of the law, ever questioned but that a letter would be an overt act sufficient to prove a man guilty of high treason; for *scribere est agere*," *ibid* at p. 889.

<sup>6</sup> "Another thing which I must take notice of to you in this case, is to mind you, how this book contains all the malice and revenge and treason that mankind can be guilty of: it fixes the sole power in the parliament and the people; so that he carries on the design still, for their debates at their meetings were to that purpose. And such doctrines as these suit with their debates; for there a general insurrection was designed, and that was discoursed of in this book and encouraged," *ibid* at p. 893; Foster admits, *Crown Law*, 198, that if, "the papers found in Mr. Sidney's closet had been plainly relative to the other treasonable practices charged in the indictment, they might have been read in evidence against him, though not published."

<sup>7</sup> Below 316-317.

<sup>8</sup> (1629) Cro. Car. 117.

<sup>9</sup> Above 312.

<sup>10</sup> (1634) Cro. Car. 332.

<sup>11</sup> (1616) 1 Rolle Rep. 185; above; Hale, P.C. i 215-216, draws from these cases the moral that words, "that are expressly menacing the death or destruction of the king, are a sufficient overt act to prove that compassing of his death"; in *Crohagan's Case* he lays stress on the act of coming to England.

upon the facts that the words were accompanied by the overt act of coming to England, and that he had used scornful words when arrested; and this is the manner in which the case was explained and justified by later lawyers.<sup>1</sup> It followed that words could give a treasonable colour to an otherwise innocent overt act. It is, therefore, not surprising that, in 1660, the judges showed a tendency to minimize the importance of the difference between written and spoken words. "Words spoken," it was said,<sup>2</sup> "are the same thing if they be proved. Words are the *natural way* for a man whereby to express the imaginations of the heart. If it be *any way* declared that a man imagineth the king's death, that is treason within the stat. 25 Edw. 3." And this tendency appears in Jeffreys' summing up in *Sidney's Case*.<sup>3</sup>

The view that there was no difference between written and spoken words was not followed after the Revolution. The rule adopted was in accordance with the cases decided earlier in this century—*R. v. Owen*, *Pine's Case*, and *R. v. Crohagan*. "Loose words," said Holt, C.J., in 1696,<sup>4</sup> "spoken without relation to any act or project are not treason: but words of persuasion to kill the king are overt acts of high treason; so is a consulting how to kill the king; so if two men agree together to kill the king, for the bare imagination and compassing makes the treason, and any external act that is a sufficient manifestation of that compassing and imagining is an overt act"; and words, as Foster says,<sup>5</sup> "may explain the meaning of an overt act." But it was only under these conditions that words could be an overt act of treason. Similarly, the view that unpublished writings could be given in evidence to prove an overt act of compassing, was rejected. Such writings can only be given in evidence if they are relevant to enforce or explain other overt acts charged in the indictment. Thus, as Foster explains,<sup>6</sup> "the papers found in Lord Preston's custody, those found where Mr. Laver had lodged them, the intercepted letters of Dr. Hensley, were all read in evidence as overt acts of the treason respectively charged on them. . . . For those letters

<sup>1</sup> Foster, Crown Law 203.

<sup>2</sup> Kelyng 13.

<sup>3</sup> Above 315 n. 6.

<sup>4</sup> Charnock's Case 2 Salk. 631: "the difference (between words and writings) appeareth to me to be very great, and it lieth here. Seditious writings are permanent things, and if published they scatter the poison far and wide. They are acts of deliberation, capable of satisfactory proof, and not ordinarily liable to misconstruction. . . . Words are transient and fleeting as the wind, the poison they scatter is at the worst confined to the narrow circle of a few hearers. They are frequently the effect of a sudden transport, easily misunderstood and often misreported." Foster, Crown Law 204.

<sup>5</sup> Crown Law 204; he says that the reasons which Hale gives for this rule (P.C. i 111-115, 323) "founded on temporary Acts or Acts since repealed, which make speaking the words therein set forth felony or misdemeanour, are unanswerable," *ibid* 201.

<sup>6</sup> *Ibid* 198.



and papers were written in prosecution of certain determinate purposes which were all treasonable and then in contemplation of the offenders, and were plainly connected with them." The rule as so settled was probably the rule which Hale considered to be the law.<sup>1</sup>

But, except in these two cases, the seventeenth-century decisions, extending the constructive interpretation of this clause, were adopted, and even carried further, after the Revolution. And, here again, the extension was probably inevitable. If a conspiracy to levy war, and the publication of a writing advocating the deposition of the king, or merely arguing that it is lawful to depose him, are overt acts which can be given in evidence to prove the compassing of his death, it will be difficult to draw the line at these acts. It will be difficult to rule out any acts done in preparation for any other act, which, if accomplished, will be an overt act. That no attempt was made to draw the line is clear from the case of Lord Preston.<sup>2</sup>

Foster's summary of that case is as follows:<sup>3</sup> "Lord Preston and two other gentlemen had procured a smack to transport them to France, but were stopped before they got out of the river, and their papers seized. Among the papers was found a scheme intended to be laid before the French king or his ministers for invading the kingdom in favour of the late king James II.; with many letters, notes and memoranda, all tending to the same purpose. Lord Preston upon his trial insisted, among other matters, that no overt act was proved upon him in Middlesex, where all the overt acts were laid, for he was taken with the papers in the county of Kent. But the court told the jury, that if upon the whole evidence they did believe that his lordship had an intention of going into France, and to carry those papers thither for the purposes charged in the indictment, his taking boat at Surrey stairs which are in Middlesex, in order to go on board the smack, was a sufficient overt act in Middlesex. Every step taken for those purposes was an overt act."<sup>4</sup> The last sentence contains the gist of the matter. It comes to this—every act, however remotely connected with an overt act of compassing the king's death, is itself an overt act. As the future Lord Eldon contended, when, as

<sup>1</sup> Hale, P.C. i 118; Foster, Crown Law 198.

<sup>2</sup> (1691) 12 S.T. 646.

<sup>3</sup> Crown Law 196.

<sup>4</sup> "Gentlemen give me leave to tell you, if you are satisfied upon this evidence that my lord was privy to this design, contained in these papers, and was going with them into France, there to excite an invasion of the kingdom, to depose the king and queen, and made use of the papers to that end, then every step he took in order to it, is high treason wherever he went; his taking water at Surrey stairs in the county of Middlesex will be as much high treason as the going a ship-board in Surrey, or being found on ship-board in Kent, where the papers were taken," *per* Holt, C.J., 12 S.T. at p. 740.

attorney-general, he was prosecuting Hardy in 1794,<sup>1</sup> any act which showed that the person doing it intended "to put the king in circumstances in which, according to the ordinary experience of mankind, his life would be in danger," might be given in evidence as an overt act of compassing his death. It followed that this clause of the statute could be made to cover the ground covered both by the clause against levying war against the king, and by the clause against adhering to his enemies.<sup>2</sup>

It was attempted in 1794 to apply these doctrines to the activities of the Constitutional and the London Corresponding Societies.<sup>3</sup> They were advocating universal suffrage and annual Parliaments; and they carried on their propaganda through their branches, and through a convention in which their branches were represented. They asserted that they only wished to press for these reforms by constitutional means. The Crown asserted that they were preparing for the deposition of the king and the establishment of a republic. The jury, by acquitting them, showed that they did not believe the contentions of the crown. But this acquittal by no means meant the end of the doctrine of constructive treason. As Stephen has pointed out, it was applied in 1797 and 1798.<sup>4</sup> But the trials of 1794 showed that it was an exceedingly unpopular doctrine; and the acquittals may have been partly due to that fact.<sup>5</sup> However that may be, it was in 1795<sup>6</sup> that we got the first of those statutory interferences with the doctrine, which have ended by putting the law on a different basis. But with this legislation I cannot deal till I have considered the constructive extension of the clause as to levying war against the king.

(2) *Levying war against the king.*

The offence declared to be treason by Edward III.'s statute was the actual levying of war, and not a conspiracy to levy war. A conspiracy to levy war was not made treason by the statute; and this defect was, as we have seen, cured at first by statute,<sup>7</sup> and eventually by the constructive extension of the clause directed against the compassing or imagining the king's death.<sup>8</sup> Thus, the wording of the clause against levying war, shows that its constructive extension was bound to follow a line very different from that followed in the case of the clause which has just been

<sup>1</sup> 24 S.T. at p. 256, cited Stephen, H.C.L. ii 276.

<sup>2</sup> Foster, Crown Law 197—"levying war is an overt act of compassing . . . and so is a treasonable correspondence with the enemy, though it falleth more naturally within the clause of adhering to the king's enemies."

<sup>3</sup> 24 S.T. 199 (Trial of Hardy); 25 S.T. 1 (Trial of Home Tooke); Stephen, H.C.L. ii 274-277.

<sup>4</sup> H.C.L. ii 278-279.

<sup>5</sup> Vol. iv 496-497.

<sup>6</sup> Ibid 277.

<sup>7</sup> Above 311 seqq.

<sup>8</sup> 35 George III. c. 7.

considered. In fact it proceeded upon the line of giving a greatly extended meaning to the phrase "levying war."

It is probable that the extensive construction put upon this clause began at an earlier date than that put upon the clause as to the compassing of the king's death; and that it was suggested by the distinction, drawn in the statute itself, between levying war against the king, and a mere private war.<sup>1</sup> Coke tells us that "it was resolved by all the judges of England in the reign of king H. 8 that an insurrection against the statute of Labourers, for the enhancing of salaries and wages, was a levying of war against the king, because it was generally against the king's law, and the offenders took upon them the reformation thereof, which subjects by gathering of power ought not to do."<sup>2</sup> This, Hale tells us, is the first instance that he had seen of "this interpretative levying of war."<sup>3</sup> But it is clear that the judges, who came to this resolution, had arrived at the principle upon which the constructive extension of this clause proceeded—the distinction between the use of force for a merely private end which was a mere riot, and the use of force for a public object which was treason; and it is clear that this distinction is directly suggested by the statute.<sup>4</sup>

This distinction was applied in many cases in the sixteenth and seventeenth centuries. Thus in 1597, in the case of *R. v Bradshaw and Others*, it was resolved that a rising to put down all enclosures was a levying of war within the statute;<sup>5</sup> and no doubt the judges were encouraged to give this wide construction to the statute by the Legislature, which had shown a readiness to extend it by making a conspiracy to levy war, and occasionally even a mere riot, treason.<sup>6</sup> But it is obvious that it was sometimes difficult to draw the line between a riot raised to gratify a merely private quarrel, and a riot raised to effect some public general object. Thus, in the case of a riot of weavers in 1675, for the purpose of destroying engine looms, the judges were equally divided as to whether it was treason or not. Those who held that it was treason emphasized the fact that the design was to destroy all engine looms. Those who held that it was not, regarded it as being "only a particular quarrel and grievance between men of the same trade against a particular engine that they thought a grievance to them."<sup>7</sup> And the manner in which the provisions of the statutes already referred to, had extended this clause, sometimes caused a difference of opinion. Thus, in 1668,

<sup>1</sup> Vol. iii 291; Coke cites these words of the statute, and then says, "whereby it appeareth that bearing of arms in war-like manner, for a private revenge or end, is no levying of war against the king within this statute. So that every gathering of force is not high treason." Third Instit. 10.

<sup>2</sup> Third Instit. 10.

<sup>3</sup> Third Instit. 9, 10.

<sup>4</sup> P.C. i 132.

<sup>5</sup> Vol. iv 497.

<sup>6</sup> Above n. 1.

<sup>7</sup> Hale, P.C. i 143\*-146\*.

in the case of *R. v. Messenger, Basely and Others*, Hale refused to agree with the other judges that a riot to pull down bawdy houses, and to release prisoners, was treason, on the ground that a statute of Mary had enacted that such offences were felony.<sup>1</sup> It was, however, agreed on all hands that there must be clear evidence that the intention was to effect a purpose by warlike violence;<sup>2</sup> and that, if several persons had agreed to levy war, and some had proceeded with their warlike design, and others had not actually appeared in arms, the latter were equally guilty of treason, because there are no accessories in treason.<sup>3</sup>

As in the case of the constructive extension of the clause directed against the compassing or imagining the king's death, so in the case of this clause, the Revolution did not stop the development of the law. The law laid down by Coke and Hale was restated and applied in 1710 in the case of *Dammaree and Purchase*,<sup>4</sup> who were convicted of treason for raising a riot to destroy all dissenting meeting-houses. In Stephen's opinion, their conviction was a more severe application of the law than any of the previous decisions<sup>5</sup>—indeed he almost questions its correctness.<sup>6</sup> But it is difficult to see what other conclusion could have been reached, without disregarding established authority; and Foster does not question its correctness.<sup>7</sup> The provisions of the Riot Act of 1714<sup>8</sup> have generally prevented a recourse to the doctrine applied in that case. But it was always possible to have recourse to it; and in 1781 Lord George Gordon was indicted for treason for helping to excite the riots, which raged between June 2nd and June 6th in that year, in consequence of the passing of the Act which had mitigated the penalties to which Roman Catholics were liable.<sup>9</sup> In his charge to the jury Lord Mansfield laid down the law exactly as it had been laid down by Coke, Hale, and Foster.<sup>10</sup> Lord George Gordon was acquitted, partly because the jury took

<sup>1</sup> Kelyng 75; P.C. i 134-135.

<sup>2</sup> Hale, P.C. i 150; below 328.

<sup>3</sup> Kelyng 19. <sup>4</sup> 15 S.T. 522.

<sup>5</sup> H.C.L. ii 270.

<sup>6</sup> "If Dammaree's case is good law it seems difficult to say that any riot excited by any unpopular measure, whether executive or legislative, is not high treason," *ibid* ii 271.

<sup>7</sup> See his account of the case which he had heard when a student, *Crown Law* 213-216.

<sup>8</sup> 1 George I. st. 2 c. 5; below 328-329.

<sup>9</sup> 21 S.T. 485.

<sup>10</sup> "There are two kinds of levying war:—one against the person of the king; to imprison, to dethrone, or to kill him; or to make him change measures or remove counsellors—the other which is said to be levied against the majesty of the king, or, in other words against him in his regal capacity; as when a multitude rise and assemble to attain by force and violence any object of a general public nature; that is levying war against the majesty of the king; and most reasonably so held because it tends to dissolve all the bonds of society, to destroy property, and to overturn government; and by force of arms to restrain the king from reigning according to law. Insurrections by force and violence to raise the price of wages, to open all prisons, to destroy meeting-houses, nay to destroy all brothels, to resist the execution of militia laws, to throw down all inclosures . . . have all been held levying war," *ibid* at p. 644.

the view, strongly urged upon them by Erskine,<sup>1</sup> his counsel, that he had had nothing to do with the riots; and partly perhaps because they disliked the doctrine of constructive treason.<sup>2</sup> This case, therefore, like the cases of Hardy and Horne Tooke,<sup>3</sup> effected no modification in the legal doctrine of constructive treason; but, like those cases, it showed that some change in the law was needed. But, though, as we shall now see, important changes have been made, these changes have not affected this part of the doctrine of constructive treason.

(3) *The later history.*

In 1795<sup>4</sup> a statute was passed which, in effect, gave statutory force to the constructions which had been put upon the clause of Edward III.'s statute relating to the compassing of the king's death. It provided that it should be treason to compass: (i) not only the death, but also the bodily harm, imprisonment, or restraint of the person of the king, or his deposition; (ii) the levying of war on him either in order to compel him to change his policy, or in order to overawe both or either of the houses of Parliament; (iii) the stirring up of any foreigner to invade any part of the king's dominions; such compassing being evidenced by printing, writing or other overt act. In 1848<sup>5</sup> it was in effect enacted that, such of the treasons set out in the last cited Act as related to the compassing the death or bodily harm, the imprisonment or restraint of the person of the king, should be treason; and that the other compassings specified in the Act should be felony.<sup>6</sup> But nothing in the Act was to affect the statute of Edward III.<sup>7</sup> That statute must of course be taken to bear the construction which the judges have put upon it; for there is nothing in this legislation to negative that construction.<sup>8</sup> The result is that the acts made felony by the statute of 1848 could, if the crown wished, be treated as constructive treason by virtue of the Act of Edward III. As Professor Kenny justly says,<sup>9</sup> it is "a singular juridical anomaly that

<sup>1</sup> 21 S.T. 587-621; see especially pp. 591-592, cited Stephen, H.C.L. ii 273, and the peroration at pp. 616-621.

<sup>2</sup> Dr. Johnson's saying (cited Stephen, H.C.L. ii 272 n.) that "he was glad Lord George Gordon had escaped rather than a precedent should be established of hanging a man for constructive treason," is well known.

<sup>3</sup> Above 318.

<sup>4</sup> 36 George III. c. 7 § 1; made perpetual by 57 George III. c. 6 § 1.

<sup>5</sup> 11, 12 Victoria c. 12 § 1; the object of the Act was, by diminishing the penalty, to render it easier "to prosecute these crimes with success," Kenny, Criminal Law 274.

<sup>6</sup> § 3.

<sup>7</sup> "Provided always . . . that nothing herein contained shall lessen the force of or in any manner affect anything enacted by the statute passed in the twenty-fifth year of king Edward III.," § 6.

<sup>8</sup> Stephen, H.C.L. ii 280.

<sup>9</sup> Criminal Law 274.

precisely the same action should thus occupy, simultaneously, two different grades in the sphere of crime."

This legislation did not touch the clause relating to the levying of war against the king. The result is that the constructive extension of this clause is in no way affected. Therefore, as Stephen says,<sup>1</sup> "a great riot for any public object" could still be treated as treason.

#### *Offences Cognate to Treason*

At the time when the statute of Edward III. was passed treason was regarded rather as an offence against the person of the king than as an offence against the state.<sup>2</sup> It has never ceased to be an offence against the person of the king. In fact, since the Act of 1848, it is only offences against the state which take the form of attempts against the person of the king, which must be treated as treason. But it is obvious that, as the conception of the state was more distinctly realized, and as the king came to be conceived as the head and representative of the state, treason must come to be regarded as essentially an offence, and the most heinous offence, against the state. We have seen that technical expression was given to this transformation in the conception of treason, partly by the Legislature, and partly by the growth of the doctrine of constructive treason. And, as the result of this transformation, we can see the growth of a group of offences cognate to treason. As compared with treason they are minor offences; but they all have this feature in common with treason that they are either (i) seditious in character or tendency, i.e. they aim directly at the diminution of the authority of the state; or (ii) if not seditious, they involve serious breaches of the peace, and an interference with the orderly government of the state. I have already dealt with such of these cognate offences as were created by statute during the sixteenth and seventeenth centuries.<sup>3</sup> At this point I propose to deal with such of these offences as were mainly shaped by the writings of the lawyers and the decisions of the courts.

The offences, directly seditious, which fall under the first of these heads, are, firstly, the publication of seditious words or writings, and, secondly, seditious conspiracies. Of these two matters I shall speak in the two following sections.<sup>4</sup> The offences, less directly seditious, which fall under the second of these heads, are misprision of treason, and unlawful assemblies, routs and riots. It is with these topics that I shall now deal.

#### *(1) Misprision of treason.*

We have seen that the term "misprision" meant originally the offence committed by a person who, knowing that a treason or

<sup>1</sup> H.C.L. ii 280-281.

<sup>2</sup> Vol. iv 497-503; vol. vi 399-400.

<sup>3</sup> Vol. iii 289-290.

<sup>4</sup> Below 337-346, 379-384.

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felony had been committed, failed to disclose it;<sup>1</sup> but that in the sixteenth century it had got an extended meaning.<sup>2</sup> When we talk of misprision of treason or felony we are using the term in its original sense; and that its original sense was distinct from its secondary sense is clear from the fact that Coke deals with misprision of treason and felony, and with misprision generally, in separate chapters.<sup>3</sup>

When Coke wrote, the offence had, as a result of statutes of Edward VI. and Mary's reigns, been distinguished from treason; and, even before that time, its punishment had been definitely fixed.<sup>4</sup> Its punishment was imprisonment for life, forfeiture of goods, and forfeiture of the profits of land for life.<sup>5</sup> Misprision of felony bore the same relation to felony as misprision of treason bore to treason. It differed only in the fact that its punishment—fine and imprisonment<sup>6</sup>—was less severe. But, though by the middle of the sixteenth century misprision of treason had been distinguished from treason, it was not till the middle of the seventeenth century that the two offences were clearly differentiated, by the definition of the extent of the knowledge, the concealment of which would amount to misprision. Firstly, in 1662 it was resolved by the judges,<sup>7</sup> "that where a person knowing of the design does meet with them, and hear them discourse of their traitorous designs, and say or act nothing; this is high treason in that party, for it is more than a bare concealment, which is *misprision*, because it sheweth his liking and approving of their design; but if a person not knowing of their design before, come into their company, and hear their discourses, and say nothing, and never meet with them again at their consultations, that concealment is only misprision of high treason. But if he meet with them again, and hear their consultations, and then conceal it, this is high treason. For it sheweth a liking and an approving of their design." Secondly, in 1663 it was resolved<sup>8</sup> that "to make a misprision of treason, there must be a knowledge of the design, and of the persons or some of them; for a man cannot be said to conceal what he doth not know; and therefore if one tell J. S. in general, that there will be a rising without acquainting him with the persons

<sup>1</sup> Vol. iii 388-389.

<sup>2</sup> Ibid 389 n. 1.

<sup>3</sup> Third Instit. cap. iii and lxxv.

<sup>4</sup> "Tho' some question was antiently, whether bare concealment of high treason were treason (vol. iii 389 n. 1), yet that is settled by the statute of 5, 6 E. 6 cap. 11, and 1, 2 P. and M. cap. 10, viz. that concealment or keeping secret of high treason shall be deemed and taken only misprision of treason, and the offender therein to suffer and forfeit, as in cases of misprision of treason, as hath heretofore been used," Hale, P.C. i 371.

<sup>5</sup> Coke, Third Instit. 36; Hale, P.C. i 374.

<sup>6</sup> Coke, Third Instit. 36.

<sup>7</sup> R. v. Tong, Kelyng 17; there was a similar resolution in the following year ibid 21.

<sup>8</sup> Kelyng 21, 22.

who are to rise or with the nature of the plot, if J. S. conceal this, this is no misprision of treason, because he hath no knowledge of the treason."

Certain statutes of Elizabeth's reign made misprision of treason "a kind of substantive offence, and not consequential upon the making of treason."<sup>1</sup> For instance those who counterfeited foreign gold coin,<sup>2</sup> or who failed to disclose any offer of reconciliation to the Roman Catholic religion,<sup>3</sup> or who aided or maintained any person who tried to pervert any of the queen's subjects from their allegiance to the church as by law established,<sup>4</sup> were declared to be guilty of this offence.

(2) *Unlawful assemblies routs and riots.*

It would seem that these three allied offences were beginning to acquire their modern characteristics during the latter part of the sixteenth century. A note in Brooke's Abridgment states in substance that the offence of unlawful assembly is committed, if there is an assembly for an illegal purpose against the peace, though nothing is done in pursuance of that purpose; that if the assembly proceed on their way to the execution of their purpose the unlawful assembly becomes a rout; that if they proceed to execute their illegal purpose the rout becomes a riot; and that the offence of riot, and therefore of rout and unlawful assembly, cannot be committed by less than three persons.<sup>5</sup> These definitions given by Brooke, and, as we have seen,<sup>6</sup> the treatment of these offences by the court of Star Chamber, are the foundation of the definitions of these offences recognized by our modern law.

Of the offence of "rout" it is not necessary to speak further. The two important offences are unlawful assembly and riot. We

<sup>1</sup> Hale, P.C. i 376.

<sup>2</sup> 14 Elizabeth c. 3.

<sup>3</sup> 13 Elizabeth c. 2.

<sup>4</sup> 23 Elizabeth c. 1. All these statutes are cited, Hale, P.C. i 376-377.

<sup>5</sup> "Nota quod intelligitur quod ryot nest nisi per 3 al meyns, et doyent faire illoyal acte, mes poet estre illoyal assemble, si le peuple eux assemble insimul pur male purpose contra pacem, coment que ils fessent rien, tamen videtur per rehearshals in statutes que si ils eurent assemble et puis procedunt ou chivauchent, ou allent avant, ou mouvent per instigacion dun ou plures que est conductor de eux, cest un route, coque ils meuvent, et procede en route et nombre," Bro. ab. *Riots* pl. 4; Coke, on the other hand, adopted, from Marowe's Reading, Bro. loc. cit. pl. 5, Putman, Oxford Studies vol. vii 339, another definition of a rout—it signifieth, he says, "when three or more do any unlawful act for their own or the common quarrel etc. as when commoners break down hedges or pales, or cast down ditches, or inhabitants for a way claimed by them or the like," Third Instit. 176; but, as Brooke says, the first definition is the better, and it is that which is now recognized, Hawkins, P.C. Bk. i c. 65 § 8; Kenny, Criminal Law 283; Blackstone, Comm. iv 146, tries to combine the two.

<sup>6</sup> Vol. v 198-199; [note it should have been there pointed out that Hudson's definition of a rout is more correct than Coke's and Marowe's, and is probably based on Brooke's; at p. 198 line 9 for "both by Hudson and Coke" read "by Marowe, Brooke, Hudson and Coke," and line one from the bottom for "Coke" read "Brooke."]



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have seen that certain kinds of acts, which are included in the definition of these two offences, had been the subject of important statutes of Edward VI., Mary and Elizabeth's reigns;<sup>1</sup> and, during the whole of this period, both offences were becoming the centres of important bodies of legal doctrine. I shall deal with the development of this body of legal doctrine under the following heads: (i) The definition of these offences; (ii) the relation between the repeal of the earlier legislation on the subject of riot to the distinction between riot and treason; and (iii) the liabilities of rioters, and the measures which may or ought to be taken for the suppression of riots, and the dispersal of unlawful assemblies.

### (i) The definition of these offences.

The view recognized by the court of Star Chamber,<sup>2</sup> that it takes at least three persons to commit the offence of riot or unlawful assembly, was acted upon in the case of *R. v. Sudbury* in 1700.<sup>3</sup> In that case three persons having been indicted for an unlawful assembly a rout and a riot, one was acquitted and two found guilty; and judgment was arrested because two could not be guilty of these offences.<sup>4</sup> It is obvious that to constitute a riot the element of violence must be present; and as it is clear that the offence of unlawful assembly has, from the first, been regarded as an offence which is preparatory to or contemplates a riot,<sup>5</sup> it cannot be committed unless both the purpose of the assembly is illegal,<sup>6</sup> and there is an element of violence in the illegal purposes for which the assembly is gathered together. It follows that a definition of this offence, which makes it include an assembly which contemplates the commission of any illegal act, is not historically sound; and it is the better opinion that it is not good law.<sup>7</sup> Moreover, there must be an element of deliberate purpose; for if the members

<sup>1</sup> Vol. iv 497.

<sup>2</sup> Vol. v 198.

<sup>3</sup> 1 Ld. Raym. 484.

<sup>4</sup> It was pointed out that, "if the indictment had been that the defendant, with divers other disturbers of the peace etc., had committed this riot and battery, and the verdict had been as in this case, the King might have had judgment," *ibid.*

<sup>5</sup> "An unlawful assembly is when three or more assemble themselves together to commit a riot or rout, and do it not," Coke, Third Instit. 176; Hawkins, P.C. Bk. i c. 65 § 9; vol. v 198.

<sup>6</sup> Thus an assembly of a man's friends in his house merely for purposes of defence is an assembly for a legal purpose, Y.B. 21 Hy. VII. Mich. pl. 50; Semayne's Case (1605) 5 Co. Rep. at f. 91b; Hawkins, P.C. Bk. i c. 65 § 10; but the purpose of such an assembly must be strictly defensive—"si on fuit menace que si il vient a tel marche, ou in tiel lieu, il sera batte la; en ceo cas il ne puit assemble des gens de luy assister d'aller la in saufgard de sa personne, purceque il ne besoigne de aller la, et il puit avoir remedy per surete de paix," Y.B. 21 Hy. VII. Mich. pl. 50 *per* Fineux, C.J.; and other authorities cited lay down the same law.

<sup>7</sup> Vol. v 198; Y.B. 3 Hy. VII. Hil. pl. 1; Marowe's Reading, Putnam, Oxford Studies vol. vii. 340-341; Kenny, *op. cit.* 281; Dicey, Law of the Constitution (7th ed.) 500. The source of the error was perhaps Blackstone, who, adapting Coke's definition of a riot to an unlawful assembly, says that it is "when three or more do assemble themselves together to do an unlawful act, as to pull down enclosures, to destroy a warren, and the game therein; and part without doing it or making any motion towards it"; the qualification appears in the illustrations, but it is not explicitly stated.

of a lawful assembly suddenly fall out and come to blows, it was settled, as early as 1503, that those falling out are guilty of an affray, and that no guilt attaches to the other persons attending the assembly.<sup>1</sup>

Coke had limited somewhat narrowly the sort of violent wrongdoing which an assembly must contemplate in order to make it an unlawful assembly. He defines it simply as "when three or more assemble themselves together to commit a riot or rout and do it not";<sup>2</sup> and Blackstone simply repeats Coke.<sup>3</sup> But, before Blackstone's time, it was coming to be the general opinion that this definition was too narrow. It was coming to be thought that account must be taken, not only of the purpose of the meeting, but of its character; and that, if it was of a character which would inspire the average citizen with reasonable fear, it might be held to be an unlawful assembly. Marowe had put forward this view as early as 1503;<sup>4</sup> and it came into favour during the seventeenth century. There was some slight authority for it in precedents of 1566 and 1617 cited in a Star Chamber case of 1617;<sup>5</sup> it was more distinctly asserted by Holt, C.J., in 1708;<sup>6</sup> and was clearly stated by Hawkins a few years later.<sup>7</sup> The later history of the development of this offence is mainly concerned with working out the consequences of this aspect of the offence; and of establishing criteria to distinguish between the cases when a meeting can be held to inspire this fear, and so be an unlawful assembly, and the cases when the fear, being inspired only by the unlawful acts

<sup>1</sup> Marowe's Reading, Putnam, Oxford Studies vii 340; "if several are assembled lawfully without any evil intent, and an affray happens, none are guilty but such as act; but if the assembly was originally unlawful, the act of one is imputable to all," R. v. Ellis (1708) 2 Salk. 595 *per* Holt, C.J.

<sup>2</sup> Third Instit. 176.

<sup>3</sup> Comm. iv 146.

<sup>4</sup> "Item le maner de le fesaunce de le assemble poet faire une Riott lou assemble fut loiall devant; sicome home que entende de aler al cessions ou merkett et vient en harnes et ceux servantes aussi ove luy en harnes, et uncore paraventur son entent ne fut de faire aucun Riott, mes le maner de luy face le Riott pur le presens del people," *op. cit.* 340.

<sup>5</sup> Howard v. Bell and Others, Hob. 91; in that case tenants, having a common interest, had assembled together to maintain their title; the court inclined to the view that this was lawful; but the Lord Chancellor cited a case of 1566 where, in a similar case, a riot had resulted; it was not proved that the defendants had been concerned in the riot; one Bell was fined for assembling the tenants, and "Hodson another tenant was also punished for being present at that assembly, and the event of such an assembly is in no man's power to moderate."

<sup>6</sup> R. v. Soley 2 Salk. 594; at p. 595 it is said that, "the Chief Justice thought an assembly might meet together with such circumstances of terror as to be a riot. He called it a kind of assault upon the people."

<sup>7</sup> "But this seems to be much too narrow a definition; for any meeting whatsoever of great numbers of people with such circumstances of terror, as cannot but endanger the public peace, and raise fears and jealousies among the king's subjects, seems properly to be called an unlawful assembly; for no one can foresee what may be the event of such an assembly," P.C. Bk i c. 65 § 9.

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of strangers to the meeting, will not make the meeting an unlawful assembly.<sup>1</sup>

The suggestion that a meeting is an unlawful assembly, if it meets with intent to incite disaffection to the government as by law established, does not seem to have been made in England till nearly the middle of the nineteenth century.<sup>2</sup> Generally, it would seem, the members of such an assembly would be indictable for conspiracy; but, as Dicey suggests, they might be indicted for this offence "if the circumstances of the time were such that the seditious proceedings at the meeting would be likely to endanger the public peace."<sup>3</sup>

The growth of the law as to the offence of unlawful assembly has thus been a comparatively late development. We may perhaps find a reason for this in the history of that aspect of the law as to riot with which I am about to deal.

(ii) The relation between the repeal of the earlier legislation on the subject of riot to the distinction between riot and treason.

We have seen that a statute of 1549-50<sup>4</sup> 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, all so remaining should be guilty of treason; and the same provision was made for assemblies of forty persons or more, who remained together for two hours and upwards, for purpose of committing certain other traitorous rebellious or felonious acts. It was also provided that those taking part in certain other riotous assemblies, and not dispersing after due notice, should be guilty of felony; and that those who summoned, procured, moved, or stirred any such assemblies should be guilty of the same offence. We have seen that in 1553<sup>5</sup> the offences which were made treason under this Act were reduced to felony; that this enactment was renewed in 1558;<sup>6</sup> and that it remained in force till the end of Elizabeth's reign, when it expired.<sup>7</sup>

It is clear that these Acts hit most cases of riot and unlawful assembly. While they were in force, therefore, there was not much need to invoke the assistance of the common law. Moreover, any other cases could be and generally were dealt with by the Star

<sup>1</sup> Dicey, *Law of the Constitution* (7th ed.) 500-504; see vol. x 701-705.

<sup>2</sup> "Any meeting of her Majesty's subjects which a party procures to assemble for the purpose of addressing a seditious speech . . . a meeting called for that purpose and used for that purpose is an unlawful meeting," *R. v. Ernest Jones* (1848) 6 S.T.N.S. at p. 816 *per* Wilde, C.J.; a similar ruling by the same judge was given in *R. v. Fussell* (1848) *ibid* at p. 764.

<sup>3</sup> *Law of the Constitution* (7th ed.) 501 n. 1.

<sup>4</sup> 3, 4 Edward VI. c. 5; vol. iv 497.

<sup>5</sup> 1 Elizabeth c. 16.

<sup>6</sup> 2 Mary II. c. 12; vol. iv 497.

<sup>7</sup> Vol. iv 497 n. 9.

Chamber. When these Acts expired, political conditions made it very unlikely that Parliament would pass any Act giving to the crown powers which might easily be used against its political opponents; and the Star Chamber was fully competent to deal with any ordinary case of riot or unlawful assembly. But at the Restoration the courts were faced with a new set of political conditions. The Star Chamber had been abolished, and the courts were therefore obliged to use their common law powers. It was no doubt because their powers were inadequate, that we see in this period a development of the constructive extension of the clause of Edward III.'s statute of treasons, which made the levying of war against the king treason.<sup>1</sup> For if a riot could be brought within the sphere of treason, not only was the punishment much more severe, but also, as we shall see,<sup>2</sup> the common law powers of magistrates soldiers and others to suppress it were greater. But the consideration of these cases necessarily involved a closer definition of the essential features of the offence of riot. And it is therefore, in this period, that the modern definition of this offence is ascertained. In the first place, the object of the riot must be merely a private object. "A recovers possession against B of a house etc. in a real action or in an *ejectione firmæ*, and a writ of seisin or possession goes to the sheriff. B holds his house against the sheriff, with force, and assembles persons with weapons for that purpose, who keep the house with a strong hand against the sheriff, tho' assisted with the *posse comitatus*. This is no treason either in B or his accomplices, but only a great riot and misdemeanour."<sup>3</sup> In the second place, if the aspect of the assembly was not warlike, it could only be a riotous assembly, and its acts of violence could only amount to a riot. To make the acts of a riotous assembly treasonable, "it must be such an assembly as carries with it *speciem belli*, as if they ride or march *vexillis explicatis*, or if they be formed into companies, or furnished with military officers, or if they are armed with military weapons. . . . and are so circumstanced that it may reasonably be concluded they are in a posture of war, which circumstances are so various, that it is hard to define them all particularly."<sup>4</sup>

It is clear from this passage that the line between a mere riot and a constructive levying of war was fine. As we have seen, it caused differences of judicial opinion;<sup>5</sup> and as, in many cases, the penalty was out of all proportion to the offence with which individual rioters were charged, it shocked the public conscience. It was for this reason that in 1714<sup>6</sup> the present Riot Act was passed, which re-enacted in a modified form the provisions of the

<sup>1</sup> Above 319-320.

<sup>2</sup> Above 319-320.

<sup>3</sup> Below 330-331.

<sup>4</sup> 1 George I. st. 2 c. 5; Bl. Comm. iv 143.

<sup>5</sup> Hale, P.C. i 146.

<sup>6</sup> Ibid 150.

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Acts which had been in force during Mary and Elizabeth's reigns; and we have seen that it was due to this enactment that the government generally avoided recourse to this species of constructive treason.<sup>1</sup> This statute in effect provides that, if twelve or more persons are unlawfully assembled to the disturbance of the peace, and a mayor, sheriff, or justice of the peace command them to disperse, and they continue together for one hour after such command, all so continuing are guilty of felony; and those who afterwards disperse the assembly are indemnified for the consequences of any violence which they may employ.

This Act has generally been found sufficient to deal with unlawful assemblies, the demeanour of which is obviously threatening, and with actual riots. It was the large increase in meetings held to advocate public objects, which occurred at the end of the eighteenth and the beginning of the nineteenth centuries, which has led to the development of the law as to unlawful assembly, which I have already noticed.<sup>2</sup> Their demeanour was generally not obviously threatening; and they were not assembled with the direct object of committing a riot. In many cases, however, it was fairly clear that a riot might easily result from their meeting. But to them the provisions of the Riot Act were not immediately applicable; and therefore they have caused not only a development of the law relating to unlawful assemblies, but also some reconsideration of the law as to powers of the authorities in dealing with these assemblies.<sup>3</sup>

(iii) The liabilities of rioters, and the measures which may or ought to be taken for the suppression of riots, or the dispersal of unlawful assemblies.

The law as to the liability of rioters who, in the course of their riotous conduct, committed a felony, was strict and satisfactory. It was established, as early as Edward III.'s reign, that all were equally liable for the felony.<sup>4</sup> "Note also," says Dalton,<sup>5</sup> "that if divers persons come in one company to do any unlawful thing, as to kill, rob or beat a man, or to commit a riot, or to do any other trespass, and one of them thereof kill a man, this shall be adjudged murder in them all, that are present of that party abetting him, and consenting to the act, or ready to aid him, altho' they did but look on." Hale quotes this passage from Dalton with approval, and cites a case of 1675 in which this rule of law was restated.<sup>6</sup> But, if no felony was committed, the law was not equally

<sup>1</sup> Above 320.

<sup>2</sup> Above 326.

<sup>3</sup> Dicey, *Law of the Constitution* (7th ed) 504-512.

<sup>4</sup> Fitz. Ab. *Corone* pl. 350 (3 Ed. III.).

<sup>5</sup> Cited Hale, P.C. 1441.

<sup>6</sup> Ibid 462-463; cp. *Mackalley's Case* (1612) 9 Co. Rep. at f. 67b.

satisfactory. Each individual rioter was only liable for a misdemeanour, whatever damage he did; and thus the technical distinction between felony and misdemeanour tended sometimes to lighten unduly the liability of the rioters.

The same cause tended also to hamper the authorities in suppressing riots, or in dispersing unlawful assemblies; and to render the position of the ordinary citizen, who helped to suppress or disperse them, somewhat dubious. It was largely for this reason that the provisions of the Riot Act<sup>1</sup> were needed. This will be clear if we look at the rules on this matter, some of which, though elaborated and extended in this period, originated in the Middle Ages.

In the sixteenth century every citizen was justified in taking all reasonable means to put a stop to breaches of the peace committed in his presence.<sup>2</sup> He was therefore justified in intervening to help to suppress a riot or to disperse an unlawful assembly. But, if no felony had been committed, he could only use reasonable force for this purpose; and to-day<sup>3</sup> as in the thirteenth century,<sup>4</sup> he must at his peril hit the mean between excess and defect.<sup>5</sup> On the other hand, if a felony has been committed, all the rioters are, as we have seen,<sup>6</sup> guilty of felony; and it is the duty of every citizen to apprehend the felon.<sup>7</sup> If, therefore, in such a case a rioter is killed in resisting apprehension, the homicide is justifiable.<sup>8</sup> A fortiori, the same rule applies if some duly constituted officer of the law has raised the posse comitatus, or has called for assistance to suppress a riot or to disperse an unlawful assembly, and a private person goes to his help, and kills

<sup>1</sup> 1 George I. st. 2 c. 5.

<sup>2</sup> Marowe, *Oxford Studies* vii 336; Coke, *Third Instit.* 158; *R. v. Pinney* (1832) 3 S.T.N.S. at p. 4. Coke cites no authority, though in fact his statement is justified by the resolution of the judges in the *Case of Armes* (1597) Pop. 121; the rule may well be a sixteenth-century extension of the duty to arrest felons, vol. iii 599-601; Maitland says, "we may strongly suspect that in general the only persons whom it is safe to arrest are felons, and that one leaves oneself open to an action, or even an appeal, of false imprisonment if one takes as a felon a man who has done no felony," P. and M. ii 580-581; this is justified by Marowe's statement, *loc. cit.*, that though a man could stop an affray, he had no action if he were hurt, but that those guilty of the affray had an action if he hurt them; and see Stephen, *H.C.L.* i 193; in fact the right to arrest felons merely on suspicion seems to be denied in 42 Ass. pl. 5; however, it seems to be admitted in Y.B. 11 Ed. IV. Trin. pl. 8 that a private person may arrest another whom he suspects of felony; and in Y.B. 10 Hy. VII. Pasch. pl. 8 it was said that if A had wounded B, A could be arrested, till it could be known whether B died of the stroke; this implies a power to arrest for an act which was not ascertained to be felony; and the rule stated by Coke may well be a further stage in the extension of these precedents.

<sup>3</sup> Kenny, *Criminal Law* 283.

<sup>4</sup> "The ordinary man seems to have been expected to be very active in the pursuit of malefactors, and yet to act at his peril," P. and M. ii 581.

<sup>5</sup> In *R. v. Pinney* (1832) 3 S.T.N.S. at p. 510 Littledale, J., speaking of the duty of a magistrate called on to suppress a riot, said, "he is bound to hit the exact line between an excess and doing what is sufficient."

<sup>6</sup> Above 329.

<sup>7</sup> Vol. iii 599-600.

<sup>8</sup> Hale, *P.C.* i 495.

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a rioter who resists the attempt to apprehend him.<sup>1</sup> And in this case it would seem that the homicide of those resisting dispersal or arrest would, *prima facie* at any rate, be justifiable, even though no felony had been committed.<sup>2</sup>

Since an ordinary citizen might be made liable if he did not help to suppress a riot or disperse an unlawful assembly when called upon to do so, a *fortiori* an official could be made liable if he neglected this duty. And just as statutes had added to the powers of officials to take measures to arrest rioters,<sup>3</sup> so other statutes had rendered them liable to special penalties if they failed in their duties.<sup>4</sup> But these statutes only rendered more explicit the common law principles; and it is these principles upon which the modern common law rests.<sup>5</sup> The erroneous idea that the Riot Act had somehow modified these principles, led to the failure of the authorities to check the Lord George Gordon riots in their initial stage, and to the authoritative correction of this error.<sup>6</sup>

The development of the law of treason during this period, and of offences cognate thereto, represents the contribution made by the common law to the maintenance of the authority of the state and its law. Professor Kenny has said that the severity of the law on these matters was largely due to the inadequacy of its powers for the prevention of crime—an inadequacy which was due to the absence of efficient police. "The law felt its parish constabulary to be comparatively powerless to prevent any offence that involved the presence of a plurality of offenders. It consequently attempted to supply the defect by very comprehensive prohibitions of all such crimes."<sup>7</sup> This is true, but not I think the whole truth. It explains, I think, the rules which have just been discussed as to the measures which may or ought to be taken by officials and others for the suppression of riots; and, to

<sup>1</sup> Hale, P.C. i 495.

<sup>2</sup> "And it seems, as to this manner of killing rioters, that resist the ministers of justice in their apprehending, it is no other but what the common law allows, or at least what the statute of 13 H. 4 cap. 7 implicitly allows to two justices of the peace with the sheriff or undersheriff of the county, by giving them power to raise the posse comitatus, if need be, and to arrest the rioters. . . . And it seems the same law is for the constable of a vill in case a riot happen within the vill," Hale, P.C. i 495; according to Marowe, Putnam, Oxford Studies, vii 338-339 the sheriff had, apart from this and other statutes, no power to call for assistance—"Quar per le comen ley null puit commaunder les homez del conte de aler ove luy en cest cas forsque le Roie tantum; quar cest commaundement fut entendue une sequestracion de loure liberte."

<sup>3</sup> 34 Edward III. c. 1; 17 Richard II. c. 8; 13 Henry IV. c. 7; Hawkins, P.C. Bk. i c. 65 §§ 15-29.

<sup>4</sup> 13 Henry IV. c. 7; 2 Henry V. c. 8; 19 Henry VII. c. 13.

<sup>5</sup> See Tindal C.J.'s charge to the grand jury at the opening of the special commission to try the Bristol rioters in 1832, 3 S.T.N.S. 4-6.

<sup>6</sup> Kenny, Criminal Law 285; vol x 706-707.

<sup>7</sup> Ibid 280.

some small extent, it perhaps explains the severity of the rules as to these and other offences cognate to treason. But, it seems to me, the severity of these rules admits not merely of explanation, but of a justification, which is as much applicable to the present age as to the age in which they were evolved.

However efficient the police system may be, a neglect to deal severely with these and the like offences of a seditious kind will speedily undermine the authority of the state and the law; and, as the history of the criminal law in this period shows, firm measures of suppression will, even in the absence of an adequate police system, vastly diminish their power for evil. More really depends on the spirit which animates the rulers of the state than upon the material means of coercion at their disposal. If a state allows its subjects too large a freedom to express opinions directly hostile to its authority, and too large a power to combine; and, if, in addition, it puts the most formidable of these combinations above the law; it will soon sink back to the condition in which the English state found itself at the time of the Wars of the Roses. It will soon find that its authority is small in comparison with that of its over mighty subjects, and that the duty of allegiance to it is held to be of small account, when it conflicts with the allegiance exacted by these usurpers of its authority.

In fact, the history of the law of treason and of the offences cognate thereto, shows that the creation and preservation of a law-abiding instinct is as difficult to maintain as it is easy to undermine. This work can only be successfully accomplished by a firm, a far seeing, and an intelligent administration of the rules designed to safeguard the state against those who attempt, from whatever motives, to set up rivals to its authority,—an administration of these rules which, on adequate grounds, is not afraid to be cruel. As I have already pointed out,<sup>1</sup> the more firmly the law is administered on these lines, the less need there will be for cruelty; for the state will cease to fear its criminals, and will consequently feel itself able to be generous. It was largely due to the fact that the criminal law was administered on these lines during these two centuries, that, at the end of this period, the state and its law had emerged supreme. It is true that all through this period lawlessness was rampant. But the measure of the success which had been achieved in dealing with this lawlessness, and especially with lawlessness of the seditious variety, can be best measured by the contrast between the state of England in 1500 with its state in 1700. At the latter date life and property were far more secure, and the foundations of the future commercial prosperity of the country had been laid.

<sup>1</sup> Vol. v 196.



That this result had been attained was also due to the fact that the common law had been careful to guard against many other offences, which were almost as much cognate to treason as those which have just been described. We shall see in the ensuing sections that its rules as to the treatment of seditious speeches and writings, as to conspiracy, and, to some extent, the rules which imposed legal disabilities upon religious nonconformists, all helped towards the attainment of this result; for they all helped to form a consistent public opinion upon such fundamental matters as the sanctity of the law, the protection of property, and the sacredness of contract. Both the experience of the Commonwealth period, and the experience of our own days, prove that the unlimited tolerance of all opinions tends to undermine all these fundamental principles upon which the stability of the state, and, therefore, of civilization itself, depend.

## § 2. DEFAMATION

The wrong of defamation is sometimes a crime pure and simple, sometimes a tort pure and simple, and sometimes it can be treated either as a crime or a tort at the option of the injured person. Defamation is a crime when it consists of the publication of seditious obscene or blasphemous speeches, or the publication of seditious obscene or blasphemous writings, or the utterance of writings or the utterance of speeches which directly incite to a breach of the peace. Defamation is a tort when it consists of the publication of writings, or the utterance of speeches, which hold another person up to hatred contempt or ridicule, provided, in the case of speeches, special damage can be proved or is presumed. Defamation can be treated either as a crime or tort at the option of the injured person, if it consists of the publication of writings which hold him up to hatred contempt or ridicule.<sup>1</sup>

There is nothing anomalous in the fact that defamation is thus treated sometimes as a crime, sometimes as a tort, and sometimes as either a crime or a tort; for it is obvious that defamatory writings or speeches may, according to their contents, either (i) affect the stability or the peace of the state or the morals of its subjects, or (ii) cause loss of reputation or pecuniary loss to an individual, or (iii) be both dangerous to the peace of the state and harmful to an individual. In Roman law some forms of defamation could be regarded either as delicts or as crimes;<sup>2</sup> and, if no

<sup>1</sup> Kenny, Criminal Law 305-314.

<sup>2</sup> Girard, Droit Romain 393—"Le droit impérial continua le mouvement commencé par la loi Cornelia et donna, finalement dans tous les cas, à la victime de l'injure, le droit de choisir entre l'action d'injures et une punition physique infligée au coupable *extra ordinem* par le magistrat que le jurisconsulte récent Hermogénien représente comme choisie d'ordinaire de son temps."

specific person was defamed, the defamation could only be criminally prosecuted.<sup>1</sup> Nor is there anything anomalous in the manner in which English law treats seditious obscene or blasphemous writings or speeches, or writings or speeches which directly incite to breaches of the peace. What is anomalous is the manner in which it treats defamation, when it consists of writings or speeches which hold up another person to hatred contempt or ridicule. In this part of the law a sharp line is drawn between written and spoken defamation, which puts them into two very different categories. Other systems of law sometimes provide that the penalty shall be increased if the defamation is written.<sup>2</sup> No other system treats what is essentially the same offence in two essentially different ways.

In English law the written defamation of another is a libel which is actionable *per se*, and can be treated at the option of the injured person as either a crime or a tort. On the other hand, spoken defamation of another can only be a tort, and will only be a tort if the words fall into a limited class of cases in which words are actionable *per se*, or if they cause temporal loss. The result is, as it has been well said, "absurd in theory, and very often mischievous in its practical operation."<sup>3</sup> It is only partially remedied by the growth of the specific tort of slander of title,<sup>4</sup> and of the analogous tort of maliciously uttering falsehoods which damage a plaintiff's business.<sup>5</sup> It is clear that this anomalous state of the law can only be explained by the history of the way in which the law on this, and other branches of the law of defamation, has grown up.

Some of the leading principles and characteristics of the modern law of defamation began to take shape during the last half of the seventeenth century. The shape which they took is the product of the earlier development of this branch of the law. Of that earlier development I have already said something.<sup>6</sup> But in order to understand its modern development, a brief recapitulation is necessary.

The primitive codes of the Anglo-Saxons<sup>7</sup> and other Teutonic

<sup>1</sup> "Quod senatus-consultum necessarium est, cum nomen adjectum non est ejus, in quem factum est: tunc ei, quia difficilis probatio est, voluit senatus publica quacunque rem vindicari. Ceterum si nomen adjectum est, et jure communi injuriarum agi poterit: nec enim prohibendus est privato agere judicio, quod publico judicio praejudicatur, quia ad privatam causam pertinet," Dig. 47. 10. 6; cp. Code 9. 36.

<sup>2</sup> See e.g. the provisions of the German law cited L.Q.R. x 160; and the Scotch law follows the same rule, *ibid* 161.

<sup>3</sup> Veeder, *The History of Defamation*, Essays, A.A.L.H. iii 446.

<sup>4</sup> Below 351-352.

<sup>5</sup> Below 352.

<sup>6</sup> Vol. ii 366, 382-383; vol. iii 409-411; vol. v 205-212.

<sup>7</sup> Vol. ii 382 n. 11.

racés,<sup>1</sup> like the primitive code of the Twelve Tables,<sup>2</sup> punished defamatory words; and in later days the manorial and other local courts gave remedies for this offence.<sup>3</sup> But the provisions of the Anglo-Saxon laws on this matter have no continuous history; and the jurisdiction of the manorial and other local courts decayed. Unless the defamation was of a sort which came within the statutes which created the offence of *scandalum magnatum*,<sup>4</sup> the mediæval common law gave no remedy. For all other defamation the suitor was obliged to go to the ecclesiastical courts. It was not till the beginning of the sixteenth century that the common law courts began to compete with the ecclesiastical courts in this field of jurisdiction, by allowing an action on the case for defamation.<sup>5</sup> As usually happened when the common law courts and the ecclesiastical courts came into conflict, the common law courts soon deprived the ecclesiastical courts of the greater part of their jurisdiction. This was due partly to the fact that the common law courts prohibited the ecclesiastical courts from entertaining any suit for defamation, unless the defamatory words had charged the plaintiff with some offence of exclusively ecclesiastical cognisance; and partly to the popularity of the common law remedy of damages, as compared with the merely ecclesiastical penalty which the ecclesiastical courts could inflict.<sup>6</sup> In fact, so popular was the common law remedy, that the common law courts found themselves obliged to take measures to diminish the flood of litigation which threatened to overwhelm them.<sup>7</sup>

Since the common law remedy was an action on the case, damage was the gist of the action. And damage was construed in a narrow proprietary sense. As Sir F. Pollock has said,<sup>8</sup> "the law went wrong from the beginning in making the damage and not the insult the cause of the action." But this defect was inherent in the form of action by which alone redress could be given; and there is no doubt that the inherent defect of this way of looking at this wrong was aggravated by the measures which the courts took to stem this tide of litigation. We shall see that, in order to discourage litigants, they insisted on construing words, whenever possible, as innocent; and that, in their endeavours to give them a "*mitior sensus*," they construed them with the same

<sup>1</sup> "Even the rude *Lex Salica* decrees that if one calls a man 'wolf' or 'hare' one must pay him three shillings, while if one calls a woman 'harlot,' and cannot prove the truth of the charge, one must pay her forty-five shillings. . . . In the Norman custom it is written that the man who has falsely called another 'thief' or 'manslayer' must pay damages, and, holding his nose with his fingers, must publicly confess himself a liar," P. and M. ii 536.

<sup>2</sup> "*Nostrae contra xii tab. cum perpauca res capite sanxiasset, in his hanc quoque aanciendam putaverunt: si quis occentavisset sive carmen condidisset, quod infamiam faceret flagitiumve alteri*," Cicero *De Rep.* iv 10, 12.

<sup>3</sup> Vol. ii 382-383.

<sup>4</sup> Vol. iii 409-410.

<sup>5</sup> Ibid 411; vol. v 205-208.

<sup>6</sup> Ibid 206.

<sup>7</sup> Ibid; below 353 seqq.

<sup>8</sup> *Torte* (12th ed.) 324.

strictness as they were accustomed to construe writs or pleadings, with results which were often absurd and sometimes unjust.<sup>1</sup>

But, while the development of the tort of defamation was thus being warped by the action of the common law courts, a wholly new conception of this offence was being developed in the court of Star Chamber. We have seen that the Council and the Star Chamber had, in the interests of the peace and security of the state, assumed a strict control over the press.<sup>2</sup> Naturally the Star Chamber assumed jurisdiction in all cases in which its rules on this matter had been infringed; and this led it to regard defamation as a crime. Borrowing perhaps from the Roman law as to *Libella Famosa*,<sup>3</sup> it treated libels both upon officials and private persons as crimes. The former were seditious libels, and directly affected the security of the state. The latter obviously led to breaches of the peace. On the same principle it dealt with seditious words.<sup>4</sup> But we have seen that in this case its practice was not always consistent; for, at any rate in the case of words which were not seditious, their truth was allowed to be pleaded as a defence—a defence which is, as we have seen, wholly out of place if defamation is regarded as a crime.<sup>5</sup>

When the Star Chamber was abolished, the law of defamation thus consisted of two very divergent parts. In the first place, there was the body of law developed in the Star Chamber, which regarded defamation as a crime; and, in the second place, there was the body of law developed round the common law action on the case, which regarded defamation as a tort. The common law judges after the Restoration took over the law as developed by the Star Chamber, and further developed it on similar lines. They also further developed the conception of the tort of defamation. Naturally these cognate bodies of law, being developed by the same tribunals, exercised a reciprocal influence on one another; and our modern law is the result. The history of its construction during this period I shall trace under the two heads of Defamation as a Crime, and Defamation as a Tort.

#### *Defamation as a Crime*

The two main varieties of the crime of defamation were distinguished by Coke in the case *De Libellis Famosis*.<sup>6</sup> It can be committed either against a private person, or against a magistrate or other public person; and the latter is the much more serious offence, "for it concerns not only the breach of the peace but the scandal of Government." The first variety can be quickly

<sup>1</sup> Below 355-356; vol. v 206.

<sup>4</sup> Ibid 211.

<sup>5</sup> Ibid 211-212.

<sup>2</sup> Vol. vi 367-370.

<sup>3</sup> Vol. v 208.

<sup>6</sup> (1606) 5 Co. Rep. 125a; vol. v 208.

disposed of. It was defined by the common law courts and punished, just as the Star Chamber had defined and punished it.<sup>1</sup> The chief addition made by the common law courts to the earlier law was the definite settlement of the rule, foreshadowed in the earlier law,<sup>2</sup> that mere spoken words defamatory to a private person cannot be treated as a crime.<sup>3</sup> We shall see that this decision is important in the history of defamation as a tort; for it probably had a good deal to do with creating the unfortunate distinction between the torts of libel and slander.<sup>4</sup> It is the second variety of libels which is the most important, and it is the law as to these libels which was the most developed during this period. Naturally, as we shall see, some of the principles thus developed helped to elucidate some of the incidents of the first variety of the crime of libel.

The crime of publishing defamatory statements against the government falls under several heads. It may be committed by publishing seditious writings or by speaking seditious words, or by publishing blasphemous or obscene writings, or by speaking blasphemous or obscene words, or by uttering words which incite directly to a breach of the peace.<sup>5</sup>

With the history of the law as to blasphemous writings and speeches I shall deal later.<sup>6</sup> With regard to obscene writings and speeches, Holt, C.J., seemed to think that this was matter for the ecclesiastical courts, and was not remediable by indictment;<sup>7</sup> but a few years later this opinion was reversed, and the law was placed on its modern basis by the decision in *R. v. Curl*.<sup>8</sup> With regard to words which tend to a breach of the peace, Holt, C.J., ruled in *R. v. Langley*<sup>9</sup> that "words that directly tend to breach of the peace may be indictable; but otherwise to encourage indictments for words would make them as uncertain as actions for words are."<sup>10</sup> It is the history of the law as to seditious writings and words which is the most important. The history of the manner in which it was shaped by the common law courts, after they had taken over this jurisdiction from the Star Chamber, I must now relate.

Stephen has pointed out<sup>11</sup> that the view which the law takes

<sup>1</sup> See *R. v. Beare* (1699) 1 Ld. Raym. 414; S.C. 2 Salk. 417.

<sup>2</sup> Vol. v 211-212.

<sup>3</sup> *R. v. Penny* (1697) 1 Ld. Raym. 153.

<sup>4</sup> Below 364.

<sup>5</sup> Kenny, Criminal Law 313.

<sup>6</sup> Below 407 seqq.

<sup>7</sup> *R. v. Read* (1708) Fortescue 98; in that case Powell, J., said, "this is for printing bawdry stuff, but reflects on no person, and a libel must be against some particular person or persons, or against the Government. It is stuff not fit to be mentioned publicly; if there should be no remedy in the Spiritual Court, it does not follow there must be a remedy here. There is no law to punish it, I wish there were, but we cannot make law."

<sup>8</sup> (1727) 2 Stra. 788; cp. *R. v. Hicklin* (1868) L.R. 3 Q.B. 360.

<sup>9</sup> (1704) 6 Mod. 124.

<sup>10</sup> Ibid at p. 125.

<sup>11</sup> H.C.L. ii 299-300.

of the offence of publishing seditious writings or uttering seditious words, will depend upon the view held as to the relation of rulers to their subjects. "Two different views may be taken of the relation between rulers and their subjects. If the ruler is regarded as the superior of the subject, as being by the nature of his position presumably wise and good . . . it must necessarily follow that it is wrong to censure him openly, that even if he is mistaken his mistakes should be pointed out with the utmost respect, and that whether mistaken or not, no censure should be cast upon him likely or designed to diminish his authority. If, on the other hand, the ruler is regarded as the agent and servant, and the subject as the wise and good master, who is obliged to delegate his power to the so-called ruler . . . it is obvious that this sentiment must be reversed. Every member of the public who censures the ruler for the time being exercises in his own person the right which belongs to the whole of which he forms part. He is finding fault with a servant. . . . To those who hold this view fully, and carry it out to all its consequences, there can be no such offence as sedition. There may indeed be breaches of the peace which may destroy or endanger life limb or property, and there may be incitements to such offences. But no imaginable censure of the government, short of a censure which has an immediate tendency to produce such a breach of the peace, ought to be regarded as criminal." The first of these two views was the accepted view in the seventeenth century. The second was gathering strength during the latter part of the eighteenth century, and is now the accepted view.<sup>1</sup> It is the history of the development of the law under the influence of the first of these views that I must here describe. The modifications effected by the growth of the second will be dealt with in a subsequent Book of this History.

We have seen that both the rules relating to the censorship of the press,<sup>2</sup> and the manner in which the Star Chamber administered the law of defamation,<sup>3</sup> show that, during this period, the first of these two views was that taken by the law. After the Restoration the principles upon which the Star Chamber had acted were taken over by the common law courts; and it was inevitable that this should be so. We have seen that statutory force had been given to a set of rules for the regulation of the press, which were in substance not dissimilar to those which had been made by the Star Chamber.<sup>4</sup> The principles applied by the Star Chamber to seditious writings had been embodied by

<sup>1</sup> *R. v. Lovett* (1839) 9 C. and P. at p. 466 *per* Littledale, J.; *R. v. Sullivan* (1868) 11 Cox C.C. at p. 58.

<sup>2</sup> Vol. vi 367-370.

<sup>3</sup> Vol. v 208-212.

<sup>4</sup> Vol. vi 372-3.

Coke in the case *De Libellis Famosis*;<sup>1</sup> and he had affirmed that these offences could be punished either by indictment at common law or by proceedings in the Star Chamber.<sup>2</sup> The view held by the king and the judges as to the relation between rulers and their subjects, were the same as those held by the king and his judges in the earlier part of the century. Hence we find that the judges accepted the rules that truth was no defence to an indictment,<sup>3</sup> that publication was not necessary,<sup>4</sup> and that the death of the person libelled was not necessarily a bar to a prosecution.<sup>5</sup> They also accepted the rules that the contriver the procurer and the publisher were all equally guilty;<sup>6</sup> and Holt, C.J. made it quite clear that both the writing and the copying of a libel, without just cause or excuse, amounted to the contriving of a libel.<sup>7</sup> Similarly, the common law courts had shown, in the earlier part of the seventeenth century, that they were prepared to follow the lead of the Star Chamber,<sup>8</sup> and treat seditious words in substantially the same manner as seditious writings. Part of the charge against Eliot Holles and Valentine was the uttering of seditious words;<sup>9</sup> and other cases show that the common law courts treated as criminal seditious words not only against the king,<sup>10</sup> but also against his government,<sup>11</sup> the judges,<sup>12</sup> or the established church.<sup>13</sup>

<sup>1</sup> (1606) 5 Co. Rep. 125a.

<sup>2</sup> At ff. 125a, 125b.

<sup>3</sup> Vol. v 210; Anon (1707) 11 Mod. 99; Bl. Comm. iv 150.

<sup>4</sup> Vol. v 210; Bl. Comm. iv 150.

<sup>5</sup> Vol. v 211; R. v. Topham (1791) 4 T.R. 126; cp. R. v. Critchley (1734) cited ibid 129 note 4; Hawkins, P.C. Bk. 1 cap. 73 § 3.

<sup>6</sup> Lamb's Case (1611) 9 Co. Rep. 59b; vol. v. 210.

<sup>7</sup> R. v. Beare (1699) 1 Ld. Raym. at p. 417—"the writing of a copy of a libel is the writing of a libel. And if the law were otherwise it might be very dangerous, for then men might take copies of them with impunity; and for the same reason the printing of them would be no offence; and then farewell to all government."

<sup>8</sup> Vol. v 211.

<sup>9</sup> Stephen, H.C.L. ii 307.

<sup>10</sup> It is clear from Pine's Case (1629) Cro. Car. 117, 126, that the judges considered that an offence had been committed, though it was not treason, above 312; R. v. Harrison (1678) 3 Keble 841.

<sup>11</sup> R. v. Harrison (1678) 3 Keble 841; R. v. Frost (1793) 22 S.T. at p. 517; cp. R. v. Winterbotham (1792) 22 S.T. 823, 875; R. v. Briellat (1793) 22 S.T. 909. Stephen points out, H.C.L. ii 377, that no prosecution for this offence has taken place for many years; but that "seditious language has on several occasions been made the subject of prosecutions, the charge being that of unlawful assembly or seditious conspiracy, of which violent speeches have been regarded as overt acts."

<sup>12</sup> Justice Hutton's Case (1639) Hutton 131; R. v. Gordon (1787) 22 S.T. 175; in later law, when the jurisdiction to punish for contempt was extended, such libels could be treated as contempts, and dealt with by the summary process of attachment, vol. iii. 394. Judges of inferior courts can only fine or attach for contempt if the words are spoken in court, Earl of Lincoln v. Fysher (1595) Cro. Eliza. 581; Bathurst v. Cox (1662) Th. Raym. 68; for contemptuous words spoken out of court only surety for the peace can be required, R. v. Langley (1704) 2 Salk. 697.

<sup>13</sup> R. v. Taylor (1676) 1 Vent. 293; cp. Atwood's Case (1618) Cro. Jac. 421; Hawkins, P.C. Bk. 1 cap. 5 § 6; Atwood's Case perhaps shows that the influence of the jurisdiction of the court of High Commission may have helped to produce this particular development; however that may be, it was quite in harmony with the prevalent views to the relation between Church and State, below 406-410.

That this view of the criminality of seditious words was comparatively new law, derived from the practice of the Star Chamber, is probable from a case of 1558, in which it was held that slander spoken of the queen was punishable under Edward I.'s statute of *scandalum magnatum*.<sup>1</sup> However that may be, it is clear that the offence of uttering seditious words was definitely recognised to be a misdemeanour, punishable by the common law courts, in the earlier part of the seventeenth century; and it is fairly clear that, as in the case of publishing seditious writings, this broad rule was derived from the practice of the Star Chamber.

It follows, therefore, that the offence was defined as widely by the common law courts as by the court of Star Chamber. This is abundantly clear, both from the resolutions of the judges, and from the numerous cases of seditious libel which came before the courts in the latter part of the seventeenth century. Thus in 1663 it was resolved<sup>2</sup> that "tho' printing be a trade, and selling of books also, they must use their trade according to law, and not abuse it, by printing and selling of books scandalous to the Government or tending to sedition." Later in the reign the judges made use of the Licensing Acts<sup>3</sup> to sharpen the edge of the law. They resolved that it was illegal to publish anything whatever without authority, even though it was not scandalous to the government. It was therefore doubly illegal if that which was published was scandalous. The law was laid down in this way by Scroggs, C.J., in *R. v. Carr*,<sup>4</sup> and *R. v. Harris*<sup>5</sup>; and Stephen points out that, though the House of Commons impeached Scroggs for many illegal and arbitrary acts, it did not allege that this statement of the law was wrong.<sup>6</sup> This view of the law was applied in the case of *R. v. Barnardiston*,<sup>7</sup> who was sentenced "to a monstrous fine of £10,000 for the mere expression of political opinions to a private friend in a private letter";<sup>8</sup> in the case of *R. v. Baxter*,<sup>9</sup> who was thought in his paraphrase of the New Testament to have reflected upon the bishops of the church of England; in the case of *R. v. Johnson*,<sup>10</sup> who issued an address to the Protestants in the army not

<sup>1</sup> Oldnoll's Case, Dyer 155a; for this offence see vol. iii 409-410.

<sup>2</sup> Kelyng 23.

<sup>3</sup> Vol. vi 372.

<sup>4</sup> Dealing with the word "illicite" in the indictment he said, "I must recite what Mr. Recorder told you of at first, what all the judges of England have declared under their hands. The words I remember are these: When, by the king's command, we were to give in our opinion what was to be done in point of regulation of the press; we did all subscribe, that to print or publish any news books or pamphlets of news whatsoever, is illegal; that it is a manifest intent to the breach of the peace, and they may be proceeded against by law for an illegal thing. Suppose now that this thing is not scandalous, what then? If there had been no reflection in this book at all, yet it is *illicite*, and the author ought to be convicted for it," (1680) 7 S.T. at p. 1127.

<sup>5</sup> (1680) 7 S.T. at pp. 929-930.

<sup>6</sup> H.C.L. ii 313.

<sup>7</sup> (1684) 9 S.T. 1333.

<sup>8</sup> Stephen, H.C.L. ii 314.

<sup>9</sup> (1685) 11 S.T. 493.

<sup>10</sup> (1686) 11 S.T. 1339.



to assist Papists illegally enlisted and commissioned; and in the case of *The Seven Bishops*,<sup>1</sup> who were put on their trial for asserting that the king's declaration of indulgence was illegal, because it was based on a prerogative to suspend laws which did not exist. These cases are a few illustrations,<sup>2</sup> and some are very extreme illustrations, of the prevailing theory that a person who questioned the legality or the policy of any act of the government, even in a respectful manner, committed the offence of seditious libel. The law was severely and brutally applied, especially by Jeffreys, but it is difficult to say, in the then state of the law, that these decisions were wrong.<sup>3</sup>

The expiration of the Licensing Act in 1694<sup>4</sup> made it impossible to say that the mere publication of a writing without authority was illegal. But neither the expiration of that Act, nor the Revolution, materially altered the law as to what constituted a seditious libel. This is clear from the ruling of Holt, C.J., in *R. v. Tutchin*:<sup>5</sup> "they say nothing is a libel but what reflects upon some particular person. But this is a very strange doctrine to say it is not a libel reflecting on the government, endeavouring to possess the people that the government is maladministered by corrupt persons, that are employed in such or such stations either in the navy or army. To say that corrupt officers are appointed to administer affairs is certainly a reflection on the government. If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it. And nothing can be worse to any government than to endeavour to procure animosities as to the management of it; this has always been looked upon as a crime, and no government can be safe without it."

It would seem to follow from this view of the nature of seditious libel that the crime of seditious libel was the intentional publication of a writing which reflected on the government; and, similarly, that the crime of libel committed against a private person was the intentional publication of a writing which held him up to hatred contempt or ridicule. But when criminal proceedings were taken for libel, it was always alleged that the accused had published the libel with a whole series of the worst intentions. He was said to have acted falsely, seditiously, maliciously, and factiously. As Stephen has said, "round full mouthed abuse of people who gave

<sup>1</sup> (1688) 12 S.T. 183.

<sup>2</sup> "The great frequency of prosecutions for political libels and seditious words at this time appears . . . from a passage in Luttrell's Diary for the year 1684, which enumerates sixteen trials for those offences between April 30 and November 28 in that year," Stephen, H.C.L. ii 313.

<sup>3</sup> Ibid ii 313-315.

<sup>4</sup> Vol. vi 375.

<sup>5</sup> (1704) 14 S.T. at p. 1128.

offence to the government was thought natural and proper";<sup>1</sup> and, as we can see from the indictments for other offences, and even from the declarations in civil actions, it was customary, wherever an accusation of any sort of wrong was made, to exhibit the defendant's conduct in the worst possible light. Naturally the use of these common forms tended to give rise to the view that the crime was, not so much the intentional publication of matter bearing the seditious or defamatory meaning alleged by the prosecution, as its publication with a seditious or malicious intent. This view of the nature of libel regarded as a criminal offence begins to appear in the eighteenth century; and it has had a large influence on its history. We shall see later, that it has reacted on the views held as to the nature of libel considered as a tort; and that the idea that a malicious intent is a necessary ingredient, both in the crime and in the tort of defamation, has not been finally got rid of till the nineteenth century.<sup>2</sup> The reasons for its appearance we must now consider.

In the earlier part of the seventeenth century, when the crime of libel, and especially of seditious libel, was chiefly dealt with by the court of Star Chamber, the question whether the offence consisted of intentionally publishing a seditious or a defamatory writing, or whether it consisted of intentionally publishing such writings with a seditious or a malicious intent, was academic. It was academic because the court decided all questions both of fact and of law. If the offence consisted of intentionally publishing a writing with the seditious or defamatory meaning alleged by the prosecution, it decided the questions whether the writing had been intentionally published and whether it meant what the prosecution alleged that it meant, which were questions of fact; and it decided whether what was so published was seditious, defamatory or otherwise malicious, and so a libel, which was a question of law. Similarly, if the offence consisted of intentionally publishing such a writing with a seditious or a malicious intent, it decided as questions of fact both whether such a writing had been intentionally published with this seditious or malicious intent, and whether it meant what the prosecution alleged that it meant; and, as a question of law, whether such a writing published with that intent was in law a libel.

But when the jurisdiction over these libels was taken over by the courts of common law, the question ceased to be academic. The courts of common law worked with a jury; and that involved an accurate delimitation of the spheres of fact and law. If the essence of libel was the publication with a seditious defamatory or otherwise malicious intent, the finding of that intent was matter of

<sup>1</sup> H.C.L. ii 354.

<sup>2</sup> Below 373-375.

fact for the jury. If, on the other hand, its essence was the intentional publication of the document set out in the indictment, all that the jury was concerned with was the fact of such publication, and the question whether it bore the seditious or defamatory meaning alleged by the prosecution.<sup>1</sup> Now it is obvious that if the malicious intent was an essential ingredient in the offence, and if, therefore, this was a question for the jury, the jury would have far larger powers than if they were required to decide only the question of intentional publication of a document with the meaning alleged in the indictment. As all these cases of seditious libels were regarded as matters nearly affecting the state, and as, after the decision in *Bushell's Case*,<sup>2</sup> the control of the government over the judges<sup>3</sup> was far closer than its control over juries, it is not surprising that the courts should have laid it down that the malicious intent was not an essential ingredient in the offence, but that the offence consisted of the intentional publication of a document with the seditious or defamatory meaning alleged by the prosecution. It followed that the function of the jury was limited to finding these two sets of facts; and that it was for the court to say as a matter of law whether a writing published with this seditious or defamatory meaning was a libel.

Thus in the case of *R. v. Carr*<sup>4</sup> Scroggs, C. J., directed the jury that, if they found that the accused had published the book, they must find him guilty. "If you find him guilty and say what he is guilty of, we will judge whether the thing imports malice or not. Sir Francis Winnington hath told you there are some things that do necessarily imply malice in them. If this thing doth not imply it, then the judges will go according; to sentence, if it doth;<sup>5</sup> so that it concerns not you one farthing, whether malicious or not malicious—that is plain."<sup>6</sup> The same ruling was given, even more plainly, in the case of *R. v. Barnardiston*. It was argued that, as there was no evidence of malice in the publication of the writing, the accused was entitled to be acquitted. To that the reply was given that malice cannot be proved by direct evidence; but that, just as a killing without provocation proved that the killing was with malice aforethought, so the publication of a seditious writing proved the malicious intent. "In case any person doth write libels, or publish any expressions which in themselves carry sedition and faction and ill will towards the government, I cannot tell well how to express it otherwise in his accusation than by such words that he did it seditiously factiously and maliciously. And the proof of the thing itself proves the evil mind it was done

<sup>1</sup> Stephen, H.C.L. ii 350 seqq.

<sup>2</sup> Vol. vi 503-511.

<sup>3</sup> The punctuation has been amended.

<sup>4</sup> (1670) Vaughan 135; vol. i 345-347.

<sup>5</sup> (1680) 7 S.T. 1111.

<sup>6</sup> At p. 1128.

with. If then, gentlemen, you believe the defendant, Sir Samuel Barnardiston, did write and publish these letters, that is proof enough of the words maliciously, seditiously and factiously laid in the information."<sup>1</sup> No doubt in the *Case of the Seven Bishops* the malicious and seditious intent of the writing was left to the jury. But we have seen that in that case all the legal talent of the day was enlisted on the side of the bishops. The bar was altogether too much for a bench of judges approved by James II.;<sup>2</sup> so that, as Stephen says, "it is impossible to appeal to that case as a precedent for any legal proposition whatever."<sup>3</sup> It is true also that in the case of *R. v. Tutchin*<sup>4</sup> some expressions used by Holt, C.J., may be taken to mean that the intention with which the writing was composed was to be left to the jury.<sup>5</sup> But probably Stephen and Lord Mansfield, C.J., are right in thinking that his words do not bear this construction, and that he meant to lay down the law substantially as it had been laid down in the seventeenth century.<sup>6</sup> At any rate this was the sense in which the law was understood by Raymond, C.J. In the case of *R. v. Francklin*<sup>7</sup> he said, "in this information for libel there are three things to be considered, whereof two by you the jury, and one by the court. The first thing under your consideration is whether the defendant Mr. Francklin is guilty of the publication of this Craftsman or not? The second is, whether the expressions in that letter refer to his present majesty and his principal officers and ministers of state, and are applicable to them or not? . . . But then there is a third thing, to wit, whether these defamatory expressions amount to a libel or not? This does not belong to the office of the jury, but to the office of the Court; because it is a matter of law, and not of fact; . . . and there is redress to be had at another place if

<sup>1</sup> (1684) 9 S.T. at p. 1352; *ibid* at p. 1349 Jeffreys said, "The law supplies the proof if the thing itself speaks malice and sedition. As it is in murder, we say always in the indictment, he did it by the instigation of the devil: can the jury if they find the fact, find he did it not by such instigation? No, that does necessarily attend the very nature of such an action or thing. So, in informations for offences of this nature, we say, he did it falsely maliciously and seditiously, which are the formal words; but if the nature of the thing necessarily imports malice reproach and scandal to the government, then needs no proof but of the fact done, the law supplies the rest"; it was for this reason, no doubt, that the jury were directed that, if they found the publication of a document with the meaning alleged by the prosecution, they were directed to give a general verdict of guilty, as to this see below 345 and n. 1.

<sup>2</sup> Vol. vi. 511.

<sup>3</sup> H.C.L. ii 315-316—"The question whether or not the king had a dispensing power was clearly a question of law and not of fact, nevertheless the records were allowed to go to the jury as evidence that the law was as the bishops said it was. This carries the powers of the jury even further than they would be carried at the present day." Stephen should have said *suspending* power.

<sup>4</sup> (1704) 14 S.T. 1095.

<sup>5</sup> "Now you are to consider whether these words I have read to you do not tend to beget an ill opinion of the administration of the government," at p. 1128.

<sup>6</sup> H.C.L. ii 317-319.

<sup>7</sup> (1731) 17 S.T. at pp. 671-672.

either of the parties are not satisfied; for we are not to invade one another's province, as is now of late a notion among some people who ought to know better."

Down to the beginning of the eighteenth century, therefore, the essence of a libel was the intentional publication of a document, bearing the seditious or defamatory meaning alleged by the prosecution. It followed that all the jury had to do was to find the fact of publication of a document bearing the meaning alleged by the prosecution; and that it was for the court to say, as a matter of law, whether what was published was seditious, defamatory, or otherwise malicious, and so a libel. This state of the law harmonised admirably with the current views as to the relations of rulers to their subjects. But, when those views changed, it gradually came to be wholly out of touch with current public opinion. The law as to what amounted to a seditious libel, having been formed in the period when the ruler was regarded as the superior of his subjects, assorted badly with the new view that he was their agent or servant. Therefore the desire for greater freedom of speech than the existing law allowed, took the technical form of the contention that the seditious, defamatory or otherwise malicious intention with which a libel was published, was the essence of the offence, and so a matter of fact for the jury. In support of this contention much was made of the fact that the jury were told to find a general verdict of guilty, when, according to the then received view of the nature of a libel, their finding amounted merely to a special verdict that a certain writing with a certain meaning had been published by the accused, which might be ruled to be perfectly innocent.<sup>1</sup> The concluding sentence from the passage in Raymond, C.J.'s, summing up in *R. v. Franklin* cited above, shows that at that date this contention was beginning to be advanced. The eloquence and ability with which Erskine advocated it later in the century, produced a statutory change in the law,<sup>2</sup> which has had great effects on the law of libel whether considered as a crime or as a tort.<sup>3</sup> But these developments and their effects upon the modern law belong, as I have said, to the legal history of the eighteenth century.

<sup>1</sup> Stephen, H.C.L. ii 358—"They (the judges) tried to make the verdict of guilty in trials for libel an imperfect special verdict, which would have the effect of convicting the defendant, even if he was innocent in the opinion of the judge who tried him, subject to his getting the court to quash his conviction upon a motion in arrest of judgment"; note that in *R. v. Harris* (1680) 7 S.T. at p. 931, Scroggs, C. J., refused to accept a verdict of guilty of selling only, compelled the jury to give a general verdict of guilty, and then reprimanded them for trying to qualify their verdict contrary to the direction of the Court.

<sup>2</sup> 32 George III. c. 60 (Fox's Libel Act); below 374.

<sup>3</sup> Stephen, H.C.L. ii 321 seqq.; for the later history see vol x 672-696.

On other questions connected with libel considered as a crime there is as yet but little authority. We hear little, for instance, of the defence of privilege. That is a topic which will, as we shall see,<sup>1</sup> be developed mainly in connection with defamation considered as a tort. Similarly, though it was quite clear that the words or writing complained of must be set out in the indictment or information, together with any innuendoes necessary to explain their meaning, it was chiefly in connection with the tort that the learning as to the function of the innuendo was developed.<sup>2</sup> On both these matters rules were evolved which were later applied to some or all forms of the criminal offence. On the other hand, some of the rules evolved in the criminal cases have had an equally great influence on the development of the tort. But the reciprocal influence of defamation regarded as a crime, and defamation regarded as a tort, we shall be better able to appreciate when we have examined the history of this latter aspect.

#### *Defamation as a Tort*

Two sets of influences have gone to the making of our modern torts of written defamation (libel), and spoken defamation (slander). Firstly, the rules evolved by the working of the common law action on the case for defamatory words and writings; and secondly, the rules applied by the judges, after the Restoration, to written as distinct from spoken defamation. To the first of these influences we can trace a large number of the principal rules common to both libel and slander; to the second, the original elaboration of the unfortunate distinction between these two closely allied torts. In tracing their history I shall deal with (1) the early history of the common law action for defamation; (2) the origin of the difference between libel and slander; and (3) the origin of some of the essential characteristics of the torts of libel and slander.

(1) The early history of the common law action for defamation.

I shall consider this subject under the two following heads:—  
(i) the nature and scope of the action; and (ii) the methods used by the common law judges in the seventeenth century to discourage this action, and their effects.

(i) *The nature and scope of the action.*

Of this I have already said something. We have seen that, because the action was an action on the case, the damage not the

<sup>1</sup> Below 375-377.

<sup>2</sup> Below 168-169.

insult was its gist; and that it followed from this conception of the action, that, firstly, publication to some third person was essential, that, secondly, truth was a defence to the action, and that, thirdly, like other actions for tort, it died with the person.<sup>1</sup> We have seen, too, that the action was applicable both to written and spoken defamation.<sup>2</sup> We shall see that it was not till after the Restoration, and under the influence of ideas derived from the criminal offence of libel, that the modern distinction between libel and slander was introduced.<sup>3</sup>

The nature of the action, which made it necessary to regard the resulting damage rather than the insult as the cause of action, was, as we have seen,<sup>4</sup> a cause which helped to prevent the common law from reaching an adequate conception of the tort of defamation. But it was not the only cause. If the courts had placed a liberal interpretation upon the character of the reflections which they would account as defamatory, and had taken a rational view as to the kind of damage which could be regarded as the natural and probable result of defamatory words or writings, the law might have been placed upon a satisfactory basis. This fact will, I think, be made clear by the development of the rules as to the kinds of defamation from which damage could be presumed—that is, to use the modern expression, as to the words which are actionable *per se*; by the rule that words or writings, though not actionable *per se*, were actionable if they caused damage; and by the development of the tort of slander of title and torts analogous thereto.

*The rules as to the kinds of defamation which are actionable per se.*

In the developed common law words are actionable *per se* if they impute the commission of a criminal offence punishable by imprisonment, or a contagious disease which would exclude a person from society, or unfitness for a profession trade or calling, or misconduct in an office of profit which would lead to dismissal.<sup>5</sup> It is clear from March's book that these categories had been substantially reached by 1647.<sup>6</sup>

The first of these categories is probably the oldest. It dates

<sup>1</sup> Vol. v 206-207.

<sup>2</sup> Ibid 207.

<sup>3</sup> Below 364-365.

<sup>4</sup> Above 335.

<sup>5</sup> Pollock, Torts (12th ed.) 238; Clerk and Lindsell, Torts (4th ed.) 555; Halsbury, Laws of England xviii 607-608.

<sup>6</sup> "That all scandalous words which touch or concern a man in his life liberty or member, or any corporal punishment; or which scandal a man in his office or place of trust; or in his calling or function by which he gains his living; or which tend to the slandering of his title or his disinheritance; or to the loss of his advancement or preferment, or any other particular damage; or lastly which charge a man to have any dangerous infectious disease by reason of which he ought to separate himself, or to be separated by the law, from the society of men," Actions for Slander 10-11.

from the period when the action on the case for words was being admitted into the common law; and it seems to have originated in the days when the courts were trying to distinguish the defamatory words which would be actionable in the common law courts, from those which were actionable only in the ecclesiastical courts. The test hit upon was contained in the question whether the offence charged was punishable in the common law courts or in the ecclesiastical courts. If one called another thief or traitor, the offence charged was punishable in the common law courts, and therefore an action for such defamation lay in those courts. If, on the other hand, one called another "heretic and one of the new learning," or adulterer, the offence charged was "merely spiritual," and no action lay at common law. But if the offence charged was punishable by both laws, the plaintiff could bring his action in either jurisdiction.<sup>1</sup> This case presupposes that words imputing a criminal offence are actionable; and it seems to me that, though the court was then merely trying to distinguish spheres of jurisdiction, and not the qualities which would make words actionable *per se*, it was probably the foundation of the long line of cases which decided that such words were thus actionable. Conversely, it was the origin of the rule that words imputing gross acts of immorality were not thus actionable, because such acts were only cognizable by the ecclesiastical courts—an injustice<sup>2</sup> which has only partially been remedied by the Slander of Women Act of 1891.<sup>3</sup>

The other categories seem to have been developed later, and are probably based upon the obvious tendency of the imputation to cause damage. The imputation of a contagious disease seems to have been confined to statements that the person defamed was

<sup>1</sup> Y.B. 27 Hy. VIII. Mich. pl. 4—see the passage cited vol. iii 411 n. 2. The principle can, as is pointed out in American Law Rev. vi 593, be traced back to the rule, which is as old as Bracton, that the *accessorium* must come under the same jurisdiction as the *principale*, see a summary of this argument in Essays, A.A.L.H. iii 460 n.; it should be noted that the modern rule that the criminal offence imputed must be one punishable corporally and not merely by fine (see Webb v. Beavan (1883) 11 Q.B.D. 609) is of later growth; no such distinction is drawn in the Y.B.—indeed it is not really consistent with the principle there laid down; and apparently it was held, in the sixteenth and early seventeenth centuries, that the mere fact that the offence charged was enquirable in the Leet was sufficient to make it actionable *per se*, Rolle, Ab. i 44 *Action sur Case* H. pl. 8; but in 1642 Bramston, C.J., and Mallet, J., dissenting, laid down the modern rule, March, Actions for Slander 59; the reason assigned for this limitation was that if the law were otherwise, "it would be a great occasion to increase and multiply actions for words."

<sup>2</sup> "He (Lord Campbell) laments the unsatisfactory state of our law according to which the imputation of words, however gross, on an occasion however public, upon the chastity of a modest matron or a pure virgin, is not actionable without proof that it has actually produced special temporal damage to her. The only difference of opinion which I have with my noble and learned friend is that instead of the word 'unsatisfactory,' I should substitute the word 'barbarous,'" Lynch v. Knight (1861) 9 H.L.C. at p. 594 *per* Lord Brougham.

<sup>3</sup> 54, 55 Victoria c. 51.



suffering from leprosy, the plague,<sup>1</sup> or syphilis—the accusation of having contracted the last mentioned disease being much the most common in the reports. It has been suggested that the inclusion in this category of the first two diseases, may have originated in the old rules which required the removal of a leper or a person suffering from the plague.<sup>2</sup> Whether this be so or not, it is clear that the imputation of having contracted syphilis was actionable, partly by reason of the nature of the disease, and partly by reason of the obvious inference as to the sufferer's moral character.<sup>3</sup> Imputation of unfitness for a profession trade or calling is obviously calculated to cause temporal loss. There are long lists of cases in the reports of the sort of opprobrious words which, if used of clergymen,<sup>4</sup> attorneys,<sup>5</sup> barristers,<sup>6</sup> justices of the peace,<sup>7</sup> stewards of courts,<sup>8</sup> doctors,<sup>9</sup> traders,<sup>10</sup> and artificers,<sup>11</sup> were actionable *per se*. On these only two remarks need be made. Firstly, it was very early held that the imputation that a trader was insolvent or bankrupt was actionable;<sup>12</sup> and this perhaps illustrates the larger importance which commercial considerations were assuming. Secondly, it must be a definite calling recognized by the law, and not merely a temporary employment, or an employment of a menial nature, such as a carrier of post letters<sup>13</sup>—a limitation in which we can perhaps trace the mediæval idea of the distinctness of the status of persons professing different callings.<sup>14</sup> An imputation of misconduct in an office of profit, which would lead to dismissal, is obviously an imputation closely

<sup>1</sup> Though there is one case turning on an imputation of leprosy (next note) there seems to be none turning on an imputation of the plague; and though March, *Actions for Slander* 105, thinks that such an imputation would be actionable, he cites no authority.

<sup>2</sup> This suggestion was made in an article in the *American Law Rev.* vi 593; for a summary of the argument see *Essays, A.A.L.H.* iii 461; but it may be doubted whether the mediæval rules had much influence on the minds of the sixteenth and seventeenth-century judges; though there is one case turning on the imputation of leprosy, *Taylor v. Perkins* (1607) *Cro. Jac.* 144, the reason assigned for holding the words actionable is that such a disease renders the sufferer unfit for society, *Rolle, Ab.* i 44 pl. 4; but this reason was not applied to other infectious diseases, e.g. smallpox, see *James v. Rutledge* (1599) 4 *Co. Rep.* 17a.

<sup>3</sup> "Si home dit al autre que il ad le grand Poxe, action sur le case gist, pur ceo que ceo est un grand slander et disgrace tant que ceo vient per fornication; et nul home poet converser ove luy," *Rolle, Ab.* i 43, H. pl. 3; though in another case there cited, *Crittall v. Horner* (1619) *Hob.* 219, it was said that "the slander was not in the wicked means of getting the disease, but in the odiousness of the infection as a leper."

<sup>4</sup> *Doctor Sibthorp's Case* (1636) *W. Jones* 366.

<sup>5</sup> *Rolle, Ab.* i 52-54, S. pl. 1-3, 4-9.

<sup>6</sup> *Ibid* 54-55, S. pl. 14, 16, 22.

<sup>7</sup> *Ibid* 57, S. pl. 31-34.

<sup>8</sup> *Ibid* 56, S. pl. 28.

<sup>9</sup> *Ibid* 54, S. pl. 10-12.

<sup>10</sup> *Ibid* 58-63.

<sup>11</sup> *Ibid* 62, V. pl. 27.

<sup>12</sup> *Ibid* 61, V. pl. 16, citing a case of 1597.

<sup>13</sup> *Bell v. Thatcher* (1675) 1 *Vent.* 275—a doctrine now obsolete as far as applicable to the menial character of the calling, and perhaps also so far as applicable to its temporary character, see *Clerk and Lindsell, Torts* (4th ed.) 557-558 and the cases there cited.

<sup>14</sup> *Vol.* iii 385-386; *vol.* iv 402-407.

analogous to those just discussed. On this ground it was said that, "if I have a bailiff, to whom I commit the buying and selling of my corn and grain, and give him greater wages in respect of that trust and employment, and then a man will charge him to have deceived me in his office by buying and selling by false measure, to my loss and damage, this will bear an action, for this discredits him in his means of living: and this kind of offence may not only be cause to put him out of that service but to be refused of all others."<sup>1</sup> On the same ground it was held that a charge of unchastity made against a duke's chaplain, whereby he lost his office, was actionable.<sup>2</sup> If, on the other hand, the office was an honorary office, such as a justice of the peace, though a charge of corruption, or of opinions showing that he ought not to be trusted, is actionable, a charge of want only of ability is not.

The last mentioned case savours somewhat of the fine distinctions introduced by the judges who wished to discourage this action. But it is clear that the broad principles, upon which the courts adjudged imputations to be actionable *per se*, were not in themselves unreasonable. If they had been supplemented by a somewhat greater latitude in allowing actions where damage could be proved, the law thus developed would not have been wholly unsatisfactory.

*The rule that words or writings, though not actionable per se, were actionable if they caused damage.*

Though the words spoken amounted to a slander punishable only in the ecclesiastical courts, yet if it could be proved that temporal loss had been occasioned by them, an action lay. Thus, if one accused a woman of incontinency, whereby she lost a marriage which was being arranged, she had a right of action. "For in this case the ground of the action is temporal, *sc.* that she was to be advanced in marriage, and that she was defeated of it, and the means by which she was defeated was the same slander, which means tending to such end, shall be tried by the common law. So if a divine is to be presented to a benefice, and one to defeat him of it says to the patron 'that he is an heretic, or a bastard, or that he is excommunicated,' by which the patron refuses to present him . . . and he loses his preferment, he shall have his action on the case for these slanders tending to such end. . . . And Popham Chief Justice said that if one says of a woman that keeps an inn that she has a great infectious disease by which

<sup>1</sup> *Bray v. Hayne* (1615) Hob. 76.

<sup>2</sup> *Payne v. Beuwmorris* (1668) 1 Lev. 248; cp. *Gallway v. Marshall* (1853) 9 Exch. 294.

<sup>3</sup> *How v. Prinn* (1702) 2 Salk. at p. 695—in that case it was held actionable to say of a justice of the peace and a deputy lieutenant that he was a Jacobite, and for bringing in the Prince of Wales and popery to destroy our nation; cp. *Alexander v. Jenkins* (1892) 1 Q.B. 797; *Booth v. Arnold* [1895] 1 Q.B. 571.

she loses her guests, she shall have an action on the case."<sup>1</sup> Similarly, if it was affirmed that a person was a bastard, whereby his title or possibility of a title to land was negatived, and he lost a chance of selling his title or possibility of title, he had a right of action.<sup>2</sup> This last illustration comes very near to slander of title which, as we shall now see, became a separate tort in the course of the seventeenth century.

*The development of the tort of slander of title and torts analogous thereto.*

Cases of the latter part of the sixteenth century established the principle that, if an owner of land was negotiating for its sale or other disposition to another person, and a third person made false statements as to the vendor's title, which prevented the sale or disposition, the vendor could bring an action on the case and get damages for the slander.<sup>3</sup> This action on the case is clearly analogous to the ordinary action on the case for defamation; and in the fact that it makes no difference whether the slander is oral or written,<sup>4</sup> it preserves the memory of a characteristic which this ordinary action then possessed.<sup>5</sup> Both sprang from the same root; but, from an early period, differences between the conditions under which the action for slander of title and the ordinary action lay began to be developed. The action for slander of title did not lie if the third person claimed that he was entitled, though his claim were false;<sup>6</sup> and the statement must be made with knowledge of its falsity.<sup>7</sup> As early as 1629 it was recognized that the form and incidents of the action were different from those of the ordinary action for defamation<sup>8</sup>—though it was probably not till the latter half of the century that these differences were universally recognized.<sup>9</sup> In substance it was an action for malicious statements as to

<sup>1</sup> *Davis v. Gardiner* (1593) 4 Co. Rep. at f. 172; *Mathew v. Crass* (1614) Cro. Jac. 323.

<sup>2</sup> *Vaughan v. Ellis* (1609) Cro. Jac. 213; *Elborow v. Allen* (1623) *ibid* 642.

<sup>3</sup> *Mildmay v. Standish* (1585) Cro. Eliza. 34; *Gerrard v. Dickenson* (1591) *ibid* 196; *Tasburgh v. Day* (1619) Cro. Jac. 484; that it should hinder a pending sale was essential, see *March, Actions for Slander* 91, citing a dictum of Popham.

<sup>4</sup> *Ratcliffe v. Evans* [1892] 2 Q.B. at p. 527 *per* Bowen, L.J.

<sup>5</sup> Above 347; vol. v 207; below 364.

<sup>6</sup> "If the defendant had affirmed and published that the plaintiff had no right to the castle and manor of H, but that she herself had right to them, in that case, because the defendant herself pretends right to them, although in truth she had none, yet no action lies," *Gerrard v. Dickenson* (1585) 4 Co. Rep. at f. 18a.

<sup>7</sup> *Ibid* at f. 18b.

<sup>8</sup> "The action is out of the statute 21 Jac. I. c. 16 as well for the time of limitation as for the costs, for that extends to actions for slanderous words which are intended to the persons of men, and are common actions, and rather begin of spleen than otherwise; but not to this action, which is rare, and not brought without special damage," *Law v. Harwood* (1629) Cro. Car. at p. 141.

<sup>9</sup> That the differentiation was not always clearly perceived in the earlier half of the seventeenth century is clear from the passage from *March, Actions for Slander* 10-11, cited above 347 n. 6; in fact the rule laid down in *Law v. Harwood* as to the application of the statute applied to any action on the case for words, in which special

the title to property, oral or written, made with knowledge of their falsity, which had caused damage to the plaintiff.<sup>1</sup> In the seventeenth century the action was extended to other cases in which damage had been thus caused. Thus in 1662, in the case of *Sheperd v. Wakeman*,<sup>2</sup> it was held, after much debate, that a statement made falsely and maliciously of a plaintiff, whereby she lost a marriage for which she was in treaty, was actionable; and this extension is the origin of the general rule that a tort is committed, if damage is caused by the making of oral or written statements falsely and maliciously.<sup>3</sup> The action given for this tort "is not," said Bowen, L.J.,<sup>4</sup> "one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title." This sentence not only accurately describes the nature of the action, but also indicates the manner in which it had been developed. It is not an action for libel or slander for, historically, the action for slander of title and the action on the case for defamation became distinct at a comparatively early date; and this action is simply an extension of the action for slander of title.

All these rules seem to me to show that there were possibilities in this common law action on the case for defamation, which might have been developed. The different categories of the sorts of defamation actionable per se were both wide and sensible. The rule that any other kind of defamation causing temporal loss was actionable might, if liberally construed, have been made to cover other kinds of loss besides mere pecuniary loss; and occasionally some of the judges seemed inclined to adopt this more liberal view.<sup>5</sup> The development of the tort of slander of title and torts analogous thereto, showed that this common law action on the case was a vigorous root, which was capable of putting forth various branches.

damage was alleged (*Browne v. Gibbons* (1702) 1 Salk, 206), so that the criterion there laid down was not wholly conclusive, which may account for the fact that it was not recognized by March as an independent cause of action.

<sup>1</sup> *Law v. Harwood* (1629) Cro. Car. at p. 141—"slandering of one's title doth not import in itself loss, without showing particularly the cause of loss by reason of the speaking of the words, as that he could not sell or let the said lands"; and see above 351 n. 6.

<sup>2</sup> (1662) 1 Sid. 79.

<sup>3</sup> Clerk and Lindsell, *Torts* (4th ed.) chap. xviii.

<sup>4</sup> *Ratcliffe v. Evans* [1892] 2 Q.B. at pp. 527-528. For another line of cases where damage is caused by words spoken to the plaintiff, which, therefore, is analogous neither to slander nor to slander of title, see *Wilkinson v. Downton* [1897] 2 Q.B. 57; *Janvier v. Sweeney* [1919] 2 K.B. 316.

<sup>5</sup> "Williams, Justice. This rule is to be observed, as touching words which are actionable, that is to say, where the words spoken do tend to the infamy, discredit, or disgrace of the party, there the words shall be actionable, and this rule was affirmed by the Court," *Smale v. Hammon* (1611) 1 Buls. 40; "And Holt, Chief Justice, said . . . that for his part, wherever words tended to take away a man's reputation he would encourage actions for them, because so doing would contribute much to the preservation of the peace," *Baker v. Pierce* (1704) 6 Mod. at p. 24.

But, as we shall now see, these possibilities were never realized, owing to the methods used by the common law judges in the seventeenth century to discourage this action.

(ii) *The methods used by the common law judges in the seventeenth century to discourage this action, and their effects.*

We have seen that, at the beginning of the seventeenth century, the flood of these actions of defamation was so overwhelming that the judges thought it necessary to do all that they could to discourage them.<sup>1</sup> The reasons why the action was so popular are fairly obvious. In the first place, the Star Chamber was doing all that it could to suppress duelling,<sup>2</sup> and therefore those who thought that their honour had been stained were driven to the law courts. In the second place, we have seen that litigation of all kinds is always encouraged when, in a naturally turbulent age, the law courts are sufficiently strong, and the law which they administer is sufficiently developed, to provide a remedy for real or fancied wrongs.<sup>3</sup> No doubt some cautious discouragement of these actions was needed; but the methods of discouragement devised by the common law judges, being somewhat hasty and ill advised, did permanent harm to the development of this common law action, and therefore to the development of the tort of defamation. These methods of discouragement can be grouped under two main heads. (a) A very restrictive interpretation was placed on the categories of words which the courts allowed to be defamatory per se; and (b) equally restrictive rules were laid down as to the persons liable for the repetition of a slander, as to the kinds of damage for which the action lay, and as to the kinds of damage which the courts allowed to be the natural and probable consequence of the defamation.

(a) Let us take one or two instances of the restrictive interpretation placed on the categories of words which the courts allowed to be defamatory per se.

In the case of words which imported the commission of a criminal offence punishable by imprisonment, the words were strictly construed to see if they charged the plaintiff with acts which legally amounted to such an offence. Thus, if A said of B, "B seeks my life," the words were not actionable, firstly

<sup>1</sup> Vol. v 206; March, *Actions for Slander* at pp. 2-3, writing in 1647, represents the current professional opinion when, after remarking on the frequency of these actions, he says, "and it were to be wished . . . that the greatest part of them were suppressed, that words only of brangle heat and choler might not be so much as mentioned in those high and honourable courts of justice. For I profess for my part that I judge of them as a great dishonour to the law, and the professors thereof; especially when I consider that they are used only as instruments to promote the malices and vent the spleen of private jars and discontents among men."

<sup>2</sup> *Ibid* 199-201.

<sup>3</sup> Vol. i 506 and n. 6.

because, "he may seek his life lawfully upon just cause," and secondly, "seeking of his life is too general and for seeking *tantum* no punishment is inflicted by the law."<sup>1</sup> To say that a man was detected for perjury in the Star Chamber was not actionable, "for an honest man may be detected but not convicted; and every one who has a bill of perjury exhibited against him there is detected."<sup>2</sup> To accuse a man of having burnt a barn was held not to be actionable, as this was no felony if the barn was neither parcel of a mansion house nor full of corn.<sup>3</sup> To impute a mere intention to commit a crime was held not to be actionable, "for the purpose and intent of a man without act, is not punishable by law"; and that was so even though the act charged might be punished in the Star Chamber, "for that is by the absolute power of the Court and not by the ordinary course of the law."<sup>4</sup> Similarly, to accuse a man of an impossible crime, as in the well-known case where A said of B, that B, while churchwarden, had stolen the bell-rope, was not actionable.<sup>5</sup> Fine distinctions were drawn between cases where subsequent words explained a criminal charge, so as to make it impossible, and cases when they merely added an immaterial detail, so as to leave it possible. To say "thou art a thief and hast stolen my trees," was actionable, for the last words were merely an addition;<sup>6</sup> but to say "thou art a thief for thou hast stolen my trees," was not actionable, for the last words, being explanatory, showed that no crime had been committed.<sup>7</sup> The absurdity of applying such distinctions to angry words spoken in heat was pointed out by Holt, C.J.,<sup>8</sup> and is obvious. As Sir F. Pollock has said,<sup>9</sup> it followed that "minute and copious vituperation was safer than terms of general reproach, such as 'thief,' inasmuch as a layman who enters on details will probably make some impossible combination."

The same principles were applied to the other categories of words actionable *per se*. Thus to say of a man that he was full of the pox was not actionable, because that might mean merely

<sup>1</sup> *Hext v. Yeomans* (1585) 4 Co. Rep. 15b.

<sup>2</sup> *Weaver v. Cariden* (1595) 4 Co. Rep. 16a.

<sup>3</sup> *Barham v. Nethersal* (1602) 4 Co. Rep. 20a.

<sup>4</sup> *Eaton v. Allen* (1598) 4 Co. Rep. 16b.

<sup>5</sup> *Jackson v. Adams* (1835) 2 Bing. N.C. 402.

<sup>6</sup> *Rolle, Ab. i* 51, R. pl. 1.

<sup>7</sup> *Ibid.* R. pl. 2.

<sup>8</sup> "The opinions of later times have been in many instances different from those of former days in relation to words, for formerly there has been a difference taken between saying, 'thou art a thief *and* hast stolen my wood,' and 'thou art a thief *for* thou hast stolen my wood'; and judgments have gone both ways; but later opinions make no difference, if the words be spoke at the same time. And these are scrambling things that have gone backwards and forwards," *Baker v. Pierce* (1704) 6 Mod. at pp. 23-24.

<sup>9</sup> *Torts* (12th ed.) 242.

smallpox.<sup>1</sup> More liberality was shown in the case of words which imputed dishonesty or incapacity in a trade or profession; but even here the distinctions ran very fine. Thus to call an attorney corrupt was actionable,<sup>2</sup> but to call him usurer, or to say that, being an executor, he would not perform the will, was not actionable.<sup>3</sup> To call a trader bankrupt was actionable;<sup>4</sup> but, according to some, to say that he was a bankruptly knave was not, as the words did not mean that he was a bankrupt, but only that he was like a bankrupt.<sup>5</sup> As the words must cast an imputation on the plaintiff of unfitness for his particular trade, words which would be defamatory of one person might not be defamatory of another. Thus to call an attorney or a justice of the peace a common barrator was actionable;<sup>6</sup> but it was not actionable to apply the same term to a common carrier.<sup>7</sup> Obviously a man who knew the trade or profession of the person whom he wished to abuse, could, if he chose his words with care, indulge with impunity in a considerable latitude of vituperation.

The application of these principles was partly the cause, and partly the effect, of the general doctrine that in these actions the words complained of must be construed, not in their natural sense, but, whenever possible, in "*mitiore sensu*." That is, they must be held not to be defamatory if a non-defamatory sense could be twisted out of them. This principle is taken for granted by Coke;<sup>8</sup> and, if it had been limited to the case where the words were really of doubtful meaning, it would have been unobjectionable. The rule was, it is true, stated in this way by Coke,<sup>9</sup> Rolle,<sup>10</sup> and March,<sup>11</sup> in the first half of the seventeenth century. But the judges, in their desire to discourage these actions, did not so limit it. They examined the words in the same manner as

<sup>1</sup> *James v. Rutledge* (1599) Moore 573; S.C. 4 Co. Rep. 172.

<sup>2</sup> *Birchley's Case* (1585) 4 Co. Rep. 16a.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Kempe's Case* (1553) Dyer 72b; 4 Co. Rep. 19a.

<sup>5</sup> Rolle, Ab. i 47 l. pl. 3, citing a case of 1608; *Selby v. Carrier* (1615) Cro. Jac. 345; *sed contra* 4 Co. Rep. 19a, if the words imply an act done and not merely an inclination to do an act, and with this view the Court agreed in *Booth v. Scale* (1663) 1 Sid. 103.

<sup>6</sup> Rolle, Ab. i 54, S. pl. 15.

<sup>7</sup> *Ibid.* i 59, V. pl. 3.

<sup>8</sup> "And it was said quod sensus verborum est duplex, scil. mitis et asper; et verba semper accipienda sunt in mitiori sensu," *Cromwell's Case* (1578-81) 4 Co. Rep. at f. 13a; *ibid.* at ff. 15b, 17b, 20a.

<sup>9</sup> "We will not give more favour unto actions upon the case for words than of necessity we ought to do, where the words are not apparently scandalous," *Crofts v. Brown* (1617) 3 Buls. 167.

<sup>10</sup> "Lou les parols sont dubious et poient receiver un double interpretation lun voie que ils seront actionable et l'autre neiny, ils seront prise en mitiori sensu," Rolle, Ab. i 71, Z. pl. 1.

<sup>11</sup> "We have a rule that words, if they admit of a double construction, shall always be taken in the best sense for him that speaks them. . . . This I say the law doth when the words are amphibolus, but if the words are clearly actionable, in such case the law will never aid a man," *Actions for Slander* 5.

they were accustomed to examine a writ or a pleading, in order to discover, if possible, a non-defamatory sense; and, as they were experts in this art of critically examining words, it was not difficult to find a non-defamatory sense in the most insulting words. Indeed, it would seem that the result of an action often depended on the comparative ingenuity of the counsel in suggesting interpretations of the words used. Two instances will suffice. "If one man says of another, 'Thou art a priggish pilfering merchant and hast pilfered away my corn and my goods from my wife and my servants and this I will prove,' no action lies for that (as it seems), nor does it appear that he intended that he had taken these goods feloniously, and therefore the words shall be taken in *mitiori sensu*."<sup>1</sup> "If a man says of A, 'he was a pick-pocket, and had picked my pocket, and took 12s. of money out of my pocket,'<sup>2</sup> no action lies for these words, because it might be done merely as a trespass or in jest and not feloniously."<sup>3</sup> A long line of similar cases are reported in the books; and in spite of attempts in the latter part of the seventeenth and in the eighteenth centuries to restrict this vicious system of interpretation,<sup>4</sup> and to put the law upon a more sensible basis, it still continued. "It is only in comparatively recent times that the perverse subtlety of special pleading, by which this branch of the law was specially encumbered, has altogether disappeared";<sup>5</sup> for, as we shall see,<sup>6</sup> it is not till comparatively recent times that the Courts have ceased to look at the cases in order to come to a conclusion as to whether the words used are or are not defamatory.

We shall now see that the effect of these principles was aggravated by equally restrictive rules as to the persons liable for the repetition of a slander, as to the kinds of damage for which the action lay, and as to the kinds of damage which the courts allowed to be the natural and probable consequence of the defamation.

<sup>1</sup> Rolle, Ab. i 73, Z. pl. 14.

<sup>2</sup> Ibid Z. pl. 20; and see also below 360.

<sup>3</sup> Ibid.

<sup>4</sup> "And tho' in the old books the rule was to take the words in *mitiori sensu*, yet by Holt, C.J., they would give no favour to words, and should give satisfaction to them whose reputation is hurt; and would take words in a common sense according to the vulgar intendment of the bystanders. The rule de *mitiori sensu* is to be understood when the words in their natural import are doubtful, and equally to be understood in the one sense as in the other," *Somers v. House* (1694) Holt 39; "I have heard my Lord Hale and Justice Twisden say that they knew no set rule for actions for words, but that all words stood upon their own feet," *Baker v. Pierce* (1704) 6 Mod. at p. 24 *per* Holt, C.J.; "men's tongues growing more virulent, and irreparable damage arising from words, it has been by experience found, that unless men can get satisfaction by law, they will be apt to take it themselves. The rule therefore that has now prevailed is, that words are to be taken in that sense that is most natural and obvious, and in which those to whom they are spoken will be sure to understand them," *Harrison v. Thornborough* (1714) 10 Mod. at p. 198; *cp. Carpenter v. Tarrent* (1737) Cas. t. Hardwicke *per* Lord Hardwicke, C.J.

<sup>5</sup> Clerk and Lindsell, Torts (4th ed.) 563.

<sup>6</sup> Below 358-359.



(b) One effect of the line of cases, which has just been discussed, was to make it unnecessary, in many instances, to consider whether or not the plaintiff had suffered damage. The words were held not to be defamatory, and that was the end of the case.<sup>1</sup> But even if the plaintiff could prove that he had been defamed and had suffered damage, his difficulties were not at an end. Firstly, it was laid down by Coke in the *Earl of Northampton's Case*<sup>2</sup> that, "if J.S. publish that he hath heard J.N. say that J.G. was a traitor or thief, in an action of the case, if the truth be such, he may justify. But if J.S. publish that he hath heard generally without a certain author, that J.G. was a traitor or thief, there an action *sur le case* lieth against J.S. for this, that he hath not given to the party grieved any cause of action against any, but against himself who published the words, although that in truth he might hear them." This was long regarded as settled law,<sup>3</sup> and was not overruled till the beginning of the nineteenth century.<sup>4</sup> It is not till then that we begin to get the development of the modern rules as to when a person is liable for slander, when damage has been caused by its repetition by other persons.<sup>5</sup> Secondly, the damage must be ascertainable temporal damage. Thus it was held in 1669<sup>6</sup> that to say of a virgin of good fame, "she was with child by Simons," whereby she lost her parent's favour, was not actionable. This rule was no doubt due in part to the rule that defamation, which alleged offences cognizable only in the ecclesiastical courts, and unaccompanied by temporal damage, was not actionable at common law.<sup>7</sup> But, as the case of *Lynch v. Knight*<sup>8</sup> in 1861 shows, the rule long worked hardship; and it has only partially been remedied by the Slander of Women Act 1891,<sup>9</sup> in the case of the one particular class of slander in which the rule worked the greatest hardship. Moreover, the existence of the damage must be strictly proved—"when the speaking of the words might be a damage to the plaintiff, yet if the ground of that damnification do not sufficiently appear by the record, the action

<sup>1</sup> Bramston, C.J., once went so far as to say that, if the words did not import a scandal in themselves, the averment of a particular damage could not make them actionable; but no one else seems to have taken this extreme view, *March, Actions for Slander* 102.

<sup>2</sup> (1613) 12 Co. Rep. at p. 134.

<sup>3</sup> See *Davis v. Lewis* (1796) 7 T.R. 17.

<sup>4</sup> *McPherson v. Daniels* (1829) 10 B. and C. 263.

<sup>5</sup> See *Ratcliffe v. Evans* (1892) 2 Q.B. at p. 530, where Bowen, L.J., lays it down that, "Verbal defamatory statements may be intended to be repeated, or may be uttered under such circumstances that their repetition follows in the ordinary course of things from their original utterance. Except in such cases, the law does not allow the plaintiff to recover damages which flow, not from the original slander, but from its unauthorised repetition."

<sup>6</sup> *Barnes v. Bruddel* 1 Lev. 261.

<sup>7</sup> 9 H.L.C. 577.

<sup>8</sup> Above 348.

<sup>9</sup> 54, 55 Victoria c. 51.

will not lie." <sup>1</sup> Thirdly, we have seen that, though the defamation imputed only an offence cognizable in the ecclesiastical courts, yet if it was followed by damage, an action lay—e.g. the imputation of unchastity to a woman whereby she lost her marriage.<sup>2</sup> Similarly it was held that, where the plaintiff's shepherd falsely and maliciously told the bailiff of the manor that one of the plaintiff's sheep was an estray, whereupon the bailiff seized it, this damage was attributable to these words, and made them actionable.<sup>3</sup> But it was laid down in *Vicars v. Wilcocks* <sup>4</sup> that, if in consequence of the words spoken, another does an act which would be illegal, even assuming that the words were true, no action lay. It is probable that this decision was based on somewhat the same ground as the decision in the *Earl of Northampton's Case*.<sup>5</sup> Just as in that case the person slandered was only allowed to recover against the originator of the slander, and not against the person who had repeated it, so, according to this decision, he was only allowed to recover against the man who had done the illegal act which had damaged him, and not against the person who had uttered the slander, which had caused the illegal act to be done. The law in the one case allowed an action against the originator of the slander, and in the other case against the person who had done the illegal act. It refused to allow any other action, and so the slanderer went free. But it is probable that this hard and fast rule is as obsolete as the rule laid down in the *Earl of Northampton's Case*.<sup>6</sup> The true test is, as Sir F. Pollock has pointed out,<sup>7</sup> not whether the act done was legal or illegal, but whether the act, whether legal or illegal, was the natural and probable consequence of the slander.

All these evil results, which flowed from the attempts of the judges to discourage these actions for defamation, were aggravated by the accumulation of cases in the reports, in which the courts had construed this or that specimen of abuse to be or not to be defamatory. We have seen that the practice of reporting cases, which turned on the construction of particular documents, tended

<sup>1</sup> March, *Actions for Slander* 49; a fortiori if it appeared by the record that there was no damage—"if one say of a woman that 'she hath murdered her husband'; and she and her husband bring the action, it will not lie, because it doth appear by the record that the slander is not prejudicial," *ibid.*, citing a case of 1608.

<sup>2</sup> Above 350.

<sup>3</sup> *Newman v. Zachary* (1647) Aleyn 3.

<sup>4</sup> (1806) 8 East 1—"the special damage must be the legal and natural consequence of the words spoken, otherwise it did not sustain the declaration: and here it was an illegal consequence; a mere wrongful act of the master; for which the defendant was no more answerable, than if in consequence of the words, other persons had afterwards assembled and seized the plaintiff, and thrown him into a horsepond by way of punishment for his supposed transgression," *per* Lord Ellenborough, C.J.

<sup>5</sup> (1613) 12 Co. Rep. 132.

<sup>6</sup> See the remarks of Lord Wensleydale in *Lynch v. Knight* (1861) 9 H.L.C. at p. 600.

<sup>7</sup> *Torts* (12th ed.) 240.

to create all sorts of arbitrary rules for the interpretation of these documents; that the status of these rules was often uncertain—it was not clear whether they were rules of law, or rules of construction, or merely inferences of fact as to the interpretation of the particular document before the court; and that the application of these rules often tended to frustrate the intentions of the parties to these documents.<sup>1</sup> Similar evil effects followed these numerous reports of actions for defamatory words. A very cursory glance at Rolle's and the later Abridgments, will show that this practice of piling up cases, which turned on the construction of particular words, had a disastrous effect on this branch of the law. Rolle tried to reduce them to some sort of order by grouping them under general headings. Thus he has a long list of cases turning on the imputation of perjury; on more general words of abuse; on words which do not impute felony but only minor offences; on adjective interrogative conditional and disjunctive words, and words in the past tense; on words which are not directly affirmative; on words imputing a criminal intention; on cases in which later words will explain and modify the effect of former words; on words imputing disgraceful conduct in one's profession office or trade; on words which will support an action in spite of their uncertainty; on cases where the words will be taken in *mitiore sensu*; on cases where the action lies though the words are repugnant, though the person slandered is not directly described, or though the charge is not quite precisely made; on cases in which an averment would, and cases in which it would not, render words actionable. A study of those cases makes it quite obvious that so many and such fine distinctions were drawn by the judges as to the actionable quality of words, that it was a mere lottery whether or no any particular words would be held to be defamatory; and although, as we have seen, protests were made in the late seventeenth and the eighteenth centuries against this vicious system of citing cases to prove that this or that set of words were or were not defamatory,<sup>2</sup> it was not till modern times that it was eliminated, by the application to words and writings, which were the subjects of actions for defamation, of the rule that the meaning of all words and documents is a question of fact to be deduced from the words and the documents themselves.<sup>3</sup>

The best proof of the absurd results of this practice is the cases themselves; and as illustrations I will take one or two cases from Croke's reports of James I.'s reign.

In the following cases the words were held to be defamatory:—Words spoken of a justice of the peace, stating that he had

<sup>1</sup> Vol. vii. 392-394.

<sup>2</sup> Above 356 n. 4.

<sup>3</sup> Above 356; see Lord Halsbury's *Laws of England* xviii 639 n. (f).

instigated others to attempt to murder the speaker, were held to be actionable by three judges against two.<sup>1</sup> Words spoken of a commissioner to examine witnesses, imputing that he had taken bribes to favour one of the parties, were held actionable by four judges against one.<sup>2</sup> The statement that a justice of the peace was "a partial justice" was held actionable by the two judges who tried the case.<sup>3</sup> To accuse a man of having robbed the church, and stolen lead from it, was held actionable by three judges against two; but no action would have lain if the words had been "thou hast robbed the church *for* thou hast stolen lead," because there could be no larceny of the lead which was fixed to the freehold.<sup>4</sup>

In the following cases the words were held not to be defamatory:—It was held by three judges to two that, to say of a magistrate that "he is a rascally villain, and keeps a company of thieves and traitors to do mischief," was not actionable;<sup>5</sup> and again by three judges to two that it was not actionable to say "thou art a thievish knave and hath stolen my wood," as "stealing of wood may be intended growing wood, and then it is not any felony, and so no cause of action."<sup>6</sup> On the same principle it was held not actionable to charge a man with having stolen iron bars from windows, or corn from a field.<sup>7</sup> But, perhaps, the most absurd of all these cases is the following:<sup>8</sup> the words were, "Sir. Thomas Holt struck his cook on the head with a cleaver, and cleaved his head; the one part lay on the one shoulder and the other on the other"—as clear an accusation of homicide, one could think, as could be desired. But "it was moved in arrest of judgment that these words were not actionable, for it is not averred that the cook was killed, but *argumentative*. The Court was of that opinion, Fleming, Chief Justice, and Williams *absentibus*; for slander ought to be direct, against which there may not be any intendment: but here notwithstanding such wounding the party may yet be living; and it is then but trespass."

It is clear that an action which had given rise to such a body of law as this, gave no adequate remedy for defamation. No doubt in the early part of the seventeenth century its inadequacy was mitigated by the fact that proceedings might be taken in the court of Star Chamber.<sup>9</sup> But, when the Star Chamber was abolished, a new and better remedy was imperatively needed. We shall now see that it was mainly for this reason that, after the Restoration, the courts began to treat the tort of libel in a different way from the tort of slander. The old unsatisfactory law

<sup>1</sup> *Harper v. Beaumont* (1605) Cro. Jac. 56.

<sup>2</sup> *Moor v. Foster* (1606) *ibid* 65.

<sup>3</sup> *Benson v. Morley* (1608) *ibid* 153.

<sup>4</sup> *Robins v. Hildredon* (1608) *ibid* 65.

<sup>5</sup> *Holt v. Astgrigg* (1608) *ibid* 184.

<sup>6</sup> *Kemp v. Housgoe* (1606) *ibid* 90.

<sup>7</sup> *Hollis v. Briscoe* (1605) *ibid* 58.

<sup>8</sup> *Powell v. Hutchins* (1609) *ibid* 204.

<sup>9</sup> Vol. v. 208-212.

was still applied to spoken defamation; but some very different rules were applied to defamation which was written. These rules eventually reacted on the tort of slander, and effected some improvement in the law; but the unfortunate distinction between written and spoken defamation, due ultimately to the treatment of the action on the case by the judges of the early years of the seventeenth century, and immediately to the remedy for that treatment adopted by the judges of the latter part of that century, still remains to trouble the law.

— (2) The origin of the difference between libel and slander.

The abolition of the jurisdiction of the court of Star Chamber, and the absorption of some parts of it by the common law courts after the Restoration, created a difficult problem in connection with several wrongs or offences which hover on the border line between crime and tort. This problem can be stated as follows: There were several of these wrongs or offences, notably defamation, conspiracy and maintenance, as to which the common law, because it had provided a civil or a criminal remedy, had, in the mediæval period and later, acquired a certain number of rules.<sup>1</sup> But, during the sixteenth and seventeenth centuries, the law as to these wrongs or offences had been further developed by the court of Star Chamber; and this development had been concerned mainly with their criminal aspect.<sup>2</sup> It followed that, when the common law courts took over these parts of the jurisdiction of the Star Chamber, it took over the law relating to the wrongs or offences which had been there developed. They became common law misdemeanours; and the definition of these misdemeanours owed something both to the common law rules and to the rules of the Star Chamber. How much they owed to these two sets of influences varied in each case. In the case of the criminal aspect of defamation<sup>3</sup> and conspiracy<sup>4</sup> the debt owed to the Star Chamber was large, and that owed to the common law was comparatively small. In the case of the civil aspect of defamation, and of the civil and criminal aspect of maintenance,<sup>5</sup> the influence of common law rules was more prominent; and we shall see that, for a considerable period, the same thing can be said of the civil aspect of conspiracy.<sup>6</sup> Now, when all these three wrongs or offences came to be recognized as common law misdemeanours, two questions naturally arose. Firstly, could all these criminal offences be regarded as torts? and, if so, were the incidents of these offences, regarded as

<sup>1</sup> For the mediæval rules as to conspiracy and maintenance see vol. iii 395-399, 401-407; for the rules as to defamation see vol. iii 409-411; above 335.

<sup>2</sup> Vol. v, 201-205, 208-212.

<sup>3</sup> Above 336, 338 seqq.

<sup>4</sup> Below 397-400.

<sup>5</sup> Below 379-384.

<sup>6</sup> Below 392-393.

torts, in all respects the same as the incidents of these offences regarded as crimes? Secondly, were they torts like trespass, which would give rise to an action for nominal damages? or were they torts like negligence, which would only give rise to an action if the plaintiff could show that he had suffered damage? In other words, was the act *per se* tortious, or was it only tortious if accompanied by damage?

These problems were raised by the historical development of the law on these subjects. But there is no reason to think that the judges realized their precise nature; and it is certain that they did not try to solve them on any general or theoretical grounds. As must necessarily happen under a system of case law, they decided the cases as they arose in the manner which seemed to them most expedient, and for reasons which seemed sufficient to dispose of the case in hand. The result has been that they have left undecided many points which, in later years, have given rise to much difference of professional and judicial opinion. Controversy upon these points has often not been illuminating, and the decisions arrived at have not always been convincing, mainly because the historical causes, and therefore the real nature of the problem, have not been clearly realized—a fact of which the conflicting decisions in the case of *Neville v. London Express Newspaper Ltd.*,<sup>1</sup> and the long unsettled question of the nature of the tort of conspiracy,<sup>2</sup> are leading illustrations. But, even if the judges of the seventeenth century had realized the true nature of the problem, and had approached it from its theoretical side, it would have been found difficult to solve, because many good reasons could be given for opposite solutions.

(i) Could all those criminal offences be regarded as torts? and, if so, were the incidents of these offences, regarded as torts, in all respects the same as the incidents of these offences regarded as crimes?

In favour of the view that all these offences should be regarded as torts, it could be argued that they were all treated by the law as criminal offences; and that, if an act so treated caused damage to another, that other ought to have an action for damages. Moreover, it could be argued that this was the right solution on historical grounds, because, firstly, the common and statute law had recognized, in the case of conspiracy and maintenance, that these offences could give rise to proceedings in the nature of trespass, which, like trespass, were as much civil in their nature as criminal;<sup>3</sup> and, secondly, because the court of Star Chamber sometimes gave damages to the person injured by all

<sup>1</sup> [1919] A.C. 368.

<sup>2</sup> Below 394-397.

<sup>3</sup> Vol. iii 397-398, 404-407.

these offences.<sup>1</sup> On the other hand, it might be said that the mere fact that the law chose, from motives of public policy, to treat a given course of conduct as a criminal offence, did not necessarily prove that the law would regard it as a tort; and that, even admitting that these wrongful acts should be regarded as torts if they caused damage to another, it did not follow that the tort would necessarily have the same incidents as the criminal offence which had been developed by the court of Star Chamber. This truth was realized in the case of defamation, as the differences between the tort and the crime of libel testify.<sup>2</sup> The failure to realize it in the case of maintenance is at the bottom of the inconsistent opinions in the case of *Neville v. London Express Newspaper Ltd.*;<sup>3</sup> and, as we shall see, it has something to do with the obscurity which long hung about the question whether there is such a thing as the tort of conspiracy.<sup>4</sup>

(ii) Were these torts like trespass, which would give rise to an action for nominal damages? or were they torts like negligence, which would only give rise to an action if the plaintiff could show that he had suffered damage?

If these wrongs could be regarded as torts, there was something to be said in favour of the view that they should be so regarded, whether damage resulted or not, so that they would give rise to a right of action for nominal damages, because from them general damage could be presumed. They were obvious abuses of so serious a kind that the state had deemed it expedient to treat them as crimes. Why should they not be regarded as involving a tort of this character? It might be argued that they should be regarded as involving a tort of this character, just as larceny involves a trespass. On the other hand, it might be said that the form of action by which these torts were remedied was Case; and that that necessarily involved the conclusion that they were only torts if the plaintiff could show that he had suffered damage. No doubt this is a technical reason; but, in support of it, it might be argued that, though it might be expedient to treat these wrongs as crimes, there was no reason to treat them as torts unless a plaintiff could show that he had suffered damage—a line of reasoning which is fully admitted in the rule, laid down at the end of this period, that a public nuisance will not give rise to an action in tort in the absence of special damage.<sup>5</sup> We shall see that this line of reasoning has been followed in the case of the torts of conspiracy<sup>6</sup> and maintenance.<sup>7</sup> On the other hand, in the

<sup>1</sup> Vol. v 211-212.

<sup>2</sup> [1919] A.C. 368; below 400-402.

<sup>3</sup> *Iveson v. Moore* (1700) 1 Ld. Raym. 486.

<sup>4</sup> Below 394, 396-397.

<sup>5</sup> Above 339.

<sup>6</sup> Below 392-397.

<sup>7</sup> Below 400.

case of written as opposed to spoken defamation, the first line of reasoning was followed. We shall see that in the case of libel, as distinct from slander, the courts, after the Restoration, held that no special damage need be shown to ground the action<sup>1</sup>—that libel was a wrongful act from which damage could be presumed.

If we took a narrow historical view of the development of these torts, we might wonder at the conclusion thus reached. It might be said that the early common law remedies, both in the case of conspiracy and maintenance, showed that, being wrongs in the nature of trespass, they should have been regarded as torts of the nature of trespass, that is as violations of absolute rights; while defamation, spoken or written, being redressible at common law only by an action on the case, should not have been regarded as giving rise to an action in tort in the absence of special damage. But to reason in this way would be to ignore, both the manner in which the Star Chamber had developed all these wrongs in the sixteenth century, and the new conditions which the problem had, in consequence, assumed after the Restoration. The judges, as I have already said, were not fully conscious of the problem in all its bearings; but, when faced with the question whether, in any particular case, written defamation, or conspiracy, or maintenance should give rise to an action in tort, they answered it in a manner seemed to them to be most expedient.

Now in considering the question whether written defamation should give rise to an action in tort without proof of special damage, the judges had before them the following three facts: firstly, such defamation was a crime; secondly, the development of the action on the case had made this action a wholly unsatisfactory remedy for the tort of defamation; thirdly, if the prevalent habit of duelling was to be suppressed, some better remedy must be provided. We know that the last two considerations had induced them to try to improve the conditions under which the action on the case lay;<sup>2</sup> and, though there is no direct evidence as to their reasons for deciding that written, unlike spoken defamation, would give rise to an action without proof of special damage, I cannot help thinking that it was the combined weight of all these three reasons which induced them to reform the law by drawing this distinction. However that may be, the cases make it quite clear that this distinction was drawn in the latter half of the seventeenth century.

The earliest decision is the case of *King v. Lake* in 1670.<sup>3</sup> Hale, C.B., held that, "although general words spoken once without writing or publishing them would not be actionable; yet

<sup>1</sup> Below 365.

<sup>3</sup> Hardres 470.

<sup>2</sup> Above 356 n. 4.



here, they being writ and published, which contains more malice, than if they had been once spoken, they are actionable"; and this decision was affirmed on a writ of error.<sup>1</sup> It was followed in 1683 in the case of *Austin v. Culpepper*.<sup>2</sup> In the eighteenth century these decisions were followed in the cases of *Harman v. Delany*,<sup>3</sup> and *Villers v. Monsley*,<sup>4</sup> though one of the judges in the latter case seemed to think that the authority for the distinction between written and spoken defamation was somewhat slender.<sup>5</sup> The rule was finally settled in 1812, after a full consideration of the cases, by the decision of the Exchequer Chamber in the case of *Thorley v. Kerry*.<sup>6</sup> Mansfield, C.J., held with regret that the distinction between spoken and written defamation, though indefensible in principle,<sup>7</sup> was too well established to be repudiated.

It cannot be doubted that this decision of the judges of the latter part of the seventeenth century to treat libel as an independent tort, for which a plaintiff could recover damages without the need for proving special damage, had the results which were intended. In the first place, though the damage and not the insult was still the gist of the action, the fact that the publication of written defamation was regarded as a wrong to reputation from which damage could be presumed, naturally tended to make the insult a more prominent element in the tort than the damage; and so tended to put the tort upon a more satisfactory footing.<sup>8</sup> In the second place, once the libel was proved, the defendant was shown to be a wrongdoer, and the plaintiff could recover damages because the commission of such a wrong implies damage. There was no need, as in the case of slander, to allege the special damage suffered with particularity, and prove that it had been suffered. This difference between an act which was in itself wrongful, and an act which was only wrongful if it caused damage, was recognized in the case of *Iveson v. Moore* in 1700;<sup>9</sup> and it gave rise to one of the most beneficial effects of thus treating libel as a wrong in itself—the emancipation of the court from that long series of cases, in which the question whether or not temporal damage could be said to have flowed from the words spoken, had been discussed with so much misplaced subtlety. In the third place, it followed also that

<sup>1</sup> Skinner at p. 124.

<sup>2</sup> "And t'was said that to say of any body that he is a dishonest man is not actionable, but to publish so, or to put it up upon posts is actionable," Skin. at p. 124; S.C. 2 Show. 313.

<sup>3</sup> (1731) Fitz-Gibbon at p. 254.

<sup>4</sup> (1769) 2 Wils. 403.

<sup>5</sup> "I repeat it that I wish there was some more solemn determination that the writing and publishing anything which tends to make a man ridiculous or infamous ought to be punished," *ibid* at p. 404 *per* Bathurst, J.

<sup>6</sup> 4 Taunt. 355.

<sup>7</sup> Below 366.

<sup>8</sup> Above 335.

<sup>9</sup> 1 Ld. Raym. 486 at p. 490 *per* Gould, J.; *cp.* Ratcliffe v. Evans [1892] 2 Q.B. at pp. 528-532 *per* Bowen, L.J.

the courts were also relieved from considering whether the case fell within one of the categories of words actionable *per se*. This meant that another of the longest and most unsatisfactory series of these older decisions on the action on the case could be disregarded. For these three reasons, therefore, the invention of the separate tort of libel for the first time put the most important branch of the law of defamation on a satisfactory footing; and it cannot be doubted that the principles applied to this tort helped the judges to improve the tort of slander, by enabling them to disregard many of those unprofitable rules, such as the doctrine of the *mitior sensus*,<sup>1</sup> which their predecessors had laid down in order to discourage the action on the case.

At the same time this improvement had been effected at the expense of imposing upon the law the unfortunate distinction between the torts of libel and slander. At the latter part of the seventeenth century this may well have seemed not too high a price to pay for the rescue of the tort of defamation from the wholly unsatisfactory condition to which it had sunk. But, when the law had been reformed, and some of the more rational rules of libel were being applied to slander; when the real reasons for the decision of the judges to treat libel as an independent tort had been forgotten, and unsatisfying *a priori* reasons were being invented;<sup>2</sup> the absurdity of the distinction began to appear. How completely the original reason for the establishment of the distinction had been forgotten appears from Mansfield, C.J.'s judgment in *Thorley v. Kerry*.<sup>3</sup> He would have liked to assimilate libel to slander, by ruling that "no action could be maintained for written scandal which could not be maintained for words if they had been spoken."<sup>4</sup> This would no doubt have got rid of the separation of the two torts; but it would have got rid of it at the expense of undoing most of the good effects of the recognition of libel as a separate tort, and of throwing the law back into the state in which it was before that recognition had taken place. The converse solution would have been infinitely preferable. Fortunately the current of authority was too strong to be overruled in this way;<sup>5</sup> and so it may be said that the case affords a striking

<sup>1</sup> Above 355.

<sup>2</sup> See *Thorley v. Kerry* (1812) 4 Taunt. at p. 365 where some of these arguments are exposed by Mansfield, C.J.

<sup>3</sup> (1812) 4 Taunt. 355.

<sup>4</sup> *Ibid* at p. 365.

<sup>5</sup> "These are the arguments which prevail on my mind to repudiate the distinction between written and spoken scandal; but that distinction has been established by some of the greatest names known to the law, Lord Hardwicke, Hale, I believe, Holt, C.J., and others . . . I do not now recapitulate the cases, but we cannot, in opposition to them, venture to lay down at this day, that no action can be maintained for any words written, for which an action could not be maintained if they were spoken," 4 Taunt. at p. 365.

illustration of the salutary principle that settled rules should not be lightly overruled on a priori grounds.

In fact, the modern torts of slander and libel represent two different strata of legal development. Slander represents the tort developed in the sixteenth and early seventeenth centuries in and through the action on the case. Libel represents the tort created by the judges of the latter part of the seventeenth century, in order to remedy those defects of the tort developed in the earlier period, which had been caused largely by the efforts of the judges to discourage the action on the case. Their action put the tort of libel on the right lines; and if ever an assimilation between the two torts is effected by the Legislature, it will be taken as the model. At the same time, the tort developed in and through the action on the case in the earlier period has influenced in many ways the later development of the law. We shall now see that some of the rules, which originated in the action on the case for defamation, were applied to the tort of libel; and, similarly, that some of the rules applicable to libel as a crime have both influenced, and been influenced by, the development of the torts of libel and slander.

(3) The origin of some of the essential characteristics of the torts of libel and slander.

During the sixteenth and seventeenth centuries we can see the origins of some of the essential characteristics of the tort of defamation. Many of them originated in the rules applied by the common law courts to the action on the case, and were applied both to slander and libel. Some of them, notably the rules as to the innuendo and privilege, were applied both to the crime and to the tort of defamation, and illustrate the manner in which the tort influenced the crime. On the other hand, in the rule, which long prevailed, that the statement must have been made maliciously we can trace one way in which the crime influenced the tort. I shall deal with these rules under the following heads:—(i) the words or writing must be defamatory, and they must be proved to have been spoken or written in the manner alleged by the plaintiff; (ii) they must be proved to have been spoken or written of and concerning the plaintiff; (iii) they must have been published to some third person; (iv) they must have been published maliciously; and (v) they must not admit of justification nor have been written or spoken on a privileged occasion.

(i) *The words or writing must be defamatory, and they must be proved to have been spoken or written in the manner alleged by the plaintiff.*

So soon as the courts allowed an action on the case for defamation, the question, what statements could be regarded as defamatory,

arose. It soon became clear that though, as to some statements, there could be no question, as to others the context and circumstances made all the difference. It was necessary, therefore, to lay down rules as to the manner in which a plaintiff, who complained of one of these ambiguous statements, must frame his pleading. Partly by reason of the growing elaboration of the rules of pleading, and partly by reason of the desire of the judges to discourage these actions, the rules on this matter were strict. They are contained in the mass of pleading rules which grew up round the "innuendo" and the "colloquium."

If words were obviously defamatory of the plaintiff, no innuendo was needed; and if they were obviously not defamatory, an innuendo could not make them actionable. An innuendo, therefore, could only be of use where the statement was apparently defamatory, but where the person or thing alluded to in it was not described with sufficient clearness. It could not add to the statement any additional fact needed to remedy an uncertainty in the person defamed, or in the charge made against that person. It could only indicate with greater clearness a person already mentioned, or a charge already made. These rules are clearly illustrated in a case reported by Coke.<sup>1</sup> Dealing with the rule that an innuendo could only indicate with greater clearness a person already mentioned, he says, "If one says without any precedent communication that one of the servants of J. S. (he having many) is a notorious felon or traitor, here, for the uncertainty of the person, no action lies; and an innuendo cannot make it certain. . . . But when a person is once named in certain, as if two speaking together of J. S. one says, 'he is a notorious thief,' then J. S. in his declaration may show that there was speech of him between the two, and that one said of him, 'he (innuendo prædictum J. S.) is a notorious thief.' For the office of an innuendo is to contain and design the same person who was named in certain before, and in effect stands in lieu of a prædict', but an innuendo cannot make a person certain who was uncertain before." Dealing with the rule that it could only indicate with greater clearness a charge already made, he says, "An innuendo cannot alter the matter or sense of the words themselves; and therefore when the defendant in the case at bar said of the plaintiff, 'that he was full of the pox (innuendo the French pox),' this innuendo doth not do its proper office, for it endeavours to

<sup>1</sup> *James v. Rutlegh* (1599) 4 Co. Rep. 17 b; cp. *Barham v. Nethersal* (1602) *ibid* 20a; *R. v. Griep* (1698) 1 Ld. Raym. at p. 259, S.C. 2 Salk. 513; cp. *March, Actions for Slander* (ed. 1647) 141—"the office of an innuendo is only to containe and design the same person which was named in certain before . . . or else to declare the matter or sense of the words themselves which was certainly expressed before."

extend the general words, the pox, to the French pox, by imagination of an intent which is not apparent by any precedent words, to which the innuendo should refer."

These illustrations indicate the function of the colloquium. As the innuendo could only clear up doubts as to persons or matters already referred to, it was necessary to set out all these persons and matters very carefully in the introductory averments.<sup>1</sup> These introductory averments were known as the colloquium, and this colloquium must contain a careful narrative of all the circumstances which were necessary to be stated, in order to prove that the words, with the appropriate innuendoes, were defamatory. Unless these circumstances were stated with the utmost care, it would be possible to arrest judgment, on the ground that the statement and the innuendoes gave no cause of action.<sup>2</sup> It was not till the Common Law Procedure Act of 1852<sup>3</sup> that the need for this colloquium was removed, and that plaintiffs, in actions for libel or slander, were allowed "to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense, without any prefatory averment to show how such words or matter were used in that sense."

It was at first necessary for the plaintiff to prove that the words had been spoken exactly as he alleged them.<sup>4</sup> During the eighteenth century this strictness was somewhat relaxed,<sup>5</sup> but not wholly removed.<sup>6</sup> And, wherever a colloquium was necessary to ground the action, the averments in the colloquium must also be strictly proved. Thus, if words were only actionable if spoken of the plaintiff in his trade, there must be a colloquium alleging this, and the facts there set out must be proved.<sup>7</sup>

<sup>1</sup> "That in all cases for words, where there is anything that is the cause or ground of the action, or tends necessarily to the maintenance of it, in such case the action will not lie, without that thing be expressly averred to be, or not to be, as the case requireth," March, *Actions for Slander* (ed. 1647) 142.

<sup>2</sup> *Johnson v. Aylmer* (1806) Cro. Jac. 126; *Scutt v. Hawkins* (1823) 2 Rolle Rep. 243; cp. *Dacy v. Clinch* (1861) 1 Sid. 52 for a case in which a motion to arrest judgment on this ground failed.

<sup>3</sup> 15, 16 Victoria c. 76 § 61; cp. *Watkin v. Hall* (1868) L.R. 3 Q.B. at pp. 401-402; Clerk and Lindsell, *Torts* (4th ed.) 567.

<sup>4</sup> "Action for these words: 'Thou (innuendo) the plaintiff art a villainous and a murderous quean; for thou didst murder my last wife.'—The defendant pleaded not guilty. The jury found that the defendant spake these words of the plaintiff to one Spinkfoot: 'she is a villainous and a murderous quean; for she did murder my last wife.' Popham and Fenner held that this verdict is against the plaintiff; for they are not the same words mentioned in the declaration," *Blisset v. Johnson* (1597) Cro. Eliza. 503; cp. *Sydenham v. May* (1616) Hob. 180, and the cases cited by Rolle, Ab. ii 718; *Hilsden v. Mercer* (1624) Cro. Jac. 677.

<sup>5</sup> See *Compagnon v. Martin* (1772) 2 W. Bl. 790.

<sup>6</sup> See *Barnes v. Holloway* (1799) 8 T.R. 150.

<sup>7</sup> *Savage v. Robery* (1699) 2 Salk. 694.

(ii) *The words or writing must be proved to have been spoken or written of and concerning the plaintiff.*

Just as the law required strict proof that the statement was defamatory, and that it had been written or spoken as alleged, so it required strict proof that it was written or spoken of and concerning the plaintiff. Unless it was alleged in the plaintiff's declaration that the statement was made of and concerning him, the declaration was bad. Thus, in the case of *Johnson v. Aylmer*,<sup>1</sup> the plaintiff declared that the defendant spoke and published the following false and scandalous words: "Mr. Price, you do my Lord Burleigh wrong, that you do not apprehend Jeremy Johnson, innuendo the plaintiff, for a felon, and seize his goods; for he, innuendo the plaintiff, hath stolen a sheep from Wright of Rirsly, innuendo John Wright." After verdict for the plaintiff, it was successfully moved in arrest of judgment, "that the words are too generally laid to maintain the action; for they are not alleged to be spoken of the plaintiff in the writ or count; but only in reciting the words he saith, innuendo the plaintiff; and the innuendo, without expressly alleging the words to be spoken of the plaintiff, will not maintain the action." This principle was rigidly applied in later law both to actions and to indictments, as is made abundantly clear by the luminous judgment of Fletcher-Moulton, L.J., in *Jones v. Hulton*.<sup>2</sup> But the decision of the majority of the court of Appeal and the House of Lords<sup>3</sup> in that case, has, in effect, placed a new<sup>4</sup> and important limitation on the generality of this rule. If a person publishes a libellous statement of a fictitious person, whom he christens by a name of his own choosing, and neither knows nor cares whether or not his statement can be taken as referring to an existing person of that name; and if in fact the jury is satisfied that it has been taken to refer to an existing person; that person can recover damages.

Recent developments in modern journalism make this modification of the strictness of the old principle clearly necessary; and the technical reasoning by which the law has been thus modified in the interests of substantial justice, is a good instance of the flexibility which our system of case law imparts to our legal system. In effect, it is based on an analysis of the nature of the intention to libel the plaintiff which the law requires.<sup>5</sup> The

<sup>1</sup> (1606) Cro. Jac. 126.

<sup>2</sup> [1909] 2 K.B. at pp. 459-465; cp. L.Q.R. xxv 341-342.

<sup>3</sup> [1910] A.C. 20.

<sup>4</sup> That this limitation is new is I think clear; on this I agree with what is said L.Q.R. xxvi 103-104. "All the learning and subtlety of the Lord Justice (Farwell, L.J.), backed by the agreement of the noble and learned Lords, still fail to convince us that this is not very new law. It may be said, however, and no doubt will be, that the law is new only because the question had never risen in such a form."

<sup>5</sup> [1909] 2 K.B. at pp. 480-482 *per* Farwell, L.J.

law will impute intention to do an act, not only if the defendant actually meant to do it, but also if he acts recklessly, that is without any care whether he does it or not. Just as an intention to deceive can be imputed, both where a person makes a false statement of fact with knowledge of its falsity, and also where he makes such a statement recklessly, that is neither knowing nor caring whether it be true or false; so an intention to libel the plaintiff can be imputed from either of these two states of mind. "The element of intention, which is as essential to an action for defamation as to an action for deceit, can be proved in the same way in both actions."<sup>1</sup>

(iii) *The words or writings must have been published to some third person.*

We have seen that this rule was always applied to the action on the case, because it followed from the fact that the damage to the person, arising from the defamatory statement, was the gist of the action.<sup>2</sup> Therefore the plaintiff must always allege such publication in his declaration;<sup>3</sup> and, if the words were in a foreign language, he must further allege that they were understood by those who heard them.<sup>4</sup> This rule as to the necessity of publication to a third person was naturally followed in the case of libel; but in the case of a libel written in a foreign language, and published to the world at large, though the words must be set out, both in the original and in a translated form in the plaintiff's declaration,<sup>5</sup> the allegation that they were understood would be obviously unnecessary.

(iv) *The words or writings must have been published maliciously.*

At the present day it would hardly be correct, and it would certainly be misleading, to state the rule in this form. When it is said that the words or writings must have been published maliciously, all that is meant is that they must have been published without just cause or excuse.<sup>6</sup> We shall see that this was all that the earlier cases upon the tort of defamation meant; and we have seen that the same thing is true of the crime of defamation.<sup>7</sup> But, when it became customary to allege malice both in declarations in civil cases and in indictments in criminal cases, it naturally came to be thought that malice was an essential

<sup>1</sup> [1909] 2 K.B. at p. 481.

<sup>2</sup> Vol. v 207; above 335.

<sup>3</sup> As to what would be held to be a sufficient allegation of publication, see *Taylor v. How* (1602) Cro. Eliza. 861; *Mors v. Thacker* (1677) 2 Lev. 193.

<sup>4</sup> *Price v. Jenkins* (1602) Cro. Eliza. 865; cp. the declaration in *Jones v. Davers* (1597) *ibid.* 496.

<sup>5</sup> *Zenobio v. Axtell* (1795) 6 T.R. 162; 1 Wms. Saunders 242 n.

<sup>6</sup> Below 374-375.

<sup>7</sup> Above 341-345.

ingredient both of the tort and crime. Defamatory statements, it was said, must have been published maliciously. It was however admitted that, from the fact that a false and defamatory statement had been published without just cause or excuse, the law implied malice. But when it is said that the law 'implies' anything, it is generally the case that the thing implied is not really present. Hence, in modern times, the law as to this part of the subject has been considerably clarified, by the recognition of the principle that malice is not a necessary ingredient either in the crime or in the tort of defamation; and that it is only important in those cases in which the defence of qualified privilege is set up. Thus the history of this rule is the history of its gradual introduction into, and final elimination from, the law.

It is clear from the conditions under which the action on the case lay that malice was not the gist of the action; and this was recognized in some of the cases decided in the sixteenth and early seventeenth centuries. It was held in 1597 that it was not necessary in an action on the case to allege that the words were spoken "malitiose."<sup>1</sup> But, in the earlier case of *Mercer v. Sparks*,<sup>2</sup> we can see a hint of the manner in which the idea that malice is a necessary ingredient in the tort will be introduced. In that case it was held that it was no error not to allege that the words were spoken maliciously, "because the words themselves were malicious and slanderous." Clearly this comes very near to the rule that malice is implied. It is not therefore surprising to find that in other cases it is laid down that the malice or intention to slander was of the essence of the cause of action.<sup>3</sup> Moreover, no very clear distinction was as yet drawn between the malice which the law implies from the speaking of slanderous words, and the express malice which will rebut a defence of qualified privilege, because, as we shall see, the conception of qualified privilege had not as yet been attained.<sup>4</sup>

In 1652 Rolle, C.J., restated the rule that, in an action for slander, there was no need to allege that scandalous words were spoken malitiose; but he added that, in an indictment, such an allegation must be made, because that was the usual form.<sup>6</sup> In this statement we can see an indication of the manner in which the idea that malice was an essential ingredient in the tort of defamation was introduced into the law. We have seen that, when the

<sup>1</sup> Anon. Moore 459—"Auter error assigne quia ne fuit alledge que les parols fuerunt parles malitiose, et uncore auxi bone en action sur le cas pour parols."

<sup>2</sup> (1586) Owen 51.

<sup>3</sup> This point comes out clearly enough in *Brook v. Montague* (1606) Cro. Jac. 90, and in the ruling of Wray, C.J., in the case cited *ibid* at p. 91.

<sup>4</sup> Below 377.

<sup>5</sup> "And he said that in an indictment a thing must be expressed to be done falso et malitiose, because that is the usual form, but in a declaration those words are not necessary," Anon. Style 392.



criminal jurisdiction formerly exercised by the Star Chamber in libel cases was taken over by the courts of common law, the allegation that the statement was made maliciously was always made.<sup>1</sup> It is true that the judges tried to neutralize the effect of this conception of the crime, by holding that the legal effect of the words published, and therefore their malice, were matters of law for the court, and not matters of fact for the jury.<sup>2</sup> But they obviously thought that malice must be regarded as a necessary ingredient of the crime. As we have seen, they would have greatly strengthened their position at the expense of the jury, if they could have ruled that malice was not a necessary ingredient; for in that case it would have been quite clear that all the jury had to find was the publication of a writing bearing the meaning alleged by the prosecution. No room would have been left for the contention that, as malice was the gist of the offence, the jury must be convinced that the publication was malicious, before they found the accused guilty of libel, just as they must be convinced that a homicide was malicious, before they found the accused guilty of murder.<sup>3</sup> It is not surprising that it became more and more usual for plaintiffs who were suing in tort for libel or slander, to allege malice; and that, in spite of the earlier precedents to the contrary, it gradually came to be thought that malice was as essential an element of the tort as of the crime. In a case of 1632, reported by March, the plaintiff had alleged that the words were spoken "*falso et malitiose*," and the jury found that they were spoken "*falso et injuriose*." Judgment was given against the plaintiff, because the jury did not find malice—"for if the words were not spoken maliciously, no action will lie."<sup>4</sup> This statement of the law no doubt confirmed the existing practice of always alleging malice. Thus in 1737 it was said "that words are always laid to be spoken *falso et malitiose*, and that therefore any evidence proving them not to be so ought to be admitted." To this proposition the court seems to have assented, for, "it was agreed that malice is the gist of this action and that therefore evidence proving the manner and occasion of speaking the words to show that they were not spoken with malice has always been admitted."<sup>5</sup> And the law was stated in the same way by Comyns<sup>6</sup> and Blackstone.<sup>7</sup>

<sup>1</sup> Above 341-342.

<sup>2</sup> Above 343-345.

<sup>3</sup> Above 342-343.

<sup>4</sup> *Actions for Slander* (ed. 1647) 122—he concluded from this case that if the declaration did not state "that the words were spoken *malitiose* as well as *falso* the action will not lie."

<sup>5</sup> *Smith v. Richardson*, Willes at p. 24.

<sup>6</sup> "The declaration must show a malicious intent in the defendant," *Digest, Action on the Case for Defamation* G. 5; note however that, having made this general statement, Comyns at once qualifies it by the admission that "it is sufficient to say *falso dixit* without *malitiose*."

<sup>7</sup> "Words of heat and passion, as to call a man rogue and rascal, if productive of no ill consequence, and not of any of the dangerous species before mentioned, are not

But, in the first quarter of the nineteenth century, it began to be perceived that malice was not an essential ingredient in either the crime or the tort of defamation. This new view of the law rested in substance on a distinction between what was called "legal" malice or malice implied by law, and "actual" malice. As long ago as 1713 this distinction had been recognized by Parker, C.J., who had pointed out that the former variety of malice meant nothing more than that the thing, said to be maliciously done, was done without just cause or excuse.<sup>1</sup> But it was not till the beginning of the nineteenth century that this doctrine was applied to defamation, because it was not till then that the disturbing effects of the controversy, as to the rights of juries in cases of libel, had been quieted by Fox's Libel Act.<sup>2</sup> As the result of that Act, it was possible to approach the question as a pure matter of law; for, however libel was defined, the jury could now return a general verdict on the whole question. The manner in which this new view of the law was put forward and reconciled with the older view, will appear from the following cases: In 1823, in the case of *R. v. Harvey*, Holroyd, J., said that, "It is not necessary to aver in such an indictment any direct malice, because the doing of such an act without any excuse is indictable. . . . If the matter published was in itself mischievous to the public, the very act of publishing is prima facie evidence to show that it was done *mal animo*; for when a publication having such an injurious tendency is proved, it is intended to have been done with a malicious intention; because the principle of law is that a party must always be taken to intend those things and those effects which naturally grow out of the thing done."<sup>3</sup> In 1825, in the case of *Bromage v. Prosser*,<sup>4</sup> this rule was applied to actions for tort; and it was

actionable: neither are words spoken in a friendly manner, as by way of advice, admonition, or concern, without any tincture or circumstance of ill will; for in both these cases they are not *maliciously* spoken, which is part of the definition of slander. . . . What was said with regard to words spoken, will also hold in every particular with regard to libels by writing or printing, and the civil actions consequent thereupon," *Bl. Comm.* iii 125-126; dealing with the criminal law, he defines libels as "malicious defamations of any person, and especially a magistrate, made public by either printing writing signs or pictures in order to provoke him to wrath, or expose him to public hatred contempt and ridicule," *ibid* iv 150.

<sup>1</sup> "Malice in common acceptation is a desire of revenge, or a settled anger against a particular person. . . . This is by the vulgar use of the words in English. But (it) is not the legal sense taking them as law terms. . . . In short malice and maliciously I take to be terms of law which in the legal sense always exclude a just cause. So in case of murder, the statutes take away clergy in case of wilful murder of malice prepense, when wilful stands in opposition to accidental, and of malice to cases of reasonable provocation, such as might move an honest and good man; and the Court and not the jury have ever determined of malice. And the question has always been with or without cause or excuse, and therefore that which is only malice implied by law, perhaps would be expressed more intelligibly, at least more familiarly, if it were called malice in a legal sense," *Jones v. Givin* (1713) *Gilb. Cas.* at pp. 190-193.

<sup>2</sup> Above 345.

<sup>3</sup> 2 B. and C. at pp. 266-267.

<sup>4</sup> 4 B. and C. 247.

clearly laid down that, except as an answer to the defence of privilege, the allegation of malice was unnecessary. "Malice," it was said, "in common acceptation means ill will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse."<sup>1</sup> Except when malice is alleged as an answer to the defence of privilege, the term is used in its legal sense. Hence it is not necessary to aver it, as the law implies it from the fact that a defamatory statement has been made.<sup>2</sup> But, in the course of the nineteenth century, it was admitted that the general rules of pleading were the same in criminal and in civil cases.<sup>3</sup> These two cases were therefore held, in *R. v. Munslow*<sup>4</sup> in 1895, to show that malice was not an essential ingredient, either in the crime or the tort of defamation.

We have seen that, in the seventeenth century, the influence of the criminal law had helped to establish the view that malice was an essential ingredient in the tort of defamation.<sup>5</sup> The judgment in *R. v. Munslow* shows that, in the nineteenth century, the influence of the law of tort helped to overthrow this view, and to establish the rule that malice is not an essential ingredient in either the crime or the tort of defamation, and that it only becomes important when a plea of privilege is set up. To the origins of the conception of privilege we must now turn.

(v) *The words or writing must not admit of justification nor have been spoken or written on a privileged occasion.*

We have seen that to an action for the tort of defamation a plea of truth was always a defence.<sup>6</sup> This plea is known as a plea of justification; and the same strict principles were applied to the construction of such a plea as were applied to the plaintiff's declaration. Thus, in the case of *Johns v. Gittings*,<sup>7</sup> the plea was held bad, partly upon the ground that the defendant had not fully justified the words which he was alleged to have used; and it is still the law that a plea of justification is bad, unless it establishes

<sup>1</sup> At p. 255 *per* Bayley, J.

<sup>2</sup> "If I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not, and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces? And I apprehend the law recognises the distinction between these two descriptions of malice, malice in fact and malice in law, in actions of slander. In an ordinary action for words, it is sufficient to charge that the defendant spoke them falsely. . . . But in actions for such slander as is *prima facie* excusable on account of the cause of speaking or writing it, as in the case of servants' characters . . . malice in fact must be proved by the plaintiff," 4 B. and C. at p. 255.

<sup>3</sup> *Heymann v. R.* (1873) L.R. 8 Q.B. at p. 105 *per* Blackburn, J.

<sup>4</sup> [1895] 1 Q.B. 758.

<sup>5</sup> Above 373.

<sup>6</sup> Vol. v 207.

<sup>7</sup> (1590) Cro. Eliza. 239; *cp. Hillsden v. Mercer* (1624) Cro. Jac. 677; 1 Wms. Sanders, 244 n.

that the statement "was true as a whole and in every material part thereof."<sup>1</sup> In addition to this narrower sense of the term justification, it is sometimes used in a larger sense to mean a defence which otherwise justifies, i.e. renders legal, the making of a defamatory statement. In other words, it covers the defence of privilege; for privilege, like truth, is a defence to an action for libel or slander; and, unlike truth, it is also a defence to a criminal prosecution.<sup>2</sup>

During this period the law as to privilege was meagre, and the modern distinction between absolute and qualified privilege had not arisen. Most of the cases are cases of what we should now call absolute privilege. The earlier cases all turn upon documents written with a view to, or in the course of, judicial proceedings, or upon words spoken by persons concerned in litigation. Thus, it was held in 1569, that to sue out a writ for forgery of deeds could not be made the basis of an action for scandalum magnatum;<sup>3</sup> and the same rule was applied in 1585 to matter alleged in articles of the peace, exhibited to the justices.<sup>4</sup> It was settled, by the first quarter of the seventeenth century, that no action lay against judges, witnesses, or counsel for defamatory statements made in the conduct of litigation;<sup>5</sup> and it was settled by the case of *Lake v. King* in 1668,<sup>6</sup> after considerable debate and conflict of judicial opinion, that a similar rule must be applied to documents, circulated to the members of a committee of the House of Commons, and dealing with the matters which that committee was appointed to consider.<sup>7</sup> This case settled, in substance, that documents connected with Parliamentary proceedings, and published to members of Parliament, had the same privilege as had already been accorded to judicial proceedings. A little later it was settled there was no privilege for those who published documents connected with these proceedings to the world at large.<sup>8</sup>

<sup>1</sup> Pollock, Torts (12th ed.) 261.

<sup>2</sup> Kenny, Criminal Law, 309-310.

<sup>3</sup> Lord Beauchamp v. Croft Dyer 285a.

<sup>4</sup> Cutler v. Dixon 4 Co. Rep. 14b—"If actions should be permitted in such cases, those who have just cause for complaint, would not dare to complain for fear of infinite vexation."

<sup>5</sup> Brook v. Montague (1606) Cro. Jac. 90; Weston v. Dobniet (1618) *ibid* 432; Harding v. Bodman (1618) Hutton 11; Ram v. Lamley (1633) *ibid* 113; cp. Floyd v. Barker (1608) 12 Co. Rep. 23 where the judicial immunity from all actions arising out of things done in a judicial capacity is laid down in very wide terms; for the history of these rules see vol. vi 234-240.

<sup>6</sup> 1 Wms. Sanders 131.

<sup>7</sup> Kelyng, C.J., held that, though the exhibiting of the petition was lawful, "the printing of it was a publication to all the world, which is not lawful," *ibid* at p. 132; but, "after this case had depended twelve terms, now this term judgment was given for the defendant by Hale, Chief Justice, Twysden, and Rainsford, upon this point, namely, that it was the order and course of proceedings in Parliament to print and deliver copies etc., whereof they ought to take judicial notice," *ibid* at p. 133.

<sup>8</sup> R. v. Salisbury (1699) 1 Ld. Raym. 341.

The idea that there could be any privilege for those who published true reports of judicial or Parliamentary proceedings had not as yet arisen.<sup>1</sup> In fact it could not arise, till the courts had arrived at the modern distinction between absolute and qualified privilege, and had ascertained the true meaning of the latter kind of privilege; for the privilege accorded to these reports at the present day is essentially qualified privilege, in as much as it can be rebutted, if the report can be shown to be garbled or unfair.<sup>2</sup> During this period, we can only see faint traces of the ideas which underlie the conception of qualified privilege; and the notion that privilege could be divided into these two classes had not as yet arisen. In a case of the year 1597, it was ruled that defamatory words spoken by the defendant of the plaintiff, in order to advise a third person upon a matter in which he had an interest, were not actionable.<sup>3</sup> We can see here the germ of the idea which will cover most of the cases of qualified privilege in later law; and it would seem that the law had not advanced very far beyond this stage when Blackstone wrote.<sup>4</sup> In a case of the year 1606, we can see the germ of the idea that a statement, *prima facie* privileged, will lose its privilege if spoken with malice.<sup>5</sup> But this was said of a statement which would, at the present day, be absolutely privileged, so that it is clear that the courts had as yet no idea of the modern distinction. No doubt the very wide terms in which the privilege accorded to judicial and Parliamentary proceedings was being laid down by the courts, helped to give rise to the modern conception of absolute privilege. But probably the uncertainty which, as we have seen,<sup>6</sup> long prevailed as to the part played by malice in the tort and crime of defamation, helped to retard the recognition of the conception of qualified privilege.

<sup>1</sup> See *Wason v. Walter* (1868) L.R. 4 Q.B. at pp. 93-94 *per* Cockburn, C.J.; and *ep. Curry v. Walter* (1796) 1 B. and P. 525.

<sup>2</sup> "It is to be observed that the analogy between the case of reports of proceedings of courts of justice and those of proceedings in Parliament being complete, all the limitations placed on the one to prevent injustice to individuals will necessarily attach on the other: a garbled or partial report, or of detached parts of proceedings, published with intent to injure individuals, will equally be disentitled to protection," *Wason v. Walter* at p. 94.

<sup>3</sup> The plaintiff alleged that he was a merchant, and that the defendant, to discredit him, said to D, "Doth Vanspike (the plaintiff) owe you any money?" and that on D saying that he did, the defendant said, "you had best call for it; take heed how you trust him"; judgment was given for the defendant, "for it is not any slander to the plaintiff, but good counsel to D," *Vanspike v. Cleyson*, Cro. Eliza. 541.

<sup>4</sup> Bl. Comm. iii 125, cited above 373 n. 7; but it was just about this period that the modern law was beginning to be developed by Lord Mansfield, see *Weatherston v. Hawkins* (1786) 1 T.R. 110.

<sup>5</sup> *Brook v. Montague* Cro. Jac. 90—"if he (counsel) give in evidence anything not material to the issue, which is scandalous, he ought to aver it to be true, otherwise he is punishable; for it shall be intended as spoken maliciously and without cause"; and the law so stated by March, *Actions for Slander* (ed. 1647) 119-120.

<sup>6</sup> Above 345, 372-375.

In the law of defamation, as in many other branches of the common law, the outlines of the modern law emerged during the sixteenth and seventeenth centuries. But, owing principally to the great changes effected by the introduction of printing, and to some extent to the desire of the common law courts to expand their jurisdiction, this branch of the law is, perhaps, more distinctly than any other, the creation of these two centuries. At the beginning of the period the ecclesiastical courts still retained the lion's share of this jurisdiction; and it was only in cases involving the exercise of the statutory jurisdiction over the defamation of magnates, that the common law regularly interfered. At the end of this period the criminal law of defamation, which had been created by the Star Chamber, had been taken over by the common law; and the torts of libel and slander had been established on substantially their modern basis. The law as thus settled has not been found to be wholly satisfactory in later periods in the history of the law. In the eighteenth century, political developments necessitated important changes in the criminal law; and the division of the tort of defamation into libel and slander—a division due historically to the need for finding some remedy for the mistakes made by the common law in the initial stages of the development of the tort—still disfigures the law. But the definition of the tort of libel was on the whole satisfactory; and it has formed a good starting point for the development of, and a sufficient framework, for the many detailed rules which the modern expansion of literature and journalism has necessitated. If the rules applicable to libel were applied to all kinds of defamation, and the fact that the defamation was oral, was only allowed to weigh in considering the measure of damages, no serious complaint could be made against our modern law.

### § 3. CONSPIRACY, MALICIOUS PROSECUTION, AND MAINTENANCE

#### *Conspiracy and Malicious Prosecution*

We have seen that two divergent streams of doctrine have gone to the making of the law of conspiracy. (i) Statutes of the thirteenth century had provided a writ of conspiracy, which lay against two or more persons who had combined to indict or appeal another of felony, if that other had been acquitted by verdict of the jury.<sup>1</sup> In addition, the mediæval common law had developed an action on the case in the nature of conspiracy, which was generally brought for a combination to defraud the plaintiff by the

<sup>1</sup> Vol. iii 402-405.

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fraudulent use of the machinery of the courts; and the damage, and not the conspiracy, being the gist of this, as of other actions on the case, it differed from the statutory writ in that it lay against one defendant only.<sup>1</sup> (ii) The court of Star Chamber had enlarged the scope of the offence of conspiracy. It punished criminally, not only conspiracies to abuse the process of the courts, but also conspiracies to commit any wrongful act;<sup>2</sup> and we have seen that the jurisdiction which it assumed in these cases, tended to shade off into the very salutary jurisdiction which it exercised over attempts to commit crimes.<sup>3</sup> Moreover, though it treated these conspiracies as criminal offences, it adopted, somewhat illogically, the rule applied by the common law to the action on the case, and punished a single person who had made a false accusation.<sup>4</sup>

When the common law courts took over the jurisdiction of the Star Chamber, they found it necessary to construct a law of conspiracy on these foundations. The result of their efforts can be summed up as follows: Firstly, they adopted the wide definition of conspiracy which had grown up in the court of Star Chamber, and so created the modern crime of conspiracy; but, as the gist of the crime was the conspiracy, they held that it could not be committed by a single person. Secondly, from the statutory writ of conspiracy and the action on the case, they developed the tort of malicious prosecution. Thirdly, at a later date it came to be thought that acts which would amount to the crime of conspiracy, would also give rise to an action in tort for conspiracy at the suit of an individual damaged thereby; and, as the gist of this action was not the conspiracy, but the resulting damage, it followed that it would lie against a single defendant. But whether in such a case the cause of action is the conspiracy, or whether it is not rather the unlawful acts done in pursuance thereof—whether, in other words, there is any such thing as a separate tort of conspiracy, is a controverted question which has given rise to much difference of opinion.

With the history of these developments I propose to deal under the following heads: (1) The modern crime of conspiracy; (2) Malicious prosecution; and (3) The modern tort of conspiracy.

### (1) *The modern crime of conspiracy.*

The modern crime of conspiracy is almost entirely the result of the manner in which conspiracy was treated by the court of Star Chamber. Almost the only idea which it has borrowed from the common law is the rule, taken from the statutory writ of conspiracy, that the crime (like the crime of riot) cannot be committed by one person, though the other persons need not be specified,

<sup>1</sup> Vol. iii 405-407.

<sup>2</sup> *Ibid* 201, 203, 204.

<sup>3</sup> Vol. v 204-205.

<sup>4</sup> *Ibid* 204.

and may indeed be unknown.<sup>1</sup> The other two essential features of the crime—(i) the fact that the gist of the offence is the conspiracy and not acts done in pursuance thereof, and (ii) the fact that the crime is committed if persons conspire to commit any unlawful act, or any lawful act by unlawful means—are derived ultimately from the practice of the Star Chamber.<sup>2</sup> But these two essential features were developed by the common law courts after the Restoration; and it is of the beginnings of this development that I must speak at this point.

(i) When it is said that the gist of the offence is the conspiracy, what is meant is that the offence consists, not in the illegal acts done in pursuance thereof, but in the act of agreement or combination for these purposes. But there must always have been an overt act of agreement or combination, so that a mere uncommunicated intention to conspire is not a conspiracy. Just as in the case of high treason, where the offence is the intention to kill the king, so in conspiracy, where the offence is the fact of agreement<sup>3</sup>—in neither case can the offence be committed unless an overt act manifesting an intention to kill, or an agreement to do the unlawful act, be proved. It is clear from Coke's statement in *The Poulterers' Case*<sup>4</sup> that the common law has always required proof of a "coadunation, confederacy or false alliance";<sup>5</sup> and there is no reason to think that the law of the Star Chamber was otherwise. This is assumed in the later cases; and that this assumption was correct was laid down by Willes, J., and assented to by the House of Lords in 1868, in a statement which was noteworthy, not for its novelty, but for the clearness with which it defined the meaning of both of the two essential features of the crime.<sup>6</sup> Of the second

<sup>1</sup> *R. v. Starling* (1664) 1 Sid. 174, cited below n. 3; *R. v. Kinnersley* (1719) 1 Str. 193; Kenny, *op. cit.* 288; Winfield, *Hist. of Conspiracy* 59-65; for the rule applicable to the statutory writ see vol. iii 405; and for the rule applicable to riot see above 324.

<sup>2</sup> Vol. v 204-205.

<sup>3</sup> "Ne poit estre conspiracy sans ascun overt act de plusors," *R. v. Starling* (1664) 1 Sid. at p. 174; cp. *R. v. Beat* (1705) 1 Salk. 174; *R. v. Kinnersley* (1719) 1 Str. at p. 195.

<sup>4</sup> (1611) 9 Co. Rep. 35b.

<sup>5</sup> "The usual commission of oyer and terminer gives power to the commissioners to enquire, etc., *de omnibus coadunationibus confederationibus et falsis alligantiis*; and *coadunatio* is a uniting of themselves together, *confederatio* a combination amongst them, and *falsa alligantia* is a false binding each to the other, by bond or promise, to execute some unlawful act: in these cases before the unlawful act executed the law punishes the coadunation, confederacy, or false alliance to the end to prevent the unlawful act," *ibid* at ff. 36b, 37a.

<sup>6</sup> "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced if lawful, punishable if for a criminal object or for the use of criminal means," *Mulcahy v. R.* (1868) L.R. 3 H. of L. at p. 317.



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of these essential features, emphasized in the statement of Willes J., I must now say a few words.

(ii) It is well established law at the present day that the crime is committed by an agreement to do an unlawful act, or to do a lawful act by unlawful means. If the act agreed to be done is a crime or a tort—at any rate a malicious tort,<sup>1</sup> or if means are to be adopted to secure a lawful object, which involve the commission of a crime or a tort, there is no difficulty. The chief difficulty, to which the definition of the crime has given rise, consists in the fact that an act may be sufficiently unlawful to render an agreement to do it a criminal conspiracy, though it cannot be brought under any of the recognized categories of crime or tort. That this was so, was clearly recognized by the common law courts after the Restoration. In addition to conspiracies to indict maliciously, which fell under the statutory writ of conspiracy,<sup>2</sup> and to do acts which amounted to a crime or a tort,<sup>3</sup> conspiracies to do acts, which were neither crimes nor torts, were held to be indictable. Thus, the brewers of London were held to be guilty of conspiracy, because they had conspired to carry on their trade in such a way that the revenue was defrauded;<sup>4</sup> and the journeymen tailors of Cambridge were likewise held to have committed this offence, because they had conspired to raise their wages.<sup>5</sup> In the last mentioned case the court expressly laid it down that "a conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them or any of them to do, if they had not conspired to do it, as appears in the case of *The Tubwomen v. The Brewers of London*."<sup>6</sup> These cases were followed in later law;<sup>7</sup> and, as Professor Kenny has pointed out, they have made it possible "for judges to treat all combinations to effect any purpose which happens to be distasteful to them as indictable crimes, by declaring this purpose to be 'unlawful.'"<sup>8</sup>

<sup>1</sup> Kenny, *op. cit.* 289.

<sup>2</sup> *R. v. Kimberty* (1662) 1 Lev. 62; *R. v. Best* (1705) 1 Salk. (174).

<sup>3</sup> *R. v. Twisleton and others* (1668) 1 Sid. 387—taking a daughter and marrying her without the father's assent; *R. v. Grey and others* (1682) 9 S.T. 127—conspiracy to debauch a woman; *R. v. Thorp* (1697) 5 Mod. 221—taking a son and heir and seducing him to contract a disgraceful marriage; *R. v. Orbell* (1704) 6 Mod. 42, 12 Mod. 499—conspiracy to cheat by running slackly in a race; see also *Winfield*, *op. cit.* 112-115.

<sup>4</sup> *R. v. Starling* (1664) 1 Sid. 174.

<sup>5</sup> *R. v. Journeymen Tailors of Cambridge* (1721) 8 Mod. 11.

<sup>6</sup> 8 Mod. at pp. 11-12; *cp.* the argument in *R. v. Thorp* (1697) 5 Mod. at p. 224—"that which is lawful for one man to do may be made unlawful to be done by conspiracies: for instance, it is lawful for any brewer to brew small beer, but if several shall conspire together to brew no strong, but all small beer, on purpose to defraud the king of his duties, such conspiracy is unlawful. And so it was held in *Sir Samuel Starling's case*, who, because he could not farm the excise, did confederate with several brewers to brew small beer only."

<sup>7</sup> Kenny, *op. cit.* 289-290.

<sup>8</sup> *Ibid.* 291.

There can be little doubt that this wide definition of the crime of conspiracy originates in the criminal equity administered in the Star Chamber. We have seen that Hudson says that the Court acted as "the curious eye of the state and the king's Council, prying into the inconveniences and mischiefs which abound in the Commonwealth,"<sup>1</sup> and that, "by the arm of sovereignty it punisheth errors creeping into the Commonwealth, which otherwise might prove dangerous and infectious diseases, or it giveth life to the execution of laws, or the performance of such things as are necessary in the Commonwealth, yea, although no positive law or continued custom of the common law giveth warrant to it."<sup>2</sup> Clearly, it is these ideas which the common law adopted, when they held that conspiracies to do acts, which were neither crimes nor torts, were indictable. These acts were contrary to public policy, and therefore a conspiracy to effect them must be treated as a crime. This idea came naturally to the court of Star Chamber, because it was intimately allied to the Council—the governing body in the state in the sixteenth and early seventeenth centuries. It came equally naturally to the common law courts, when the Star Chamber had been abolished, and when the common law had made good its claim to be the supreme law in the state.

It was inevitable that it should be through the law of conspiracy that the common law should apply these ideas. In the first place, it was a far more elastic crime than the older and more precisely defined offences known to the earlier common law. In the second place, the law as to the punishment of attempts to commit crimes was still rudimentary, till it was put on a more satisfactory basis by the adoption of the Star Chamber doctrines on this matter.<sup>3</sup> A criminal conspiracy, as defined by the Star Chamber, and an attempt to commit a crime, are closely allied;<sup>4</sup> and an alternative method of dealing with such offences was as valuable to the common law courts as to the Star Chamber. In the third place, a combination of any kind, unless it is very carefully regulated by the state, must always (in spite of the *a priori* views of political speculators) be dangerous to the authority of the state, and the regular administration of its law;<sup>5</sup> and *a fortiori* a combination formed to effect illegal or questionable purposes. "Leagues of the subjects of one and the same Commonwealth," says Hobbes, "where every one may obtain his right by means of the Sovereign Power, are unnecessary to the maintaining of peace and justice, and (in case the designe of them be evill or unknown

<sup>1</sup> Star Chamber 126, cited vol. i 504.

<sup>2</sup> Star Chamber 107, cited vol. i 504.

<sup>3</sup> Vol. v 202.

<sup>4</sup> Vol. iii 478-479.

<sup>5</sup> *Ibid* 203, 204.

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to the Commonwealth) unlawfull. For all uniting of strength by private men, is if for evill intent unjust; if for intent unknown, dangerous to the Publique, and unjustly concealed."<sup>1</sup> And Burke agreed with him—"liberty," he said, "when men act in bodies is power."<sup>2</sup> This danger, inherent in combinations, was increased by the inadequacy of the police system of the seventeenth and eighteenth centuries;<sup>3</sup> and, as we can see more clearly than the politicians of the latter half of the nineteenth century, it is not removed by a police system sufficient to guard the state against ordinary criminals.<sup>4</sup> This is, in fact, the true reason why such a crime as conspiracy is as essential a part of the criminal law in the twentieth as in the sixteenth century.

In fact, just as in the law of contract the courts used the doctrine of public policy to control certain of the activities of the citizen,<sup>5</sup> so in the criminal law it used this wide conception of conspiracy for the same purpose. And just as in the law of contract there is a legitimate use for this doctrine, so there is a legitimate use for it in the criminal law. In both cases it is used legitimately to strike at practices and courses of conduct which are contrary to the established principles of the common law, and are obviously dangerous to the state. In both cases, because it is an elastic doctrine, it gives the law a power of so developing its principles that they are kept in touch with the needs and ideas of the age. But, in the criminal law, just as in the law of contract, it may be used illegitimately, and may become merely another name for political expediency; and there is obviously a greater danger that it will be thus used illegitimately in the criminal law; for in this branch of the law its action is more direct, and can be made to cover a much wider ground. There is therefore more danger that it will be used to give effect to the political prejudices of the judges; and, as we can see from the legal history of the seventeenth century,<sup>6</sup> and from our own experience, to put judges in a position in which they can hardly avoid adjudicating upon political questions, is detrimental, both to the impartial consideration of questions of legal principle, and to their own authority.

Just as it is in relation to contracts in restraint of trade that the doctrine of public policy in contract law has received its most

<sup>1</sup> *Leviathan* Pt. ii c. 22 p. 122.

<sup>2</sup> *French Revolution*, 9.

<sup>3</sup> "In days when our police system was ineffective, the law felt itself dangerously threatened by any concert among evil doers; and consequently, in the seventeenth and eighteenth centuries, indictments against conspirators were held good very readily," Kenny, *op. cit.* 290-291.

<sup>4</sup> "It is not a set number that makes the Assembly unlawfull, but such a number as the present officers are not able to suppress and bring to justice," Hobbes, *Leviathan* Pt. ii c. 22 p. 123.

<sup>5</sup> *Above* 54-56.

<sup>6</sup> *Vol. v* 350-352, 421-422.

important application,<sup>1</sup> so it is in relation to the freedom of employers and workmen to use their capital and labour as they please, that, in our own times, the criminal law of conspiracy has received its most striking applications. The repeal of the combination laws, and of nearly all the other laws which regulated commerce and industry, under the influence of the doctrine of *laissez-faire*, gave both to employers and workmen a large liberty, which they used or attempted to use in a manner destructive of liberty. And just as the large powers allowed by law to landowners, and other owners of property, necessitated the creation of a rule against perpetuities, to prevent that liberty being used to its own destruction,<sup>2</sup> so the large liberty allowed to employers and workmen, necessitated large developments in the law of conspiracy, to guard against attempted infractions of individual liberty thereby rendered possible. But the history of the manner in which the common law attempted, by the application of the law of conspiracy, to safeguard this liberty, and of the very different solutions of the problem from time to time enforced by the Legislature, belongs to the legal history of the nineteenth and twentieth centuries. Here we need only note that, though the technical weapon was different, the policy pursued by the common law was the same as that which has resulted in the rules as to the invalidity of contracts in restraint of trade, and in the rules against perpetuities. In all these cases the policy aimed at was the removal of the danger of arbitrary restraints on freedom—on the freedom of contract, on the freedom of alienation, and on the freedom to dispose of one's capital or labour at one's will. In all, except the last and the most important of these aims, the ideas of the common law have triumphed, to the manifest advantage of the community. Whether or not it would not have been equally to the advantage of the community, if, in this last case also, the common law had triumphed, will be one of the most interesting problems awaiting the students of the political, economic, and legal history of our own times.

The growth of this crime of conspiracy naturally gave rise to the problem whether or not a person injured by an indictable conspiracy had a right of action in tort, and, if so, what was the nature of that right of action. We shall see that this problem did not become acute in this period; but, as some of the considerations relevant to its discussion do emerge, I must say a few words about it. But, before it can be profitably discussed, I must deal with the later history of the statutory writ of conspiracy, and the supplementary action on the case, and show how, from these two remedies, the modern torts of malicious prosecution, and malicious abuse of the process of the courts, have emerged.

<sup>1</sup> Above 56-62.

<sup>2</sup> Vol. vii 193-194.

(2) *Malicious prosecution.*

It was during the sixteenth and seventeenth centuries that the definition of the competence of the statutory writ of conspiracy, and the development of the action on the case founded upon it, gave rise to the torts of malicious prosecution, and malicious abuse of the process of the courts. Though, as we have seen, there are a few hints in the mediæval period that the action on the case might have been used to redress conspiracies other than those connected with the malicious use of legal process,<sup>1</sup> this line of development was not pursued. For remedies against other kinds of conspiracies litigants applied to the court of Star Chamber,<sup>2</sup> with the result that the common law remedies never developed in this direction. They did however develop, during this period, in a manner which is closely parallel to other developments of common law remedies. In the first place, the criminal element in the statutory writ of conspiracy was tending to evaporate during the mediæval period; and this, as we have seen, is precisely what was happening in the case of the writ of trespass.<sup>3</sup> It disappeared entirely during this period, because its place was taken by the much wider conception of conspiracy, which was being developed from the principles applied in the court of Star Chamber. In the second place, the action on the case, which, even in the mediæval period, had begun to be used to supplement the defects of the statutory writ, practically superseded it during this period; and this, as we have seen, is precisely what was happening in the case of such writs as debt and detinue.<sup>4</sup> The history of these developments, and of the modern torts which resulted from them, I must now trace.

In one respect the statutory writ of conspiracy, and the action on the case, resembled one another—it is fairly certain that the plaintiff must prove that the proceedings taken against him were both false and malicious, and that they terminated in his favour.<sup>5</sup> But we

<sup>1</sup> Vol. iii 406.<sup>2</sup> Vol. v 205.<sup>3</sup> Vol. iii 328, 370.<sup>4</sup> Ibid 351, 428 seqq.; vol. vii 402, 413-414.

<sup>5</sup> Vol. iii 403, 405; Staunford, P.C. Bk. iii c. 11; *Payne v. Porter* (1619) Cro. Jac. 490; March, *Actions for Slander* (ed. 1647) 130-131, citing a ruling of Tanfield, J., in 1606, thus sums up the law of his time: "A conspiracy nor an action in nature of a conspiracy will not lie if the plaintiff be not legitimo modo acquietatus; but if one procure another to be indicted arrested and imprisoned falso et malitiose, he shall have an action on the case for the slander and vexation though that he be never acquitted (i.e. acquitted by verdict); and he said that the like action upon the case had been adjudged to lie well, though that the plaintiff were never acquitted; and the justices relied much upon the words falso et malitiose; and after, judgment was given for the plaintiff. Thus you may see that when a man is falsely and maliciously procured to be indicted, if he be acquitted, a writ of conspiracy or action on the case in nature of a conspiracy, as the case shall be, will lie, and though he be not acquitted, yet an action upon the case will lie for the slander and vexation"; for a full discussion of this point see Winfield, *op. cit.* 83 seqq.

have seen that in other respects they were very different.<sup>1</sup> The main points of difference can be summarized as follows: Firstly, the statutory writ applied only to a conspiracy to indict or appeal a man of felony; but the action on the case applied to conspiracies to accuse a man of other offences, or to harass him by the malicious abuse of the process of the courts. Secondly, a plaintiff could only use the statutory writ if he had been acquitted by verdict. If he had escaped in any other way, e.g. by reason of a defective indictment, he could not make use of the writ. But the action on the case was not fenced about by any such restrictions. Thirdly, as the gist of the offence covered by the statutory writ was the conspiracy, it could not be brought against one person only; but, as the gist of the action on the case was the resulting damage, it could be brought against one person only. We shall now see that it was the development of these three characteristics of the action on the case which eliminated the element of conspiracy, and created, from these common law remedies for conspiracy, the tort of malicious prosecution, and other torts analogous thereto.

(i) The extension of the action on the case to cover all kinds of malicious conspiracies to injure another by an abuse of the process of the courts, involved (a) its extension to a conspiracy to accuse another of the more serious offence of treason; (b) its extension to a conspiracy to accuse another of some less serious misdemeanour; and (c) its extension to a conspiracy to injure another by other abuses of process.

(a) The question whether the statutory writ lay against persons who had maliciously conspired to indict another of treason, had not, as we have seen, been raised in the Middle Ages.<sup>2</sup> It seems to have been raised for the first time in 1614, in the case of *Lovet v. Faulkner*.<sup>3</sup> In that case Coke, C.J., and the whole court were of opinion that no such action would lie. Coke pointed out that there was no precedent for such an action—"all the precedents are pro feloniam";<sup>4</sup> and both Coke and the court evidently considered that it would be dangerous to the safety of the state to make a precedent, as it might discourage persons from giving information of treasonable plots.<sup>5</sup> No actual

<sup>1</sup> Vol. iii 406-407.

<sup>2</sup> On this matter see generally Winfield, *op. cit.* 58-59; *cp.* vol. iii 405.

<sup>3</sup> 2 Bulstr. 270.

<sup>4</sup> "I never yet did know in case of high treason, and for the prosecution thereof against one, any writ of conspiracy ever brought. There is no case in the law for this, but all the precedents are pro feloniam; high treason concerns the person of the king; and there is no book in law to warrant the bringing of such an action for a prosecution pro prodicione," *ibid.* at p. 271.

<sup>5</sup> "Haughton and Dodderidge et tota Curia, every one by his oath of allegiance is bound to discover treason, and to have one punished for this, by an action upon the case in the nature of a writ of conspiracy, to be brought against him; this should be very hard," *ibid.*

decision was given. But it is clear that this opinion was based mainly on political grounds; and in 1623, the court, after a long argument, held, in the case of *Smith v. Cranshaw*,<sup>1</sup> that an action would lie. The court pointed out that, though a person might be obliged to reveal treason, he was certainly not bound to accuse others of treason falsely and maliciously; that it would be most unreasonable if a person falsely and maliciously accused had no remedy; and that there was no warrant in Edward I.'s statute for confining even the statutory writ to false and malicious accusations of felony. Dodderidge, J., cited a case in which such an action had been successfully brought;<sup>2</sup> and, as Dr. Winfield has pointed out, the Star Chamber punished persons who made such accusations falsely and maliciously.<sup>3</sup>

(b) We have seen that the rule that the action on the case could be used to remedy a conspiracy to accuse another of trespass, or other offence under the degree of felony, had been recognized in the Middle Ages.<sup>4</sup> It was accepted as well-established law in this period. Thus, in the case of *Marham v. Pascoe*,<sup>5</sup> an allegation that the plaintiff was "legitime acquietatus," without saying "de feloniam," was held to be sufficient in an action on the case, though it would not have been sufficient in proceedings on the statutory writ; and it was held in *Carlion v. Mill*<sup>6</sup> that the action lay for a malicious citation before the ecclesiastical courts. But it would seem that, at the latter part of the seventeenth century, the courts were beginning to think that some limitation should be put on the scope of the action. It was suggested in one case that it should be limited to cases where the indictment "contains matter of imputation and slander as well as crime";<sup>7</sup> and it would seem that this had given rise to the opinion that the action would not lie for the malicious preferment of any indictment for trespass<sup>8</sup>—an opinion clearly contrary to the older cases.

<sup>1</sup> W. Jones, 93; S.C. 2 Rolle Rep. 258.

<sup>2</sup> "Come fuit a ore in un case de Cambridgeshire, lou un conspire ove auter pur indicter J.S. de treason, que ils font, apres l'un confesse que le auter ad suborne luy, et que ils font sur ceo malice, sur que il auxi confesse ceo, et conspiracy port sur ceo vers eux, et l'un est a cest jour imprison pur ceo," 2 Rolle Rep. at p. 260.

<sup>3</sup> Op. cit. 59 n. 7.

<sup>4</sup> Vol. iii 406.

<sup>5</sup> (1603) Cro. Jac. 130; cp. *Bell v. Fox and Gamble* (1610) Cro. Jac. 270—a case on the statutory writ.

<sup>6</sup> (1633) Cro. Car. 291.

<sup>7</sup> Thus in *Henley v. Burstal* (1669) Th. Raym. 180 Serjt. Maynard argued that, "when the indictment is preferred maliciously, and such indictment contains matter of imputation and slander as well as crime; then the action lies; but otherwise when the indictment contains crime without slander, as forcible entry etc. . . . and of that opinion was all the court"; see also *Low v. Beardmore* (1665) *ibid.* 135, and *Chamberlain v. Prescott* (1639) there cited, where this view was apparently upheld by the Exchequer Chamber.

<sup>8</sup> "The opinion of all the judges in the case of *Sir Andrew Henley and Dr. Burstall* Th. Raym. 180 was, that no action will lie for falsely and maliciously

(c) There are several cases in which the action on the case was brought for miscellaneous abuses of legal proceedings. Thus, it was held that the malicious suing out of a writ of *feri facias*,<sup>1</sup> or *capias ad satisfaciendum*,<sup>2</sup> was a good ground for an action on the case; and, in the case in which the former point was decided, it was laid down generally that, "if a man sue me in a proper court, yet if his suit be utterly without ground of truth, and certainly known to himself, I may have an action of the case against him for the undue vexation and damage that he putteth me unto by his ill practice, though the suit itself be legal, and I cannot complain of it as it is a suit."<sup>3</sup> It is thus clear that the action was being used to cover many miscellaneous cases of malicious abuse of process. But it would seem that the nature of the wrongs thus redressed was as yet not nicely distinguished. In particular, the case of *Steer v. Scoble*<sup>4</sup> shows that no clear line was as yet drawn between the acts which will constitute the tort of malicious prosecution, and those which will constitute the tort of false imprisonment.

(ii) These extensions of the sphere of the action on the case necessarily helped to emphasize the rule that it was not confined to cases where the plaintiff had been acquitted by verdict; because, obviously, in many of these cases in which the action was held to lie such acquittal was not possible. There are many cases illustrating the application and the extension of this rule in this period. In *Sydenham v. Keilway*<sup>5</sup> in 1574 it was held that, where the jury had ignored the indictment, though the statutory writ would not lie, the action on the case would; and in 1619 the court of Exchequer Chamber decided the same point in the same way.<sup>6</sup> In *Francis Throgmorton's Case* in 1597<sup>7</sup> the court held that the action did not lie, if the plaintiff escaped, because the court, before which the indictment was tried, had no jurisdiction; but in *Atwood v. Monger*<sup>8</sup> in 1653 it was held that the action would lie

procuring a man to be indicted of a trespass. He said that he remembered that they were of such opinion, and denied the case of 7 Hen. 4. 31 (7 Hy. IV. Mich. pl. 15, vol. iii 405 and n. 3). But to that he answered, that though he had a great regard to what the judges then said, for the Court was then composed of very knowing men, yet that opinion was not judicial, for such matter was not then in question," *Savile v. Roberts* (1698) 1 Ld. Raym. at p. 379 *per* Holt, C.J.; and at p. 380 he said that *Bridgman, C.J.*, "was against all such actions."

<sup>1</sup> *Waterer v. Freeman* (1618) Hob. 205, 266.

<sup>2</sup> *Steer v. Scoble* (1624) Cro. Jac. 667; *Daw v. Swaine* (1669) 1 Sid. 424.

<sup>3</sup> Hob. at p. 267.

<sup>4</sup> (1624) Cro. Jac. 667; cp. *Barker v. Braham* (1779) 2 W. Bl. 867, where, in a case similar to *Steer v. Scoble*, the action was brought for false imprisonment; the modern distinction is most clearly explained by *Willes, J.*, in *Austin v. Dowling* (1870) L.R. 5 C.P. at pp. 538-541.

<sup>5</sup> Cro. Jac. 7—there reported *ex relatione* Popham, C.J.; see generally on this topic *Winfield, Present Law of Abuse of Legal Procedure* 181, 187.

<sup>6</sup> *Payne v. Porter*, Cro. Jac. 490.

<sup>7</sup> Cro. Eliza 563.

<sup>8</sup> *Style* 378; *Rolle, C.J.*, at p. 379 said, "an action upon the case lies for bringing an appeal against one in the Common Pleas, though it be coram non iudice, by reason



in these circumstances. In two cases, one of Charles I.'s<sup>1</sup> and the other of Charles II.'s reigns,<sup>2</sup> a distinction was drawn between the rule laid down in the last cited case, and cases where the indictment was bad on the face of it. In the latter class of cases it was held an action on the case would not lie, so that in these cases the rule applicable to the statutory writ and to the action on the case was the same. Possibly this distinction was drawn with a view of discouraging these actions; but it was clearly a distinction without a difference, and we shall see that it was overruled<sup>3</sup> both by Holt, C.J., in *Savile v. Roberts*<sup>4</sup> and by Parker, C.J., in *Jones v. Givin*.<sup>5</sup> Thus the rule that the action on the case both for malicious indictment and for malicious abuse of legal process would lie, if the proceedings had in any way terminated in the plaintiff's favour, was established. The necessity for showing an acquittal by verdict was confined to the statutory writ, and, like that writ, became in practice obsolete.

(iii) We have seen that, in the mediæval period, it had been settled that, as the gist of the action on the case was not the conspiracy but the damage, it could be brought against one defendant only.<sup>6</sup> Does it not follow, therefore, that the action lay, even if the malicious indictment had been preferred by one defendant only? In other words, is not the conspiracy merely a circumstance of aggravation, and not a necessary part of the cause of action? This question caused much division of judicial opinion in Elizabeth's reign. In 1588, in the case of *Knight v. German*,<sup>7</sup> Wray, C.J., held that the action lay, though the indictment had been preferred by one defendant only; but Schute and Gawdy, J.J., held that it would not, "for then every felon that is acquitted will sue an action against the party." Later, however, Gawdy, J., seems to have changed his opinion.<sup>8</sup> Nevertheless in 1597 Anderson, C.J., and Beaumont, J., expressed the opinion that, though an action lay if two or more had conspired to prefer an indictment, no action lay where one only had preferred it—which opinion Walmsley, J., doubted.<sup>9</sup> But though, as Parker, C.J., said in *Jones*

of the vexation of the party, and so it is all one whether here were any jurisdiction or no, for the plaintiff is prejudiced by the vexation."

<sup>1</sup> Hunt v. Line (1633), cited *Jones v. Givin* (1713) *Gilbert Cases* at p. 212.

<sup>2</sup> *Chamberlain v. Prescott*, as reported by Holt, C.J., in *Savile v. Roberts* (1698)

1 *Ld. Raym.* at p. 380.

<sup>3</sup> Below 397.

<sup>4</sup> (1698) 1 *Ld. Raym.* 374.

<sup>5</sup> (1713) *Gilbert Cases* 185.

<sup>6</sup> Vol. iii 406-407; *Skinner v. Gunton* (1669) 1 *Wms. Saunders* at pp. 229, 230.

<sup>7</sup> *Cro. Eliza.* 70.

<sup>8</sup> *Ibid.* 134.

<sup>9</sup> "Where two or more conspire together to procure one to be indicted for felony or trespass, and he is afterwards acquitted, it shall be intended by law to be maliciously done, for which conspiracy lies; but no action lies where one only prefers a bill of indictment; for it would be in hinderance of justice. . . . Walmsley doubted thereof; for the declaration supposed it to be *malitiose*," *Francis Throgmorton's Case Cro. Eliza.* at p. 564.

*v. Givin*,<sup>1</sup> the struggle "was strong and late when the prosecution was by the party suffering and there was no conspiracy," it seems to have been settled in the course of the seventeenth century, perhaps by analogy to the practice of the Star Chamber, that an action would lie if an indictment were preferred by one only.<sup>2</sup> Indeed, it was hardly possible to come to any other conclusion, as it was clearly settled that the action lay for malicious accusations of offences under the degree of felony, and for other malicious abuses of the process of the courts, though committed by one person only. In fact, the idea that the conspiracy to indict maliciously was the gist of the offence had vanished with the disuse of the statutory writ of conspiracy; and the idea that the conspiracy, as such, was an offence had become associated with the new crime of conspiracy, which, as we have seen,<sup>3</sup> rested upon a very different basis. The result was that the wrong had come to consist, not in the conspiracy, which, if present, was only a circumstance of aggravation, but in the act of malicious prosecution, or malicious abuse of process. This fact is very clearly illustrated by the ruling in *Manning v. Fitzherbert* in 1633,<sup>4</sup> that, as the action was brought for the unlawful act causing damage to the plaintiff, it could not be objected to an action for such unlawful act, that different causes of action, i.e. for the unlawful act and for the conspiracy, had been improperly joined.

These developments of the action on the case for conspiracy were giving rise to new varieties of tort. But, though they were all tending in this direction, the cases were neither wholly clear nor wholly consistent. Having regard to the popularity of these actions for malicious prosecution, and the danger to the proper administration of the criminal law of allowing them too freely,<sup>5</sup> this new branch of law needed a clear and authoritative statement. This statement was furnished in 1699 by Holt, C.J., in the case of *Savile v. Roberts*.<sup>6</sup> That case defined the conditions under which the action on the case could

<sup>1</sup> (1713) Gilbert Cases at p. 209.

<sup>2</sup> See *Manning v. Fitzherbert* (1633) Cro. Car. 271; *Carlion v. Mill* (1633) Cro. Car. 291; *Norris v. Palmer* (1675) 2 Mod. 51; cp. *Pollard v. Evans* (1679) 2 Shower, 50, where the statutory writ is contrasted with the action on the case.

<sup>3</sup> Above 379-384.

<sup>4</sup> Cro. Car. 271. This was an action on the case for a false and malicious accusation of felony before a justice of the peace; on its being moved in arrest of judgment that an action for words, and an action in the nature of a conspiracy, had been joined, the court held that, "it is not in nature of a conspiracy, but an aggravation of the false and malicious accusation."

<sup>5</sup> In 1664 the judges refused to give out copies of indictments for felony unless on special order, "for the late frequency of actions against prosecutors . . . deterreth people from prosecuting for the king upon just occasions," Orders of the Judges in 1664, Kelyng 3; and this practice was followed by Holt and in Blackstone's day, see Thayer, Evidence 230.

<sup>6</sup> (1698) 1 Ld. Raym. 374; S.C. 5 Mod. 405, Carth. 416.

be brought for a malicious prosecution, and thus put this tort upon its modern basis.

It was in substance laid down that, to succeed in this action, the plaintiff must show, firstly, one of three sorts of damage—damage to his fair fame, damage to his person “as when a man is put in danger to lose his life limb or liberty,”<sup>1</sup> or damage to his property “as when he is forced to expend his money in necessary charges to acquit himself of the crime of which he is accused.”<sup>2</sup> Secondly, he must show “express malice and iniquity in the prosecution.”<sup>3</sup> Thirdly, the ground of the action is not the conspiracy but the damage, and therefore the action will lie, though the indictment be preferred by a single defendant only.<sup>4</sup> Fourthly, no action will, as a rule, lie for bringing a civil action maliciously. Under the old law the amercement of the plaintiff who thus sued was, and under the modern law the costs awarded to a successful defendant are, held to be a sufficient compensation.<sup>5</sup> But, fifthly, the bringing of an action maliciously, or a malicious use of the process of the court, may give rise to an action on the case, if special damage be proved.<sup>6</sup> Lastly, it was assumed, as it is assumed in all the cases both on the statutory writ of conspiracy and on the action on the case, that the proceedings must have terminated in the plaintiff's favour. All these propositions were affirmed in the elaborate judgment of Parker, C.J., in 1713 in the case of *Jones v. Givin*,<sup>7</sup> in which an elaborate historical account is given of the growth of this branch of the law.

Thus the common law tort of conspiracy, founded upon the statutory writ and the action upon the case, developed into the torts of malicious prosecution, and other malicious abuses of the process of the court. It remains to enquire whether or not the law has recognized a new tort of conspiracy, corresponding to the new crime of conspiracy which had emerged during this period.

<sup>1</sup> 1 Ld. Raym. at p. 378.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid at p. 381.

<sup>4</sup> Ibid at p. 378.

<sup>5</sup> “The common law has made provision to hinder malicious frivolous and vexatious suits, that every plaintiff should find pledges, who were amerced if the claim was false. . . . But that method became disused, and then to supply it, the statutes gave costs to the defendants. And though this practice of levying of amercements be disused, yet the Court must judge according to the reason of the law, and not vary their judgments by accidents. But there was no amercement upon indictments, and the party had not any remedy to reimburse himself but by action,” *ibid* at p. 380.

<sup>6</sup> “If A sues an action against B for mere vexation, in some cases upon particular damage B may have an action; but it is not enough to say that A sued him falso et malitiose, but he must show the matter of the grievance specially, so that it may appear to the Court to be manifestly vexatious,” *ibid*; changes in procedure have rendered this cause of action less possible, see *Quartz Hill Gold Mining Co. v. Eyre* (1883) 11 Q.B.D. at pp. 689-691 *per* Bowen, L.J.; but it is still possible, see *Clark and Lindsell, Torts* (4th ed.) 659-660.

<sup>7</sup> *Gilbert Cases* 185.

(3) *The modern tort of Conspiracy.*

The question whether there is such a tort as conspiracy is essentially a modern question. Very little authority can be found on it before the latter half of the nineteenth century; and the reason for this dearth of authority in the earlier, and its extent in the later period, is to be found in the course of the legislation as to the application of the doctrine of criminal conspiracy to the activities of combinations of employers and workmen. In 1875 the Legislature enacted that a combination to do an act in contemplation or furtherance of a trade dispute, should not be indictable as a conspiracy, if the act committed by one person would not be a crime.<sup>1</sup> But it was held that this enactment did not prevent a person injured by such a conspiracy from bringing a civil action for the damages caused by it.<sup>2</sup> Hence the tort of conspiracy was brought into great prominence. But, in spite of frequent discussions and decisions in all the courts from the House of Lords downwards, neither its existence as a specific tort, nor, if it exists, its precise definition was settled till quite recently. Full discussion of the problem would here be out of place, as it is essentially a problem belonging to the legal history of the nineteenth century. But, nevertheless, the legal history of this period suggests one or two considerations, to which perhaps sufficient weight has not been attached in the many discussions to which the problem has given rise.

Technically this is a problem of the same kind as that to which I have already alluded in dealing with the history of defamation.<sup>3</sup> A crime had been developed by the court of Star Chamber, and, on the abolition of that court, the crime as thus developed had become a common law misdemeanour. If that misdemeanour was committed, and a person was damaged thereby, could he bring an action in tort? If he could, what was the nature of the tort? What was the connection, if any, between the rules applicable to this tort, and older rules of the common law as to the same or similar wrongs? Were necessarily all the rules applicable to the crime applicable also to the tort?

We have seen that, in the case of defamation, the courts had come to the conclusion that, if the defamation was written, so that the crime of libel had been committed, an action in tort lay at the suit of the injured party, without the need to allege and prove special damage.<sup>4</sup> In other words, the development of the crime of libel had given birth to the tort of libel. No doubt this decision was partly due to the extremely unsatisfactory character of the tort which had been developed in and through the action on the

<sup>1</sup> 38, 39 Victoria c. 86 § 3.

<sup>2</sup> *Quinn v. Leatham* [1901] A.C. at p. 542 *per* Lord Lindley.

<sup>3</sup> Above 361-364.

<sup>4</sup> Above 364-365.

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case. But the technical justification for the invention of the new tort was the fact that written defamation was a crime. It would seem that exactly the same principle is applicable to conspiracy; and in the case of *Pedro v. Barrett* in 1697<sup>1</sup> it seems to be admitted. The report of that case runs as follows:—"A brought case against B for falsely and maliciously procuring him to be indicted for conspiracy to lay a bastard child to B, of which indictment upon trial A was acquitted. After verdict for the plaintiff upon not guilty pleaded, adjudged that the action well lay, *for the conspiracy was a thing punishable at common law by fine and imprisonment.*" No doubt these words were spoken of the common law action on the case for a conspiracy, which, as we have seen, developed into the tort of malicious prosecution; but the general principle there laid down is applicable to the new crime of conspiracy, which had been taken over by the common law courts from the Star Chamber.

But, if the common law courts were to recognize a tort of conspiracy corresponding to the crime, had this tort any connection with the older tort of conspiracy remedied by the action on the case? It would seem, at first sight, that the connection was slender. The element of conspiracy had vanished from the older tort, and that older tort had become the tort of malicious prosecution. But nevertheless the older tort left, it seems to me, one permanent legacy. The gist of the action on the case was the damage suffered; and it was because this was the gist of the action that the element of conspiracy had been eliminated. In *Savile v. Roberts*<sup>2</sup> it was argued that conspiracy, being "of an odious nature," was "sufficient ground for an action by itself." But to this argument Holt, C.J., replied, "that conspiracy is not the ground of these actions, but the damages done to the party; for an action will not lie for the greatest conspiracy imaginable, if nothing be put in execution; but if the party be damaged the action will lie." Similarly, there has never been any doubt that the gist of the tort of conspiracy corresponding to the new crime of conspiracy, if such a tort exists, is the damage suffered; and that therefore an action for it can be brought, just as the old action could be brought, against one defendant.<sup>3</sup>

Now this has a very material bearing on the question whether or not all the rules applicable to the crime are also applicable to the tort. The fact that the conspiracy is the essence of the crime, while the damage is the essence of the tort, must make a great deal of difference in the rules applicable. In the case of libel,

<sup>1</sup> 1 Ld. Raym. 81.

<sup>2</sup> (1698) 1 Ld. Raym. at p. 378.

<sup>3</sup> *Quinn v. Leatham* [1901] A.C. at p. 542; cp. *Skinner v. Guntton* (1669) 1 Wms. Saunders at pp. 229, 230.

where the difference between the essential features of the crime and the tort are not so pronounced, the law has recognized this difference. Libel is regarded as a crime, because libels, if unpunished, tend to promote breaches of the peace; and therefore a publication to the person defamed suffices, and the truth of the defamatory statement was not a defence, and is not now a defence, unless it is for the public benefit that the truth should be known. On the other hand, the gist of libel regarded as a tort is the damage inflicted; and therefore the publication must be to some third person, and truth is a defence. Now it would seem that somewhat similar considerations should be applied to determine the question of the relation of the crime of conspiracy, to the right of the party injured by a conspiracy to sue in tort. In both cases we must look at the nature of the wrongs redressed by the criminal and civil remedy respectively. But the application of these considerations will not produce quite the same results as in the case of libel, because, as I have said, the essential features of conspiracy considered as a crime differ more markedly from conspiracy considered as a tort, than is the case with the crime and the tort of libel. The crime consists in the conspiracy; but the damage is the gist of the action by the party injured by the conspiracy—the damage, that is, flowing from the unlawful acts done by each and all of the conspirators in pursuance of their joint design. What we must look at, therefore, in order to establish a cause of action, is not so much the conspiracy, as the quality of the acts and the damage flowing therefrom. It follows that the conspiracy is important, not as establishing directly a cause of action in tort, but, firstly, sometimes as showing that the acts done were unlawful, because they amounted to a criminal conspiracy; and, secondly, always as an element in estimating the damage suffered. This seems to be the view expressed in Mr. Arthur Cohen's memorandum on the civil action of conspiracy, which was concurred in by Lord Dunedin and Sir Godfrey Lushington;<sup>1</sup> and we shall see that the case of *Sorrell v. Smith*,<sup>2</sup> which contains the latest pronouncement of the House of Lords on this subject, lays down the law substantially in this way.

But this definition of the scope of the action of conspiracy has not been reached without controversy. It may, I think, be said that two somewhat divergent views as to its scope were taken before the decision in the case of *Sorrell v. Smith*.<sup>3</sup>

<sup>1</sup> "There may be cases where the combination or conspiracy to injure is itself a misdemeanour, although the acts agreed to be done are neither actionable torts nor criminal offences. . . . In such cases it may be said that the conspiracy which is the misdemeanour is the ground of the civil action. These however are the only cases in which it can in propriety be said that a civil action may be maintained for conspiracy," Report of Royal Commission on Trade Disputes (1906) at p. 20.

<sup>2</sup> [1925] A.C. 700.

<sup>3</sup> *Ibid.*

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(i) According to one set of authorities, conspiracy does not exist at all as an independent tort. The tort consists, not in the conspiracy, but in the unlawful acts causing damage done by each and all of the conspirators. This view would seem to have the support of Lord Justice Scrutton,<sup>1</sup> of Astbury<sup>2</sup> and McCardie, JJ.,<sup>3</sup> and of Sir F. Pollock.<sup>4</sup> If this conclusion be true, it would follow that conspiracy does not exist as an independent tort. The tort consists in the unlawful acts causing damage done by each and all of the parties to a conspiracy; and the conspiracy is only important as a circumstance to be taken into account in considering the legality of the act done, and the damage inflicted. If this be the law, the modern development of the civil remedy for acts constituting a criminal conspiracy presents a very close historical parallel to the development, during the seventeenth century, of the tort remedied by the older action on the case for a conspiracy. Just as in the case of the older remedy the element of conspiracy ceased to be the gist of the action, when it came to be seen that its gist was the damage suffered by the unlawful act of the defendant, and the tort came to consist in the commission of the unlawful act—in the malicious prosecution or the malicious abuse of the process of the courts; so, in the case of the modern tort of conspiracy developed from the new crime of conspiracy, the element of conspiracy ceases to be the gist of the action for exactly the same reason; and the tort comes to consist, not in the conspiracy, but in the unlawful acts which have caused damage.

(ii) According to another set of authorities there is one case in which the existence of a conspiracy is vital to existence of a cause of action. The clearest statement of this view is to be found in Lord Justice Atkin's judgment in the case of *Ware and De Freville v. Motor Trade Association*. The Lord Justice said:<sup>5</sup> "It appears to me to be beyond dispute that the effect of the two decisions in *Allen v. Flood* and *Quinn v. Leathem* is this: that on the one hand a lawful act done by one does not become unlawful if done with an intent to injure another, whereas an otherwise lawful act done by two or more in combination does

<sup>1</sup> "Conspiracy appears to me to become actionable when the end is unlawful and causes damage, or the means by which a lawful end is pursued are unlawful and cause damage, and not to be actionable when neither the end nor the means are unlawful. It is said that the end is unlawful if it is to cause damage to another. My comment on this is that it is not true," *Ware and De Freville v. Motor Trade Association* [1921] 3 K.B. at p. 70.

<sup>2</sup> *Valentine v. Hyde* [1919] 2 Ch. at pp. 149-150.

<sup>3</sup> *Pratt v. British Medical Association* [1919] 1 K.B. at pp. 255-260.

<sup>4</sup> *Torts* (12th ed.) 321-329.

<sup>5</sup> [1921] 3 K.B. at pp. 90-91; and see *ibid* at p. 84; the same view was expressed by Sargent, J., in the case of *Reynolds v. Shipping Federation Ltd.* [1924] 1 Ch. at p. 40; see also an article by Mr. Cheshire in L.Q.R. xxxix at pp. 207-211.

become unlawful if done by two or more in combination with intent to injure another. That it is the combination to injure that makes the act unlawful is so plainly laid down in *Quinn v. Leathem* that it seems to me . . . useless . . . to suggest that the fact of combination in that case was only an incidental feature of the case, and not the gist of the matter." It would seem to follow that, according to this view, the existence of a conspiracy may make acts, otherwise lawful, unlawful, if they are done with the intent to injure another person; so that, on this view, it may be contended that there is in this case an independent tort of conspiracy.

This year, in the case of *Sorrell v. Smith*,<sup>1</sup> Lord Dunedin has adjudicated upon the whole matter; and it seems to me that the result of his judgment is a very skilful reconciliation of these two views.<sup>2</sup> After expressly approving Lord Justice Atkin's statement of the law,<sup>3</sup> he points out that it must not be forgotten that a combination formed with intent to injure another is a criminal conspiracy, and so an unlawful act. If a civil action for conspiracy is based on the existence of a criminal conspiracy, a criminal conspiracy must be proved. Such a conspiracy exists if several persons combine to do acts (lawful or unlawful) with intent to injure another. It does not exist if they do lawful acts which injure another person, with the intent, not of injuring that other person, but only of furthering their own interests.<sup>4</sup> It is true that in cases in which the element of conspiracy is not present, intent to injure another will not make an otherwise lawful act unlawful. But, where a conspiracy is proved to exist, it is this *mens rea*—the intent to injure—which, in the case of the crime of conspiracy, as in the case of other crimes, makes all the difference. It will make otherwise lawful acts done in combination criminal, and so unlawful. It comes therefore to this—an intent to injure may make acts illegal as a criminal conspiracy; and so these acts may give rise to an action in tort at the suit of the person damaged thereby, although the same acts if done by one person would give rise to no cause of action, because the existence of the conspiracy makes acts, otherwise legal, illegal. It is obvious that this manner of reconciling the authorities to some extent admits the truth of the first view, by allowing that the gist of the action is the unlawful acts causing damage, and by making the element of conspiracy essential only as proof that the acts done were unlawful—essential only, that is, in those cases in which the existence of a criminal conspiracy is the only cause of

<sup>1</sup> [1925] A.C. 700.

<sup>2</sup> Ibid at pp. 723-726.

<sup>3</sup> Ibid at p. 719.

<sup>4</sup> *Mogul Steamship Co. v. McGregor Gow and Co.* [1892] A.C. 25; *Sorrell v. Smith* [1925] A.C. 700.



their illegality. It follows that, as was said in 1906, it is only in these cases that "it *may* be said that the conspiracy is the ground of the civil action."<sup>1</sup> It is only in these cases therefore that conspiracy can be said to exist as an independent tort.

This controverted question as to the existence and ambit of the tort of conspiracy has thus, to a large extent, been settled, after half a century of keen dispute. On that settlement two observations may, I think, be made. Firstly, it assumes that the crime of conspiracy is very wide in its ambit;<sup>2</sup> for it assumes that a combination to do any act is a criminal conspiracy, if the intent of the persons combining is to injure another. Secondly, it makes one law for the individual, and another for a combination of individuals; for it distinctly decides that acts done in combination, if done with intent to injure, are actionable, although the same acts are not actionable if done by one person. That this may lead to very anomalous results is clear; for, as Lord Lindley said in *Quinn v. Leatham*, if one man acting alone could produce the same effects as several acting together, he ought to be liable in the same way.<sup>3</sup> This anomaly would, it is true, have been avoided, if *Allen v. Flood*<sup>4</sup> had been decided differently, and the views of Lord Esher in *Temperton v. Russell*<sup>5</sup> had been upheld. But it may well be that in that case the law would have laid itself open to the criticism that it restricted unduly individual liberty of action; and it is difficult to see how any such views could be reconciled with the ratio decidendi of *Mayor of Bradford v. Pickles*<sup>6</sup> and *Allen v. Flood*.<sup>7</sup> Probably, in the existing state of the authorities, the solution reached, though it may conceivably lead to some anomalous results, is the best compromise. At any rate it has the merit of recognizing that there is generally a danger in concerted action, which is not generally present in individual action—of recognising, in other words, the root principle upon which the whole law of conspiracy rests.

### Maintenance

I have already spoken of the mediæval development of the offence of maintenance. We have seen that, as the result of that development, it had become a recognized offence redressible both by a criminal and a civil remedy; and that, when Coke wrote, it

<sup>1</sup> Above 394 n. 1.

<sup>2</sup> Above 381.

<sup>3</sup> "One man exercising the same control over others as these defendants had could have acted as they did, and, if he had done so, I conceive that he would have committed a wrong towards the plaintiff, for which the plaintiff could have maintained an action," [1901] A.C. at p. 537; cp. *Sorrell v. Smith* [1925] A.C. at p. 713 *per* Lord Cave, and at pp. 740-741 *per* Lord Sumner.

<sup>4</sup> [1898] A.C. 1.

<sup>5</sup> [1895] A.C. 587; below 448.

<sup>6</sup> [1893] 1 Q.B. at pp. 728-730.

<sup>7</sup> [1898] A.C. 1.

had assumed substantially its modern form.<sup>1</sup> That it had then assumed its modern form was due principally to three causes. In the first place, we have seen that the jurisdiction of the Council and the Star Chamber had sternly repressed those abuses of legal procedure, which had made maintenance one of the most crying evils of the later mediæval period.<sup>2</sup> In the second place, changes in the law of procedure, and more especially the beginnings of the modern law of evidence,<sup>3</sup> had rendered obsolete some of the mediæval cases, which had laid it down that the mere giving of unsolicited testimony would amount to maintenance.<sup>4</sup> In the third place, we have seen that it was beginning to be recognized that it was not every assignment of a chose in action which could be attacked on the ground of maintenance.<sup>5</sup> It is true that reminiscences of the period when maintenance was so crying an evil, that to relax in any way these rules as to non-assignability, would have operated to increase it, lived on in this branch of the law long after it had become a comparatively rare offence;<sup>6</sup> and it is true also that the fact that many of the older rules were obviously ill suited to a more settled age sometimes induced judges to speak as if they thought that it was a semi-obsolete offence.<sup>7</sup> But though, for these three reasons, the offence had both altered its character and become far less frequent, it is an offence which in any political society is as ineradicable as larceny or homicide. Therefore a thin stream of cases, from the seventeenth to the twentieth century, has recognized it, and defined its modern incidents.

It is a commonplace of legal history that the form of the remedies given to redress a particular wrong, or assert a particular right, has had a decisive influence in settling the form and content of that wrong or that right. But it is no less true that changes in political and social conditions have often affected the litigant's choice of the remedies open to him; and thus the disuse of some of the remedies provided by the law, and the more extended use of others, have operated to make a change in the character of the wrong redressed, or the right protected, by these remedies. We get a particularly good illustration of this process of development in the case of maintenance. We have seen that, all through the Middle Ages, and right down to Henry VIII.'s reign, it was treated as a criminal offence, for which the offender could be punished, or for which (under Henry VIII.'s statute) an action for a penalty could be brought.<sup>8</sup> But we have seen that,

<sup>1</sup> Vol. iii 395-399.

<sup>2</sup> Vol. v 201-203.

<sup>3</sup> Vol. ix c. 7 § 1.

<sup>4</sup> Vol. i 334-335; vol. iii 398.

<sup>5</sup> Vol. vii 536.

<sup>6</sup> *Ibid* 533, 535.

<sup>7</sup> See the remarks of Buller, J., in *Master v. Miller* (1791) 4 T.R. at pp. 340-341.

<sup>8</sup> 32 Henry VIII., c. 9 § 3; vol. iii 396-397; vol. iv 521; vol. v 202.

during the Middle Ages, it was recognized that it could also be redressed by an action at the suit of the party.<sup>1</sup> The law is so stated by Coke in the seventeenth century,<sup>2</sup> and by Hawkins in the eighteenth century;<sup>3</sup> and, when maintenance ceased to be so crying an evil, the criminal remedy (though still available) tended to drop out, and to be replaced by the action for damages. Thus in modern law maintenance came to be regarded as a tort rather than as a crime. Naturally the question arises, what is the nature of this tort?

No doubt its main essential features are the same as those of the crime. We have seen that the definition of the offence, both at common law and according to the law administered in the Star Chamber, and the cases in which, on account of relationship or otherwise, maintenance was justifiable, were substantially settled at the beginning of the seventeenth century.<sup>4</sup> But the question still remains whether all the essential features of the tort redressible by the civil action, are the same as the criminal offence created by that long line of mediæval statutes which end with the statute of 1540.<sup>5</sup> This, it will be observed, is a problem of a very similar kind to that with which we have been faced in dealing with the history of defamation<sup>6</sup> and conspiracy.<sup>7</sup> All the conditions of the problem are not, it is true, exactly the same. In the first two cases we have two lines of development—a line of development, mainly civil, in the common law courts, and a line of development, mainly criminal, in the Star Chamber; and we were obliged to consider the relation between the criminal offence developed in the latter court, and the civil offence which was later developed from it. In the case of maintenance we have an offence created by statutes, which were enforced both by the common law courts and the court of Star Chamber; and this offence could be treated as either a criminal offence punishable on an indictment, or as a civil wrong redressible by an action for damages. Gradually the criminal remedy dropped out, and the offence came to be treated as a tort redressible by an action for damages. In the first two cases the civil action was clearly an action on the case, in which damage was the gist of the action; but in the case of maintenance it was not certain that the civil action was not an action in the nature of an action for trespass, in which nominal damages could be recovered. But, in spite of

<sup>1</sup> Vol. iii 397-398.

<sup>2</sup> Second Instit. 208.

<sup>3</sup> "All offenders of this kind are not only liable to an action of maintenance at the suit of the party grieved, wherein they shall render such damages as shall be answerable to the injury done to the plaintiff, but also they may be indicted as offenders against public justice," P.C. Bk. i c. 83 § 35.

<sup>4</sup> Vol. iii 398; vol. v 202-203.

<sup>5</sup> 32 Henry VIII. c. 9.

<sup>6</sup> Above 361-364.

<sup>7</sup> Above 392-394.

these differences, in all these cases the problem raised was the same—whether or not all the features of the tort were the same as all the features of the criminal offence.

Curiously enough this problem was not fully considered by the courts till 1919, when it was raised by the case of *Neville v. the London Express Newspaper Ltd.*<sup>1</sup> That case raised the two closely connected questions (i) whether an action for maintenance would lie in the absence of proof of special damage; and (ii) whether the success of the maintained litigation was a bar to the action.

(i) On principle it would seem that, if the civil action for maintenance is to be regarded as an action in the nature of an action on the case, damage is its gist; and that, on that hypothesis, the decision of the majority of the House of Lords,<sup>2</sup> that the action did not lie in the absence of the proof of special damage was right. The opinion of the two dissentient lords seems to have proceeded on the ground that, maintenance being admittedly illegal, the law should give a right of action in tort for nominal damages as in the case of trespass or libel, "since the mere invasion of the plaintiff's legal right imports damage, and is sufficient to maintain the action."<sup>3</sup> But the fact that conduct is illegal, or even criminal, does not necessarily prove that an action in tort for nominal damages will lie. This is clearly the law in the case of conspiracy, as the passage from the case of *Savile v. Roberts*,<sup>4</sup> cited above, and the modern cases<sup>5</sup> show. No doubt an opposite conclusion was come to in the case of libel. But that, as we have seen,<sup>6</sup> was largely due to the need for remedying the defects of the common law action on the case, which had wholly failed to provide a satisfactory civil remedy for defamation. The action is, as we have seen, somewhat anomalous; and the fact that an action on the case for defamation lies for nominal damages is the result of the peculiar history of this tort. On the other hand, if the civil action is to be regarded, not as an action on the case, but as a statutory or common law action analogous to trespass, there is a good deal more to be said for the view that an action would lie for nominal damages. The obscurity which hangs about the nature of the civil action naturally gives rise to differences of opinion. But, on the whole, whatever the earlier law may have been, the action of maintenance had probably come, in the eighteenth century, to be regarded as similar to other actions on the case; and, if that be so, the general rule is that laid down by Holt, C.J., in *Savile v. Roberts*. It follows that the general

<sup>1</sup> [1919] A.C. 368.

<sup>2</sup> Lords Finlay, Shaw, and Phillimore; Lords Haldane and Atkinson dissenting.

<sup>3</sup> Per Lord Atkinson at p. 405.

<sup>4</sup> (1698) 1 Ld. Raym. at p. 378, cited above 393.

<sup>5</sup> Above 395-397.

<sup>6</sup> Above 364.

rule was quite properly applied by the majority of the House of Lords to the case of maintenance.

(ii) On the other hand, the reasons given by the majority of the House of Lords for holding that the success of the maintained action is not a bar to a right of action for maintenance, are by no means convincing. They proceed mainly on the ground that, as all maintenance is a wrong, the success or failure of the action maintained can have nothing to do with the question whether or no a wrong was committed.<sup>1</sup> But, to argue from the proposition that maintenance is a wrong, to the conclusion that a plaintiff can sue for damages, in a case where the action or defence maintained was just, comes very near to contradicting the rule, upheld by the majority of the House, that such an action will not lie for nominal damages. It may well be that maintenance is a wrong, and that the criminal offence is committed, whether or no the maintained litigation has succeeded or failed.<sup>2</sup> It may well be that the same conclusion follows, if maintenance is a tort like trespass, for which an action will lie for nominal damages. But, if it is only a tort when accompanied by special damage, if the damage, that is, is the gist of the action, it does not follow that, because the crime is committed, the tort is likewise committed, when the maintained litigation has succeeded. We have seen that, in the case of the torts both of libel and conspiracy, it does not follow that, because the crime has been committed, the tort has also been committed. In both cases the conditions under which an action of tort will lie differ from the conditions under which an indictment can be preferred. Lord Phillimore, one of the Lords who dissented from the majority of the House on this point, very properly used the analogy of libel to illustrate his argument;<sup>3</sup> and he might equally well have used the analogy of conspiracy. The result is that the House has committed itself to two rules which, if not actually contradictory, are extremely hard to reconcile. For, though the success of the maintained litigation is not a bar to the action, it is clear that its success will generally prevent the plaintiff from claiming anything but nominal damages;<sup>4</sup> and for nominal damages, the action, according to the first proposition, does not lie.

In fact the House of Lords, though it appealed to history, and even to the Year Books, hardly perceived that the problem was essentially similar to the problem which the development of the

<sup>1</sup> See [1919] A.C. at pp. 383-386, 392-393, 397-404.

<sup>2</sup> Coke, dealing with the case of one who had laboured a jury, says, "and whether the jury pass for his side or no, or whether the jury give any verdict at all, yet he shall be *punished* as a maintainer or embracer either at the suit of the king or party," Co. Litt. 369a; from the use of the word "*punished*" it would seem that Coke is referring to the criminal remedy.

<sup>3</sup> [1919] A.C. at p. 434.

<sup>4</sup> See *ibid* at pp. 380-381, 393, 395.

law of crime and tort in the seventeenth century had raised in the case both of defamation and conspiracy. Given an offence which was a crime, on what conditions could a person injured by the crime sue in tort for any damage which he had suffered? If it had looked at the question in its proper historical perspective, it could hardly have avoided coming to a less contradictory conclusion than that at which it has actually arrived; for it would have avoided the error into which, as it seems to me, many of the Lords fell, of supposing that, because an act is a crime, the same act must, without qualification, necessarily be a tort. If it had grasped this principle it would probably have ruled that, just as the conditions under which the tort and crime of libel or conspiracy can be committed differ, so do the conditions applicable to the tort and crime of maintenance; that just as publication to a third party is needed to constitute the tort, though not the crime of libel, and just as an act causing damage to the plaintiff is needed to constitute the tort, though not the crime of conspiracy; so the failure of the maintained litigation is needed to constitute the tort, though not the crime, of maintenance.

#### § 4. LEGAL DOCTRINES RESULTING FROM THE LAWS AGAINST RELIGIOUS NON-CONFORMITY

In the preceding volumes of this work I have given some account of the statutes which penalized various forms of non-conformity to the established church.<sup>1</sup> In this section I propose to give some account of the developments of legal doctrine to which these statutes helped to give rise, and of the corresponding changes in that doctrine which followed upon their repeal.

The result of these statutes was to create a number of offences, which may be called offences against either the religion of the state, or the Christian religion in general. If we look at the dates at which they were enacted, it will be clear that the history of these offences, regarded as offences against the law of the state, as distinct from offences against the ecclesiastical law, does not begin till the Reformation period. During the Middle Ages such offences were essentially matters for the ecclesiastical law, and the function of the state was limited to lending the strength of its secular arm to enforce the decrees of the church. We have seen that the state recognized and obeyed the law of the church, which, till the Reformation, was the papal canon law;<sup>2</sup> and that it was because it so recognized it that the writ de hæretico comburendo must be regarded as existing at common law.<sup>3</sup> The fact

<sup>1</sup> Vol. i 616-619; vol. iv 494-495, 506-507; vol. vi 196-203, 404.

<sup>2</sup> Vol. i 580-588; vol. ii 304-306.

<sup>3</sup> Vol. i 616-618.

that the Reformation of the English church was carried through with the minimum of change, so that the thesis of its continuity could be maintained both by lawyers and ecclesiastics;<sup>1</sup> and the fact that English law, during the sixteenth and seventeenth centuries, was likewise continuously developed from its mediæval principles—ensured that, at the outset, the attitude of the law towards these offences against religion should be essentially mediæval. During the Tudor period, as in the mediæval period, Church and State were regarded, from many points of view, as a single society which had many common objects;<sup>2</sup> and the two members of that single society were still regarded as bound to give one another assistance in carrying out those common objects. The church must help the state to maintain its authority, and the state must help the church to punish non-conformists and infidels. The church was the church of the state, and membership of it was therefore a condition precedent for full rights in the state; the king was the supreme governor of the church;<sup>3</sup> and the law of the church was the king's ecclesiastical law.<sup>4</sup> But, if the church is thus regarded as an integral part of the state, if the church's law is as much the king's law as the law of the state, a fortiori Christianity must be regarded as part of the law of England. In fact, not only Christianity, but also that particular variety of Christianity taught by the Anglican church, was part of that law.<sup>5</sup>

In our day this theory of the relationship between Church and State has almost entirely disappeared. It is true that there is still an established church; that the king is still its supreme governor and the defender of its faith; that its law is still the king's ecclesiastical law, and an integral part of the law of England.<sup>6</sup> But, like many other parts of the law and constitution of England, these are survivals of an older order, from which all real meaning has departed, with the abandonment of

<sup>1</sup> Vol. i 591.

<sup>2</sup> Vol. iv 36-37, 47-48, 81-83.

<sup>3</sup> Vol. i 594.

<sup>4</sup> Ibid 594-596.

<sup>5</sup> Professor Kenny in *Cambridge Law Journal* i 130-131 has contended that the maxim or rule that "Christianity is part of the law of England" is derived from Finch's book on the Common Law (vol. v 399-401); and that Finch derived it from a statement made by Prisot, C.J., in Y.B. 34 Hy. VI. Pasch. pl. 9, p. 38, which is probably no authority for this wide proposition. But for the reasons which I have given in the text I think that the rule or maxim would, from the earliest times, have been accepted as almost self-evident by English lawyers. It is assumed both by Fortescue, vol. ii 569, n. 3, and by St. Germain, vol. iv 279-280; and it is at the root of the old distinction between *mala prohibita* and *mala in se*, vol. vi 218-219. But, for that very reason, it was difficult to find an express authority for it, see the dictum of James, L.J., cited vol. ii 470; and it was probably because Finch was hard put to it to find any authority precisely in point, that he cited this Y.B. For these reasons I cannot agree with Professor Kenny that Finch's misquotation disproves the existence of the doctrine.

<sup>6</sup> Vol. i 595.

that mediæval theory of the relationship of Church to State, to which they owed their origin.<sup>1</sup> That that theory has been completely abandoned is clear from the fact that the state now assumes the attitude of a Gallo to religion. It gives an equal measure of protection to all sects, whether religious or anti-religious, provided that their tenets do not involve a breach of its laws civil or criminal. It refuses to favour one more than another; and practically the only coercive authority which it exercises, is in respect of those whose methods of propaganda are sufficiently coarse and offensive to bring them within the modern rules of the criminal law relating to blasphemous libel.

This vast change in the relations of Church and State has been mainly the result of that policy of "conservatism combined with concession," which has been pursued during the nineteenth century.<sup>2</sup> But that policy has its roots in the past; and the modern relations of Church and State are in fact the result of some four centuries of its application. Its application has necessarily involved many statutory changes in the law, and many gradual modifications in the technical doctrines of the law to correspond with the statutory changes; and, as the result of the modifications of these technical doctrines, changes in the attitude of the courts to the interpretation of the statutes. Therefore, in relating the history of these changes both of the statute law and of the technical doctrines of English law, we must take account of many diverse lines of development, which have operated at different periods. If we look at these lines of development from the point of view of their chronological order, we can, I think, sum them up briefly as follows:

Till the outbreak of the Great Rebellion, the part played by the ecclesiastical law in the repression of all offences against religion, was by no means inconsiderable.<sup>3</sup> It did not indeed play so large a part as in the Middle Ages; for it was controlled by statutes, which were enforced by the common law courts, and it was both controlled and supplemented by the rules and doctrines of the common law.<sup>4</sup> We have seen that, in the latter half of the seventeenth century, the influence of the ecclesiastical

<sup>1</sup> Below 416-417.

<sup>2</sup> Dicey, *Law and Public Opinion* (1st ed.) 316—"In all ecclesiastical matters Englishmen have favoured a policy of conservatism combined with concession. Conservatism has here meant deference for the convictions, sentiments, or prejudices of churchmen, whenever respect for ecclesiastical feeling did not cause palpable inconvenience to laymen, or was not inconsistent with obedience to the clearly expressed will of the nation. Concession has meant readiness to sacrifice the privileges, or defy the principles, dear to churchmen, whenever the maintenance thereof was inconsistent with the abolition of patent abuses, the removal of grievances, or the carrying out of reforms demanded by classes sufficiently powerful to represent the voice, or to command the acquiescence of the country."

<sup>3</sup> Vol. i 617-620.

<sup>4</sup> *Ibid* 617-618, 620-621; below 406-407.



law rapidly declined.<sup>1</sup> This was partly due to the dislike of allowing to the ecclesiastical courts any coercive authority over laymen—a dislike which found expression in statutory changes which crippled this part of the jurisdiction of these courts, and practically limited it to a jurisdiction over the clergy.<sup>2</sup> Partly also it was due to the increased control of the common law courts. But, for a considerable time, the law administered by these common law courts maintained much of the spirit of the old system. The statute law had made even Christian non-conformity illegal, and had penalized the various sects, whether Protestant or Roman Catholic, in different ways and degrees.<sup>3</sup> A fortiori any anti-Christian propaganda must be regarded as illegal.<sup>4</sup> Though a small breach had been made in this system by the Toleration Act of 1689,<sup>5</sup> and by the liberal way in which it was interpreted,<sup>6</sup> it continued to be the foundation upon which the law rested till the beginning of the nineteenth century. But, during the earlier half of the nineteenth century, a still larger breach was made by the repeal of nearly all the older statutes which penalized Christian, and even non-Christian, nonconformity.<sup>7</sup> Very few restrictions were left upon the holding and exercise of any kind of religious belief. But, except as modified by these statutes, the common law rules, criminal and civil, as to the illegality of the expression and teaching of definitely anti-Christian beliefs, were left untouched. There had been no formal change in these rules, which were founded on the principle that, as Christianity was part of the law, any attack on it was unlawful.<sup>8</sup> It was however inevitable that, in the atmosphere of universal toleration, which was partly the cause and partly the effect of these statutes, these common law rules and doctrines should change their form and scope. It came to be thought that the expression and teaching of anti-Christian beliefs was only criminal if it amounted to blasphemous libel, and that the reverend questioning of those beliefs entailed no criminal liability.<sup>9</sup> In the twentieth century the propagation of these beliefs was held to be lawful for all purposes, so that it has become possible to establish a trust for their maintenance.<sup>10</sup> Lastly, these changes in common law doctrine have reacted on the manner in which some of the earlier statutes, which gave only a modified relief to Roman Catholics, have been interpreted; with the result that the modifications and restrictions contained in these statutes have been, to all intents and purposes, rendered nugatory.<sup>11</sup>

<sup>1</sup> Vol. i 620-621.

<sup>2</sup> Vol. iv 494-496, 506-507; vol. vi 196-203.

<sup>3</sup> 1 William and Mary c. 18; vol. vi 200-201; below 410-411.

<sup>4</sup> Below 411.

<sup>5</sup> Below 415-416.

<sup>7</sup> Below 411-413.

<sup>10</sup> Below 416.

<sup>8</sup> Ibid 621.

<sup>9</sup> Below 407-410.

<sup>11</sup> Below 413-414.

<sup>12</sup> Below 417-418.

It will be clear from this summary of the development of this branch of the law, that its history falls into certain well-marked periods. They can be classified as follows:—(1) The relation between law and religion in the seventeenth and eighteenth centuries; (2) the new situation created by the repeal or modification of the legislation against religious nonconformity; (3) the effect of this new situation upon legal doctrines as to the relation between law and religion; (4) the effect of this new common law doctrine upon the interpretation of the older legislation. Under these four heads I propose to sketch the history of the development of this branch of the law.

*(1) The relation between law and religion in the seventeenth and eighteenth centuries.*

During the whole of this period the relations between law and religion retained something of their mediæval character, in that the law considered it to be unlawful (except in so far as it might be permitted by statute) to express or to teach religious opinions contrary to those of the established church; and a fortiori to express or teach anti-Christian doctrine. But, long before the end of this period, the manner in which these principles were safeguarded was anything but mediæval; for their maintenance had passed from the ecclesiastical courts to the ordinary courts of law and equity. And the result had been a slight, but only a slight, weakening of their rigidity.

Throughout this period it fell to the ordinary courts to apply the many statutes which penalized the nonconformist, whether Protestant or Roman Catholic. While these statutes were in force, the expression of these opinions was not only illegal, but in many cases criminal; so that no contract or trust, which was designed to help the propagation of these opinions, was lawful. The only exception made to this legislation were the provisions of the Toleration Act of 1689,<sup>1</sup> in favour of certain sects of Protestant nonconformists. With this Act and its interpretation I shall deal under the following head.<sup>2</sup>

During the earlier half of the seventeenth century, the courts of common law were assisted by the ecclesiastical courts, and more especially by the court of High Commission.<sup>3</sup> All these courts exercised, as we have seen, an extensive jurisdiction over heresies of all kinds; and, as late as 1612, in the case of Legate, a writ of *de hæretico comburendo* issued, and the heretic was burned.<sup>4</sup> In fact in 1618 in *Atwood's Case*,<sup>5</sup> the court of King's Bench ruled that the uttering of scandalous words against the established

<sup>1</sup> 1 William and Mary c. 18.

<sup>2</sup> For this court see vol. i 605-611.

<sup>3</sup> Below 410-411.

<sup>4</sup> Vol. i 618.

<sup>5</sup> Cro. Jac. 421.

religion, was certainly not a matter over which the justices of the peace had jurisdiction, and inclined to the view that such a case should have come before the High Commission. In *Traske's Case*,<sup>1</sup> though the Star Chamber sentenced the accused for maintaining the theses that the Jewish and not the Christian sabbath should be observed, and that pork should be avoided, they expressly did so because the preaching of these opinions tended "to sedition and commotion," and scandalized the king, the bishops and the clergy. The offence of holding these heretical opinions, they held, was "examinable in the ecclesiastical courts and not here."<sup>2</sup> We have seen that the High Commission was abolished in 1641;<sup>3</sup> and that it was not restored with the other ecclesiastical courts at the Restoration.<sup>4</sup> We have seen, too, that the ecclesiastical courts lost in 1677 their right to inflict capital punishment; and that after that date their jurisdiction over the heretical opinions of laymen disappeared.<sup>5</sup>

But, during the latter half of the seventeenth century, the courts of common law stepped into the breach. They had long enforced the statutes against religious nonconformity. They now took over the jurisdiction of the Star Chamber as a 'censor morum,' and punished gross indecency, ribaldry, and blasphemy on the same principles as those on which the Star Chamber had proceeded. They also took over some part of the jurisdiction of the ecclesiastical courts, and punished the expression of infidel opinions, both on the ground that they tended to sedition and commotion, and on the ground that it was contrary to law to attack the foundations of the Christian faith. One or two cases of the late seventeenth and eighteenth centuries will show the principles upon which they proceeded.

In 1663 Sedley was indicted for gross indecency, against the king's peace, and to the great scandal of Christianity.<sup>6</sup> The court of King's Bench expressly claimed to have inherited the Star Chamber jurisdiction as *custos morum*, and also to punish profane actions which were wholly contrary to Christianity.<sup>7</sup> In 1676 the King's Bench laid it down that the speaking of blasphemous words was criminal, both as an offence against religion, and as an offence

<sup>1</sup> (1618) Hob. 236.

<sup>2</sup> "Now he being called ore tenus, was sentenced to fine and imprisonment, not for holding those opinions (for those were examinable in the ecclesiastical courts and not here) but for making of conventicles and factions by that means, which may tend to sedition and commotion, and for scandalizing the King, the bishops, and the clergy."

<sup>3</sup> Vol. i 611; vol. vi 112, 135.

<sup>4</sup> Vol. i 618-619.

<sup>5</sup> Vol. i 611; vol. vi 113, 196.

<sup>6</sup> 1 Sid. 168.

<sup>7</sup> "Et fuit dit a luy per les justices que coment la ne fuit a cel temps aucun Star Chamber, uncore ils voil /air luy de scaver que cest Court est custos morum de tous les subjects le Roy, et est ore haut temps de punnier tiels profane actions fait encounter tout modesty, queux sont cy frequent, sicome nient solement Christianity," *ibid.*

against the state.<sup>1</sup> The state and religion were regarded as allies who must stand together to preserve the social order, so that to speak against religion was as much an offence as to speak against the state. "To say," said Hale, "that religion is a cheat, is to dissolve all those obligations whereby the civil societies are preserved." "Christianity is parcel of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law."<sup>2</sup> These cases were followed. In 1721 a person was indicted for a libel against the Trinity,<sup>3</sup> and it appears that he was convicted and sentenced.<sup>4</sup> In 1729 a person was convicted for blasphemous discourses on the miracles, "and the court declared that they would not suffer it to be debated whether to write against Christianity in general was not an offence punishable in the temporal courts at common law."<sup>5</sup> "Christianity," said Raymond, C.J.,<sup>6</sup> "is parcel of the common law of England, and therefore to be protected by it; now whatever strikes at the very root of Christianity, tends manifestly to the dissolution of civil government, and so was the opinion of my Lord Hale in *Taylor's Case*." In 1763 there was another conviction for a blasphemous libel.<sup>7</sup>

Naturally the offences thus punished took different forms. They are classified by Hawkins<sup>8</sup> as blasphemies against God, profane scoffing at Holy Scripture, impostures in religion, open lewdness, offences of a like nature tending to subvert all religion or morality, and seditious words in derogation of the established religion tending to provoke a breach of the peace. Another offence of a similar kind, that of apostasy, was made the subject of a special statute,<sup>9</sup> which, as a matter of fact, has had singularly little effect; for it was held that it did not add materially to the common law;<sup>10</sup> and no convictions are known to have been obtained for its breach.<sup>11</sup> All these offences depended at bottom on the underlying idea that offences against the Christian religion must be treated as offences against the law of the land, because Christianity, being a principal support of the state and its law, the state and its law were especially bound to maintain it.<sup>12</sup>

<sup>1</sup> *Taylor's Case*, 1 Vent. 293.

<sup>2</sup> *Ibid.*

<sup>3</sup> *R. v. Hall*, 1 Str. 416.

<sup>4</sup> In *R. v. Curl* (1727) 1 Str. at p. 790, it was stated that Hall was convicted, and was then in custody.

<sup>5</sup> *R. v. Woolston* 2 Str. 834.

<sup>6</sup> *S.C. FitzGibbon* at p. 65.

<sup>7</sup> *R. v. Annet*, 1 W. Bl. 395.

<sup>8</sup> *P.C. Bk. 1 c. 5.*

<sup>9</sup> *William III. c. 35.*

<sup>10</sup> See *Attorney-General v. Pearson* (1817) 3 Mer. at pp. 406-408 *per* Lord Eldon C.

<sup>11</sup> See *Bowman v. The Secular Society* [1917] A.C. at p. 446, *per* Lord Parker.

<sup>12</sup> "This is grounded upon the care that the government hath, or ought to have, by the constitution of the government itself, of the Christian religion, which I conceive is the main end of government. The profession and preservation of Christianity is of so high a nature that of itself it supersedes all law: if any law be made against any point

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"Christianity," says Blackstone, "is part of the law of England;" and therefore, in addition to the laws which safeguarded the position of the established church, and penalized nonconformity with it, the law must punish such offences as apostasy and blasphemy.<sup>1</sup>

And this conception was logically followed out. Because any attempt to propagate beliefs inimical to Christianity was a criminal offence, a trust for any sect which professed such beliefs was illegal and void. In 1684 a trust to pay a sum of money to ministers ejected for nonconformity was declared to be void;<sup>2</sup> and, in the case of *De Costa v. De Pas* in 1744,<sup>3</sup> Lord Hardwicke refused to enforce a trust for the "maintenance of a 'Jesiba,' or assembly for daily reading the Jewish law, and for advancing and propagating their holy religion." "The intent of this bequest," he said, "must be taken to be in contradiction to the Christian religion, which is a part of the law of the land, which is so laid down by Lord Hale and Lord Raymond; and it undoubtedly is so; for the constitution and policy of this nation is founded thereon."

It is true that common law doctrine had made some little progress in the direction of toleration. In *Calvin's Case* Coke had given utterance to the very mediæval sentiment that all infidels are in law perpetual enemies, "for between them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility and can be no peace."<sup>4</sup> But this idea had been repudiated by Littleton in Charles I.'s reign;<sup>5</sup> and it was obviously contrary to the commercial interests of a country which was beginning to conduct a prosperous trade with infidels.<sup>6</sup> Then

of the Christian religion that law is *ipso facto* void," *East India Co. v. Sandys* (1684) 10 S.T. at pp. 374-375 *per Holt arg.*; and to this Treby, who argued on the other side, assented, *ibid* at p. 392.

<sup>1</sup> Comm. iv. 39.

<sup>2</sup> *Attorney-General v. Baxter* 1 Vern. 248; the decree was reversed in 1689, 2 Vern. 105, on the ground that it was a good charitable trust for particular persons to be selected by Baxter, see the extract from Lord Hardwicke's notebook cited by Lord Eldon in *Moggridge v. Thackwell* (1803) 7 Ves. at p. 76.

<sup>3</sup> 2 Swanst. 487 note.

<sup>4</sup> (1609) 7 Co. Rep. at ff. 17a, 17b.

<sup>5</sup> 1 Salk. 46.

<sup>6</sup> Thus Treby, in his argument in *East India Co. v. Sandys* (1684) 10 S.T. at pp. 391-392 says, "if this perpetual hostility be taken in a political and proper sense and the law be so, it destroys the licence and privilege of the Company. . . . I must take leave to say that this notion of Christians not to have commerce with infidels is a conceit absurd, monkish, fantastical, and fanatical. 'Tis akin to *Dominium fundatur in Gratia*. The Indians have a right to trade here, and we there, and this is a right natural and human, which the Christian faith doth not alter"; the strictures on Coke's dictum made by Willes, C.J., in *Omichund v. Barker* (1744) Willes at p. 542, and by Lord Mansfield, C.J., in *Campbell v. Hall* (1774) 20 S.T. at pp. 294, 323 are well known, and illustrate the very different point of view of the eighteenth century; note also that the mercantile reason was much emphasized in *Omichund v. Barker* at p. 551, which case overruled Coke's statement, Co. Litt. 6b, that an infidel could not be a witness; see also 2 Swanst. 502 note.

again, in *R. v. Woolston*, the court said that, though to write against Christianity in general was an offence, "they did not intend to include disputes between learned men upon particular controverted points."<sup>1</sup> We shall see, too, that the manner in which the Toleration Act of 1689 was interpreted, is evidence of the growth of a more tolerant spirit.<sup>2</sup> Still, when all deductions have been made, there can be little doubt that, during this period, Christianity was regarded as so integral a part of the law, that any attack on it was an offence, and that no disposition of property designed to propagate anti-Christian views would be upheld. That this was then the law was almost admitted by Lord Coleridge, C.J., in *R. v. Ramsay and Foote*,<sup>3</sup> in which, as we shall see,<sup>4</sup> a very different rule of law was laid down. No doubt he endeavours to explain some of these cases away, but, as Stephen, J., has shown, with very little success.<sup>5</sup> I think that Stephen is quite right in asserting that, in this period, the judges, when they held that Christianity was part of the law, meant to hold that it was "a crime either to deny the truth of the fundamental doctrines of the Christian religion, or to hold them up to ridicule or contempt."<sup>6</sup>

We must now turn to the history of the way in which this principle was gradually undermined. We shall see that the first really decisive steps in this direction were taken by the Legislature; and that this legislation was made the more effectual by the rapid growth of the spirit of toleration among the more educated classes during the eighteenth, and the earlier part of the nineteenth, centuries.

(2) *The new situation created by the repeal or modification of the legislation against religious nonconformity.*

The first modification of the legislation against religious nonconformity was the Toleration Act of 1689.<sup>7</sup> We have seen that it was the services rendered by the Protestant nonconformists to the cause of the Revolution, which secured for them this measure of relief from the disabilities under which they suffered.<sup>8</sup> In form

<sup>1</sup> (1729) 2 Str. 834.

<sup>2</sup> Below 411.

<sup>3</sup> "Now according to the old law, or the dicta of the judges in old times, the passages would undoubtedly be blasphemous libels, because they asperse the truth of Christianity. But . . . I think that these old cases can no longer be taken to be a statement of the law at the present day," *R. v. Ramsay and Foote* (1883) 15 Cox C.C. at pp. 234-235.

<sup>4</sup> Below 413.

<sup>5</sup> *Fortnightly Rev.* xli 289 sqq.; Stephen, *H.C.L.* ii 470-476.

<sup>6</sup> *Fortnightly Rev.* xli 293; or as he puts it at pp. 293-294, "the theory is as plain and concise as possible; the truth of some of the fundamental doctrines of Christianity is essential to the welfare of society; therefore everyone shall be punished who denies, reviles, or ridicules them."

<sup>7</sup> 1 William and Mary c. 18.

<sup>8</sup> Vol. vi 200-201.

the concessions granted by the Act were not large. It simply, as its title says, "exempted their Majesties' Protestant subjects dissenting from the Church of England from the penalties of certain laws." But, as a necessary consequence, it legalized their meetings for worship, provided they were not held behind locked doors; and it provided penalties for those who disturbed these meetings. In addition, it exempted nonconformist ministers from jury service, and service in certain parochial offices, and it allowed Quakers to make a declaration instead of taking an oath. The Act did not extend either to Roman Catholics or to Unitarians. The courts interpreted the Act liberally. It was held that its effect was to render the worship of the sects coming within the protection of the Act legal for all purposes,<sup>1</sup> so that a trust for the maintenance of their teaching could be enforced by the court, or, in a suitable case, a mandamus could issue to enforce the legal rights of a minister to be admitted to office.<sup>2</sup>

No further statute was passed to legalize the worship of other Protestant nonconformists for more than a century. In 1813 the Unitarians were given the same privileges as had been accorded to Protestant nonconformists by the Toleration Act of 1689; and so much of the blasphemy Act of 1698, as related to the denial of the doctrine of the Trinity, was repealed.<sup>3</sup> But Lord Eldon had grave doubts whether this Act in favour of the Unitarians, could be given the same extensive interpretation as had been given to the Act of 1689 in favour of other Protestant nonconformists. His view was that, though the penalties for the maintenance of these opinions had been removed, the impugning of the doctrine of the Trinity was still "an offence indictable by the common law"; so that a trust to propagate such doctrines was not enforceable.<sup>4</sup> In this respect, therefore, a trust to propagate an opinion which he regarded as anti-Christian, differed from a trust to propagate opinions which, though not conformable to the doctrines of the Church of England, were Christian. But this restricted view of the Act was dissented from in 1842. The judges, in the opinions which they

<sup>1</sup> *Attorney-General v. Pearson* (1817) 3 Mer. at pp. 409-410 per Lord Eldon; it was said by Lord Mansfield in *Evans's Case* that the protecting clauses of the Toleration Act had put the worship of the Protestant dissenter, "not merely under the connivance, but under the protection of the law—have established it," cited 3 Mer. 375 n.; for *Evans's Case* see App. to Furneaux's letters to Blackstone, and *Burn Eccl. Law* ii 207; see also the passage cited by Lord Buckmaster in *Bourne v. Keane* [1919] A.C. at pp. 866-867; *Campbell*, Chief Justices ii 511-516.

<sup>2</sup> *R. v. Barker* (1762) 3 Burr. 1265.

<sup>3</sup> 53 George III. c. 160.

<sup>4</sup> "If the common law remains yet unaltered, and if the impugning the doctrine of the Trinity be an offence indictable by the common law, it is quite certain that I ought not to execute a trust the object of which is illegal," *Attorney-General v. Pearson* (1817) 3 Mer. at p. 399.

gave to the House of Lords in the case of *Shore v. Wilson*,<sup>1</sup> held that no such distinction could be drawn between the enforceability of a trust for the propagation of Unitarian tenets, and the tenets of any other sect of Protestant nonconformists.

In 1829 came the Roman Catholic Emancipation Act,<sup>2</sup> which relieved Roman Catholics from the penalties to which they were still subject, allowed them to sit in Parliament, and threw open to them nearly all the offices of state. But the Act contained provisions for the suppression of Jesuits and other religious orders of male persons belonging to the Church of Rome;<sup>3</sup> and it was not considered to have removed the illegality of charitable trusts for the maintenance of the Roman Catholic religion.

In 1832 Roman Catholics were put on the same footing as Protestant dissenters, in respect to "their schools, places for religious worship, education, and charitable purposes."<sup>4</sup> But the Act was not to affect the provisions in the Act of 1829 as to the suppression of Jesuits and other religious orders.<sup>5</sup> It was held, however, in the case of *West v. Shuttleworth*,<sup>6</sup> that this Act did not operate to validate trusts for the maintenance of superstitious purposes, such as masses for the dead. In fact, the Act of Edward VI.,<sup>7</sup> which, in suppressing certain superstitious uses then existing, had in its preamble declared the illegality of such uses, had long been considered as having had somewhat the same effect in defining what was a superstitious use, as the preamble of the statute of 1601<sup>8</sup> had in defining what was a charitable use. This was the view taken of the preamble to the Act in *Adams and Lambert's Case* in 1602.<sup>9</sup> It was followed by Duke in his book on Charitable Uses,<sup>10</sup> and, it would seem, was approved as established

<sup>1</sup> 9 Cl. and Fin. 355; at p. 578 Tindal, C.J., said, "that Unitarian preachers and their widows, and other persons professing Unitarian doctrines are capable at the present day of receiving the benefit of charities. . . . I consider, since the statute of 53 Geo. 3 c. 160, all distinction between Unitarians and other Protestant Dissenters as to this purpose is by law taken away."

<sup>2</sup> 10 George IV. c. 7; some remission of the laws rendering them liable to penalties, and a permission to conduct their worship under strict conditions, had been granted by 31 George III. c. 32.

<sup>3</sup> 10 George IV. c. 7 §§ 28-37.

<sup>4</sup> § 4.

<sup>5</sup> 1 Edward VI. c. 14.

<sup>6</sup> 4 Co. Rep. at ff. 106b, 109b, 111b, 113a, all cited by Lord Wrenbury in *Bourne v. Keane* [1919] A.C. at pp. 919-920; all through this case it is assumed that uses, such as those mentioned in the preamble to this statute, are superstitious.

<sup>7</sup> (1st ed.) 106, cited by Lord Birkenhead in *Bourne v. Keane* [1919] A.C. at pp. 843-844; dealing with gifts for the finding or maintenance of a stipendiary priest, or for the maintenance of an anniversary or obit, or of any light or lamp in any church or chapel, or any like intent, he says, "these and such like gifts and dispositions, as these are not to be accounted charitable uses intended by the purview of this statute (43 Eliz. c. 4), but superstitious uses intended by the statute of 1 Edw. 6 c. 14"; clearly the idea is that the preamble of Edward VI.'s statute is to be taken as a guide to what the law will deem a superstitious use, just as the preamble of Elizabeth's statute is to be taken as a guide to what it will deem a charitable use; and this idea is, it seems to me, implied in much of the reasoning in *Adams and Lambert's Case*.

<sup>8</sup> 2, 3 William IV. c. 115.

<sup>9</sup> (1835) 2 My. and K. 684.

<sup>10</sup> 43 Elizabeth c. 4; vol. iv 398.



law by Lord Hardwicke in *De Costa v. De Pas*,<sup>1</sup> Having regard to these authorities, the decision in *West v. Shuttleworth*<sup>2</sup> was inevitable; and it was followed in later cases.<sup>3</sup> In 1860, when the Legislature gave a larger measure of protection to Roman Catholic charities, it assumed that trusts for superstitious uses were still illegal;<sup>4</sup> and when it assumed the illegality of these superstitious uses, it must obviously have used the term superstitious use in the sense in which it had been judicially interpreted. The result of this legislation, therefore, was to remove all penalties and disabilities affecting Roman Catholics, and to legalize, not entirely, but to a very large extent, trusts for the propagation and maintenance of their worship.

In 1846<sup>5</sup> the Jews had been relieved from their disabilities by an Act, which repealed a number of other disabilities and penalties, which earlier legislation had imposed on various classes of non-conformists. Moreover, with respect to their schools, places for worship, education, and charitable purposes, they had been put on the same footing as Protestant nonconformists.<sup>6</sup>

It will be observed that this legislation contained nothing whatever affecting the position of the atheist, or person who professed no religious belief; and the curious history of the manner in which such persons were gradually allowed on all occasions to affirm instead of taking an oath—a history which in its later stages is connected with the name of Bradlaugh—illustrates the reluctance of a Legislature, which was still, almost unconsciously, under the influence of the ideas embodied in the dictum that Christianity was part of the law, to make any concessions to them.<sup>7</sup> Naturally, therefore, during the earlier part of the nineteenth century, it was still held that those who denied the truth of all religion, including the Christian religion, were guilty of a criminal offence. There are a series of such cases in which the old principle was laid down as good law.<sup>8</sup> In fact, as late as 1841, on an indictment for blasphemous libel, Lord Denman, C.J., told the jury that, “if they thought that the libel tended to question or cast disgrace upon the Old Testament it was a libel”;<sup>9</sup> and, in the decision of the court on a

<sup>1</sup> “The objection is, that this is a superstitious use, and so that the bequest must go to the crown; but in answer to this it is said, that that can only be in cases that are within the statute of Edward VI. But the cases have gone further,” 2 Swanst. 487 note.

<sup>2</sup> (1835) 2 My. and K. 684.

<sup>3</sup> Attorney-General v. Fishmongers Co. (1841) 5 My. and Cr. 11; Heath v. Chapman (1854) 2 Dr. 417.

<sup>4</sup> 23, 24 Victoria c. 134 § 1.

<sup>5</sup> 9, 10 Victoria c. 59.

<sup>6</sup> § 2.

<sup>7</sup> See Clarke v. Bradlaugh (1881) 7 Q.B.D. at pp. 58-61 per Lush, J., for a good account of this matter.

<sup>8</sup> R. v. Carlile (1819) 1 S.T.N.S. 1390, 4 S.T.N.S. 1423; R. v. Waddington (1822) 1 S.T.N.S. 1368-1369; see also R. v. Moxon (1841) 4 S.T.N.S. 694.

<sup>9</sup> R. v. Hetherington 5 Jurist 529-530.

motion in arrest of judgment, substantially the old principle, that a reflection on Christianity in general is indictable, is laid down. It followed also that all attempted dispositions of property, and other transactions, having for their object the propagation of such opinions, were void. Thus in 1850, in the case of *Briggs v. Harilev*,<sup>1</sup> it was held that a trust which contemplated an object inconsistent with Christianity failed; and in 1867, in the case of *Cowan v. Milbourn*, it was held that a contract to let a lecture room for an anti-Christian lecture was void for illegality.<sup>2</sup>

But, some time before *Cowan v. Milbourn* had been decided, the feeling in favour of a more universal tolerance, which was partly the cause and partly the effect of the legislation which I have just described, had begun to react upon these common law doctrines.

(3) *The effect of the new situation created by this legislation upon legal doctrines as to the relation between law and religion.*

During the first half of the nineteenth century, there are indications that some lawyers were beginning to be of opinion that it was not every sort of questioning of the truths of Christianity, which would make the questioner criminally liable. As early as 1729, the court had expressly said that it did not mean to assert that theories advanced by learned men upon controversial points, would expose those who held them to liability, provided that Christianity in general was not attacked;<sup>3</sup> and both Lord Mansfield<sup>4</sup> and Blackstone<sup>5</sup> had maintained that the mere holding, as distinct from the propagation, of opinions was not an offence by English law. We have seen that both the Star Chamber in the earlier part of the seventeenth century,<sup>6</sup> and the common law courts in the later part of that century,<sup>7</sup> had assigned, as their reason for taking cognizance of heretical opinions, the fact that they tended to sedition and commotions; and Blackstone had emphasized the fact that blasphemy consisted in "profane scoffing at the Holy Scripture or exposing it to contempt and ridicule."<sup>8</sup> Having regard, therefore, to the larger liberty of expressing opinions secured by the legislation of the earlier part of the nineteenth century, it is not surprising to find that, about the same

<sup>1</sup> 19 L.J. Ch. 416-417; cf. *Murray v. Benbow* (1822) 4 S.T.N.S. 1409—the famous case in which Lord Eldon refused to issue an injunction to restrain the publication of a pirated copy of Byron's *Cain*; see also the authorities cited by Lord Finlay in *Bowman v. The Secular Society* [1917] A.C. at p. 430.

<sup>2</sup> L.R. 2 Ex. 230.

<sup>3</sup> R. v. Woolston 2 Str. 834; above 410.

<sup>4</sup> "The common law of England, which is only common reason or usage, knows of no prosecution for mere opinions," *Evans v. The Chamberlain of London, Burn Eccl. Law* ii 218, cited 3 Mer. 375 note.

<sup>5</sup> Comm. iv 49.

<sup>7</sup> Above 407-408.

<sup>6</sup> Above 407.

<sup>8</sup> Comm. iv 59.

period, it began to be thought that the essence of the offence of blasphemy, was not the denial of the truths of Christianity, but their denial in an offensive manner. Starkie, the second edition of whose book on libel was published in 1830, maintained, in substance, that an honest denial of Christianity was not blasphemy; and that the essence of the offence was "a wilful intention to pervert insult and mislead others by means of licentious and contumelious abuse applied to sacred subjects, or by wilful misrepresentations or artful sophistry calculated to mislead the ignorant or unwary."<sup>1</sup>

The cases already cited show that the criminal law was not for some time expounded in this way. But the trend of public opinion was making for its acceptance. In 1842, in the case of *Shore v. Wilson*,<sup>2</sup> Erskine, J., laid it down that, "it is still blasphemy, punishable at common law, scoffingly or irreverently to ridicule or impugn the doctrines of the Christian faith, and no one would be allowed to give or to claim any pecuniary encouragement for such purpose; yet any man may, without subjecting himself to any penal consequences, soberly and reverently examine and question the truth of those doctrines, which have been assumed as essential to it." This view of the law was followed by Coleridge, J., in *R. v. Pooley* in 1857,<sup>3</sup> and by his son Lord Coleridge, C.J., in *R. v. Ramsay and Foote* in 1883.<sup>4</sup> The correctness of this statement of the law was assailed by Stephen, J.<sup>5</sup> That it was not a correct statement of the law of England in the seventeenth, or even the eighteenth, centuries, I think he proves; and indeed the historical truth of Stephen's view is, as we have seen, almost admitted by Coleridge, C.J.<sup>6</sup> But there is no doubt that, as the nineteenth century proceeded, this newer view of

<sup>1</sup> "Though as a matter of discretion and prudence, it might be better to leave the discussion of such matters to those who, from their education and habits, are most likely to form correct conclusions, yet it cannot be doubted that any man has a right, not merely to judge for himself, on such subjects, but also legally speaking, to publish his opinions for the benefit of others. . . . The law visits not the honest errors, but the malice, of mankind. A wilful intention to pervert, insult, and mislead others, by means of licentious and contumelious abuse applied to sacred subjects, or by wilful misrepresentations, or artful sophistry, calculated to mislead the ignorant or unwary, is the criterion and test of guilt," Starkie, *Libel* (3rd ed.) 559, 600, cited Stephen, *Fortnightly Rev.* xli 311.

<sup>2</sup> 9 Cl. and Fin. at pp. 524-525; and he had laid down substantially the same rule in the same year in *R. v. Holyoake* 4 S.T.N.S. 1381.

<sup>3</sup> Stephen, *Fortnightly Rev.* xli 311.

<sup>4</sup> 15 Cox C.C. 231; "I think that these old cases can no longer be taken to be a statement of the law at the present day. It is no longer true in the sense in which it was true, when these dicta were uttered, that Christianity is part of the law of the land. . . . To asperse the truth of Christianity cannot *per se* be sufficient to sustain a criminal prosecution for blasphemy," *ibid* at p. 235; "I now lay it down as law, that, if the decencies of controversy are observed, even the fundamentals of religion may be attacked, without the writer being guilty of blasphemy," *ibid* at p. 238.

<sup>5</sup> *Fortnightly Rev.* xli 289; H.C.L. ii 474-476.

<sup>6</sup> Above n. 4.

the law had been gathering strength, because it was obviously so much more in accordance with men's views as to the proper relation between law and religion than the older view<sup>1</sup>—a fact illustrated by the settlement in 1888 of the long controversy as to the right of the atheist to affirm instead of taking an oath.<sup>2</sup> The law laid down in *R. v. Ramsay and Foote* was approved by the Court of Appeal in 1915;<sup>3</sup> and the principle was applied by the House of Lords in 1917.<sup>4</sup> It is therefore now indisputably the law of England.

It did not follow, however, that, because a reverend denial of Christianity was no longer a criminal offence, the law would uphold a trust or a contract to propagate views which were directly contrary to the Christian faith. But even here the former rigid attitude of the law was weakening. Judges were astute to find that trusts for religious purposes were not anti-Christian;<sup>5</sup> and at length in 1917, in the case of *Bowman v. The Secular Society*,<sup>6</sup> it was held that the propagation of such views was not illegal in any sense, and that therefore a bequest upon trust for a company, formed to propagate these views, was valid. The cases of *Briggs v. Hartley*,<sup>7</sup> and *Cowan v. Milbourn*<sup>8</sup> were overruled, with the result that the law now draws no distinction between the propagation of Christian, non-Christian, or anti-Christian opinions. It will help all alike, unless it can be shown that they advocate practises contrary to the rules of English Law. But just as Stephen, J., upheld the older rules as against the newer law laid down in *R. v. Ramsay and Foote*, so in *Bowman v. The Secular Society* Lord Finlay upheld the older law laid down in *Briggs v. Hartley* and *Cowan v. Milbourn*; and in both cases these advocates of the older law were solitary protestants.

The legislation of the nineteenth century, which threw open most of the offices of state to persons who were not members of the established church, destroyed, as Blackstone said it would destroy,<sup>9</sup> the logical necessity for such a church. In like manner

<sup>1</sup> "Parliament, the supreme authority as to our law has passed Acts which render the dicta of the judges in former times no longer applicable. And it is no disparagement to their authority to say that observations which were made under one state of the law are no longer applicable under a different state of things," *R. v. Ramsay and Foote* (1883) 15 Cox C.C. at p. 235.

<sup>2</sup> 51, 52 Victoria c. 46 (The Oaths Act).

<sup>3</sup> *Secular Society v. Bowman* [1915] 2 Ch. at pp. 462, 469-470.

<sup>4</sup> S.C. on appeal [1917] A.C. 406.

<sup>5</sup> See *Parr v. Clegg* (1861) 29 Beav. 589; *Thornton v. Howe* (1862) 31 Beav. 14; both these cases were decided by Lord Romilly.

<sup>6</sup> [1917] A.C. 406.

<sup>7</sup> (1850) 19 L.J. Ch. 416.

<sup>8</sup> (1867) L.R. 2 Ex. 230.

<sup>9</sup> "If every sect was to be indulged in a free communion of civil employments, the idea of a national establishment would at once be destroyed, and the episcopal church would be no longer the church of England," *Comm. iv. 53*.

the decision in *Bowman v. The Secular Society* leaves the ecclesiastical law of England in a very anomalous position. We have seen that, as late as 1881, it was described by Lord Blackburn as part of the general law of England.<sup>1</sup> If this is so, it would seem that the situation, in which the rules of law and equity sometimes found themselves before the Judicature Acts, is again reproduced. That which one part of the law of England regards as illegal is regarded as legal and enforced by the other part. But the effects of this decision have not stopped here. As we shall now see, the same trend of public opinion, which led up to this decision, has encouraged the House of Lords to change the long accepted interpretation placed upon some of the older legislation dealing with Roman Catholicism.

(4) *The effect of this new common law doctrine upon the interpretation of the older legislation.*

We have seen that the legislation, which freed the Roman Catholics from their disabilities, did not wholly emancipate them.<sup>2</sup> But it is clear that some of the judges were beginning to think that these restrictions were not wholly consistent with the larger liberty which had been accorded to all kinds of religious and anti-religious opinions. In 1860<sup>3</sup> and 1861<sup>4</sup> Lord Romilly expressed some doubts as to the correctness of the law laid down in *West v. Shuttleworth* as to the invalidity of superstitious uses. In 1914 the restrictive clauses in the Act of 1829, directed against monastic orders, were, to a large extent, rendered nugatory by the decision of Joyce, J., in the case of *In re Smith*<sup>5</sup>—the judge whose decision was affirmed by the House of Lords in the case of *Bowman v. The Secular Society*. Finally, in 1919, practically the whole law as to the invalidity of superstitious uses was swept away by the decision of the House of Lords in *Bourne v. Keane*.<sup>6</sup> The House asserted that the preamble to the Chantry Act of Edward VI.<sup>7</sup> could not have the effect which is still accorded to the preamble of Elizabeth's Act of 1601;<sup>8</sup> and it reversed all the cases and dicta which were founded ultimately upon the view that just as the preamble to Elizabeth's Act is a guide to the definition of a charitable use, so the preamble to Edward VI.'s Act must be taken as a guide to the definition of a superstitious use. This was a bold step. When the House of Lords in 1916 was reminded that in 1888 it had reversed a decision of 1849, the retort was

<sup>1</sup> *Mackonochie v. Lord Penzance* (1881) 6 A.C. at p. 446, cited vol. i 595.

<sup>2</sup> Above 412-413.

<sup>3</sup> *Re Michel's Trust* 28 Beav. at p. 42.

<sup>4</sup> *Re Blundell's Trusts* 30 Beav. at p. 362; see above 416 n. 5 for Lord Romilly's reluctance to find anything anti-Christian in an otherwise lawful trust.

<sup>5</sup> [1914] 1 Ch. 937.

<sup>6</sup> [1919] A.C. 815.

<sup>7</sup> 1 Edward VI. c. 14.

<sup>8</sup> 43 Elizabeth c. 4; vol. iv 398.

given that "this is hardly the right view to take of your Lordship's judicial functions nowadays."<sup>1</sup> But in this case, the House, as Lord Wrenbury pointed out, reversed dicta 317 years old, a decision 84 years old,<sup>2</sup> and a rule which, in 1917, Lord Parker had regarded as a settled rule of law.<sup>3</sup> But Lord Wrenbury in this case took the position of solitary protestant, which Stephen, J., took in relation to the decision in *R. v. Ramsay and Foote*, and Lord Finlay took in relation to the decision in *Bowman v. The Secular Society*. In all three cases the movement of public opinion in favour of the widest toleration was sufficient to overturn the principles of the older law. Indeed, it was admitted by Lord Birkenhead that it was the same public policy as that underlying the judgment in *Bowman v. The Secular Society* which played a great part in inducing the House of Lords to take the greatest liberty which it has ever taken with established legal principles.<sup>4</sup> That decision is thus the crowning illustration of the manner in which the development of this branch of the law has been dominated at all periods, and more especially in its later phases, by considerations of public policy and by the force of public opinion.

Thus the old theories upon which the relation of State to Church were based, and, consequently, both the old doctrine as to the relation of English law to Christianity, and the technical rules which depended on that doctrine, have been swept away. All that is left is the law as to blasphemous libel as restated in *R. v. Ramsay and Foote*. It is obvious that the dominant factor in the various trains of technical reasoning, which have justified the abolition of the older doctrines of law and equity, and, with the assistance of the Legislature, have impelled them in the direction of universal toleration, has been the influence of public opinion as to the proper relation of the state and its law to religion. Indeed,

<sup>1</sup> *Admiralty Commissioners v. S.S. Amerika* [1917] A.C. at p. 56, *per* Lord Sumner, cited vol. iii 677 n. 2.

<sup>2</sup> [1919] A.C. at p. 925; he might, as we have seen, above 413, have added that it was a construction in which apparently Lord Hardwicke had concurred.

<sup>3</sup> *Bowman v. Secular Society* [1917] A.C. at p. 437.

<sup>4</sup> "Unwilling as I am to question old decisions, I shall be able, if my view prevails, to reflect that your Lordships will not within a short period of time have pronounced to be valid legacies given for the purpose of denying some of the fundamental doctrines of the Christian religion, and have held to be invalid a bequest made for the purpose of celebrating the central sacrament in a creed which commands the assent of many millions of our Christian fellow-countrymen. In the second place . . . your Lordships will have the satisfaction of deciding that the law of England corresponds upon this important point with the law of Ireland, of our great Dominions, and of the United States of America. A decision based . . . upon a sound view of the law may reasonably appeal to these two powerful considerations of policy as against the admitted impolicy of disturbing old conclusions," *Bourne v. Keane* [1919] A.C. at p. 831.

I think that it would be true to say that in no branch of the law has this influence been in the past more pronounced, and that it still continues, and will continue, to exercise at least an equal influence in the future. In the past that influence has been all in the direction of a greater liberty and a fuller toleration, until in our own days, complete liberty and full toleration have been attained. No doubt the use made of this complete liberty and full toleration will largely determine the future trend of public opinion; for it is the fact that this gradually extending liberty has not in the past proved dangerous to the safety of the state, that has made for its final victory. This fact is not unconnected with that growth in the strength of the state, which has enabled it to be more generous in its administration of the criminal law than in the days when it was weak.<sup>1</sup> But if this liberty should be misused so as to endanger the safety of the state, there can be little doubt that public opinion will revert again to its older attitude.

The principles which underlie the past development and the probable future of this branch of the law, have been so fully and eloquently summed up by Lord Sumner, in one of the wisest pronouncements that have ever been made on the subject, that I shall copy his words:<sup>2</sup> "the words, as well as the acts, which tend to endanger society differ from time to time in proportion as society is stable or insecure in fact, or is believed by its reasonable members to be open to assault. In the present day meetings or processions are held lawful which a hundred and fifty years ago would have been deemed seditious, and this is not because the law is weaker or has changed, but because, the times having changed, society is stronger than before. In the present day reasonable men do not apprehend the dissolution or the downfall of society because religion is publicly assailed by methods not scandalous. Whether it is possible that in the future irreligious attacks, designed to undermine fundamental institutions of our society, may come to be criminal in themselves, as constituting a public danger, is a matter that does not arise. The fact that the opinion grounded on experience has moved one way does not in law preclude the possibility of its moving on fresh experience in the other; nor does it bind succeeding generations, when conditions have again changed. After all, the question whether a given opinion is a danger to society is a question of the times, and is a question of fact. I desire to say nothing which would limit the right of society to protect itself by process of law from the dangers of the moment, whatever that right may be, but only to say that experience having proved dangers once

<sup>1</sup> Vol. v. 196.

<sup>2</sup> *Bowman v. The Secular Society* [1917] A.C. at pp. 466-467.

thought real to be now negligible, and dangers once very possibly imminent to have now passed away, there is nothing in the general rules as to blasphemy and irreligion, as known to the law, which prevents us from varying their application to the particular circumstances of our time in accordance with that experience."

How far the law as it exists to-day is likely to be beneficial to the state and to the community remains to be seen. Complete freedom in economic relations has already been tried and found wanting. It is at least doubtful whether it will be any more successful in respect to the publication of opinions, religious or otherwise; and it may well be that in religious and intellectual, as in economic spheres, we shall, as Lord Sumner has indicated, be driven to revert to some of our older ideas. It is not unlikely that those who have abandoned all belief in the authority of a God, will carry their scepticism a little further, and begin to question the authority of the state. The Christianity upon which the state and the law were once founded, though it might at times unduly magnify the authority of the Church, recognized the need for the secular arm of the state, and generally supported its authority. But what of the various non-Christian or anti-Christian sects which seek to take its place? It may well be that "false doctrine heresy and schism" of the strictly theological variety, no longer connote, as they often did connote in the sixteenth and seventeenth centuries, "sedition privy conspiracy and rebellion"; but it does not follow that the state can afford to disregard all kinds of false doctrine. It does not follow that unlimited licence to propagate views and theories at variance with broad principles of Christian morality, will be wholly unproductive of political effects. History lends no countenance to such a conclusion; and the proved efficacy of propaganda supports its teaching. In fact, it is not unlikely that Cæsar, now that he has deliberately abandoned the task of securing for God the things that are God's, will find considerably greater difficulty than heretofore in securing for himself the things that are Cæsar's. If that result should follow one of two courses must be pursued. Either the state must reassert its authority by means of an increase in the severity of the criminal law, and an abridgment of the liberty to express immoral or seditious opinions; or it must be content to pursue a policy of drift and concession to the forces opposed to it, which can only lead straight back to a set of political conditions which will bear no small resemblance to the modified anarchy of mediæval political society—without the redeeming grace of the spiritual elements in that society, which sprang from the deeply rooted religious faith of mediæval men.



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### § 5. LINES OF FUTURE DEVELOPMENT

We have seen that the mediæval law of crime and tort was narrow. It was, so to speak, permeated by the idea of trespass—by the idea, that is, of forcible damage to person or property. At the end of the mediæval period it was only just beginning to transcend this idea through the instrumentality of the writs on the case. We have seen that, during this period, the criminal law was developed, partly by the Legislature, and partly by the new ideas introduced by the Council and Star Chamber; and that the law of tort was developed partly by the latter agency, and partly by a great expansion of the action on the case. Consequently, in the criminal law many new treasons and felonies were created, and the modern misdemeanour made its appearance; while the development of the law of tort was marked by the growth of specific torts, and, as we shall see in the next section, by large changes in and additions to the principles of liability. With some of these developments I have already dealt in the preceding sections of this chapter. At this point it will only be necessary, firstly, to sketch briefly, in respect to certain torts not already dealt with, the manner in which this process of differentiation was proceeding; and, secondly, to indicate some of its effects upon the growth of the law.

#### *The Process of Differentiation*

##### (1) *Wrongs to the person.*

During this period we can see the beginnings of the process which will differentiate the wrongs of assault, battery, and false imprisonment, and create the specific torts known by these names in our modern law. In the Middle Ages all these wrongs were redressible by an action of trespass; and they were regarded simply as illustrations of the multifarious trespasses to the person redressed by that writ. But in the cases decided upon writs brought for particular trespasses, and upon writs on the case brought for wrongs analogous thereto, we can see that the law is beginning to acquire some more precise rules as to the conditions under which these wrongs are committed. These rules are the starting points of the further developments which will give this branch of the law its modern shape.

*Assault and Battery.*—As early as the fourteenth century it was held that trespass would lie for an attempted battery which had failed to take effect—for instance when one had thrown a hatchet at another which had missed;<sup>1</sup> for a threatened battery if

<sup>1</sup> 22 Ass. 99 pl. 60; Belknappe's argument to the contrary was overruled in Y.B. 40 Ed. III. Mich. pl. 19; and in Y.B. 45 Ed. III. Trin. pl. 35 Belknappe as judge laid down the law in this sense; Street, *Legal Liability* i 10-11.

accompanied by actual damage;<sup>1</sup> and even for mere threatening words which put the plaintiff in fear, and caused him damage.<sup>2</sup> It was held, however, in the case of *Turberville v. Savage*,<sup>3</sup> that a present threat of violence was needed to constitute an assault, so that where one put his hand on his sword and said, "if it were not assize time I would not take such language from you," it was no assault; though it would have been otherwise if he had held up his hand in a threatening manner and said nothing. In this case stress was laid on the declared intention not to offer violence; and it is probably because no intention of violence can be certainly collected from general words of threatening or abuse, that the law has abandoned the idea that such words can be accounted as an assault.<sup>4</sup> It was the same emphasis on intention which has given us our modern definition of battery. In its original conception it meant the infliction of physical injury;<sup>5</sup> and we have seen that in the Middle Ages an action lay whether it was committed intentionally, negligently, or accidentally.<sup>6</sup> But it was held, during this period, that "the least touching of another in anger" is a battery.<sup>7</sup> This at once introduces the question, What is a touching in anger? and this question can only be answered by a reference to the intent of the party who touches another.<sup>8</sup> Thus it was held in *Turberville v. Savage* that a touching, "done in earnest discourse and not with intent of violence is no assault," and therefore no battery.<sup>9</sup> But this rule at once introduces into the offence a new element—the element of insult—which may justify heavy damages for a battery which inflicts only trifling physical injury.<sup>10</sup>

The writ of trespass for assault and battery remedied, not only violence offered immediately to the plaintiff's own person, but also violence offered to him indirectly through violence

<sup>1</sup> Y.B. 45 Ed. III. Trin. pl. 35.

<sup>2</sup> 27 Ass. 134 pl. 11; Y.B.B. 37 Hy. VI. Pasch. pl. 8 at p. 20b *per* Prisot, C.J.; 7 Ed. IV. Hil. pl. 31 *per* Danby and Choke, J.J.; the same rule was laid down in Y.B. 17 Ed. IV Trin. pl. 2 p. 4b by Fairfax, J., but denied by Nedham, J., and Billing, C.J.; *cp.* Pollock, Torts (12th ed.) 216 n. (p).

<sup>3</sup> (1669) 1 Mod. 3.

<sup>4</sup> Evelyn v. Stouly (1615) 2 Buls. at p. 327 *per* Dodderidge, J.; Pollock, Torts (12th ed.) 216, citing 'the Circuiteers' (L.Q.R. i 232):—"For Meade's Case proves, or my Report's in fault, that singing can't be reckoned an assault." The opinion of Nedham, J., and Billing, C.J., in Y.B. 17 Ed. IV. Trin. pl. 2 p. 4b seems to be in harmony with the later law.

<sup>5</sup> See Street, Legal Liability i 4-6.

<sup>6</sup> Vol. iii 376.

<sup>7</sup> Cole v. Turner (1705) 6 Mod. 149 *per* Holt, C.J.

<sup>8</sup> "The factor which the law accepts as sufficient to justify this extension is found in the wrongful or hostile intent of the wrong-doer; in his malice, as the element is termed in other departments of tort," Street, *op. cit.* i 6.

<sup>9</sup> (1669) 2 Keb. 545; "if two or more meet in a narrow passage, and without any violence or design of harm, the one touches the other gently, it will be no battery," Cole v. Turner (1705) 6 Mod. 149 *per* Holt, C.J.

<sup>10</sup> Street, *op. cit.* i 6; Pollock, Torts (12th ed.) 213.

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or threatened violence to his servants and tenants.<sup>1</sup> As Sir F. Pollock has said,<sup>2</sup> "examples of this kind are not uncommon down to the sixteenth century or even later; we find in the pleadings considerable variety of circumstance which may be taken as expansion or specification of the *alia enormia* regularly mentioned in the conclusion of the writ." A good example in this period is the case of *Garret v. Taylor*.<sup>3</sup> In that case the defendant had threatened the plaintiff's workmen and customers, so that they desisted from working for or trading with him. It was held that the plaintiff could recover damages in an action on the case. We shall see that the principle underlying such cases was one of the principles contributing to developments in the law of tort, which were called for by the growth of commerce and industry during this period—developments which have, owing to the legislative changes of the nineteenth century, assumed immense importance in modern times.<sup>4</sup>

*False Imprisonment.*—"False imprisonment," as Mr. Street says,<sup>5</sup> "was one of the first trespasses recognized by the common law. A laying of violent hands upon the person, and an actual forceful deprivation of liberty, is the element undoubtedly at the root of liability in this wrong. In other words, the typical original imprisonment involved a battery." But even in mediæval times this notion was extended. In Edward III.'s reign Thorpe, C.J., ruled that, "there can be said to be an imprisonment in all cases where a man is arrested by force and against his will, be it in the high street or elsewhere, even though he be not confined in a house."<sup>6</sup> What amount of restraint will amount to the commission of the tort has been elaborated in the later cases. It was settled, at the end of the seventeenth century, that the restraint must be total, so that, if all means of escape are not blocked, the tort is not committed.<sup>7</sup> We have seen that some aspects of the tort shade off into the very different tort of malicious prosecution; and that it was only gradually that the line between them was clearly drawn.<sup>8</sup>

Besides these specific wrongs to the person a large number of other unclassified wrongs were redressed by the action on the case. In all these cases the question whether or not a tort had been

<sup>1</sup> F.N.B. 87 N.

<sup>2</sup> Torts (12th ed.) 234, and references there cited.

<sup>3</sup> (1621) Cro. Jac. 567.

<sup>4</sup> Below 431.

<sup>5</sup> Op. cit. i 12-13, citing Bracton's Note Book cases 314, 465.

<sup>6</sup> 22 Ass. 104 pl. 85.

<sup>7</sup> "A has a chamber adjoining to the chamber of B, and has a door that opens into it, by which there is a passage to go out; and A has another door which C stops, so that A cannot go out by that. This is no imprisonment of A by C because A may go out by the door in the chamber of B, though he be a trespasser by doing it. But A may have a special action upon his case against C," *Wright v. Wilson* (1699) 1 Ld. Raym. 739 *per* Holt, C.J.

<sup>8</sup> Above 388.

committed depended upon the question whether the defendant was guilty of negligence. But of the growth and influence of this conception I shall speak in the following section.<sup>1</sup>

(2) *Wrongs to property.*

Of wrongs to a plaintiff's right to the possession of chattels and land, and of the kinds of damage to property redressible by the various writs of trespass, I have already spoken.<sup>2</sup> As in the case of wrongs to the person, a number of other unclassified wrongs to property were redressed by the action on the case, if the defendant had acted negligently.<sup>3</sup> I have also said something of the development of the scope of nuisance by means of action on the case.<sup>4</sup> At this point it will only be necessary to call attention to two other aspects of the law as to nuisance, which have given rise to important bodies of rules in the modern law of tort.

(i) It was recognized, certainly by the beginning of the sixteenth century, that a nuisance might either be public and remediable by indictment, or private and remediable by action on the case at the suit of the person damaged thereby. But the question whether, and under what conditions, a person damaged by a public nuisance, could sue for damages, remained somewhat debateable down to the close of this period. It had been laid down by Fitzherbert in 1536<sup>5</sup> that an action would lie for a public nuisance, if the plaintiff could show that he had suffered special damage over and above the ordinary damage caused to the public at large by the nuisance. "If one makes a ditch across the highway, and I come riding in my way by night, and I and my horse are thrown into the ditch, so that I suffer great damage . . . in this case I shall have an action against him who made the ditch across the way, because I am more damaged by this than any other." But Baldwin, C.J., dissented. He considered that any stoppage of the highway was simply a public nuisance, and punishable only by indictment;<sup>6</sup> and in this divergence of opinion we can see the beginnings of long standing doubts upon this matter. Though Fitzherbert's view was accepted,<sup>7</sup> differences of opinion arose in the seventeenth century as to what could be considered to be sufficiently special damage to entitle a plaintiff to sue. Holt, C.J.,

<sup>1</sup> Below 449-458.

<sup>2</sup> Vol. vii 57 seqq., 402 seqq.

<sup>3</sup> Below 458.

<sup>4</sup> Vol. iii 11, 28; vol. vii 328-331, 340-341.

<sup>5</sup> Y.B. 27 Hy. VIII. Mich. pl. 10.

<sup>6</sup> "Semblye que cest accion ne gist pur le pleintiff sur l'estoppel de haut chemin, car le Roy ad le punition de cela, et il est present en le Lect, et la il sera redresse: pur ce que il est common nuisance a tous liges le Roy, et donques n'est reason que un private particulier person aura accion sur cela; car per meme le reason que l'un person aura accion pur cela, per meme le reason chescun aura sur cela, et donques il sera puni C fois pur meme le cause," *ibid.*

<sup>7</sup> Williams's Case (1595) 5 Co. Rep. at f. 73a; Fowler v. Sanders (1618) Cro. Jac. 446.

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and Rokeby, J., ruled that the plaintiff must be prepared to show a damage to himself directly arising from the nuisance, over and above that suffered by the public;<sup>1</sup> so that, if, for instance, through a stoppage in a road, a man lost a valuable piece of business by his late arrival, such damage could not be recovered. The delay in the journey was no more than was suffered by the rest of the public, and the loss of the business was too remote.<sup>2</sup> But other judges were of opinion that such consequential damage was not too remote, and could be recovered.<sup>3</sup> This difference of opinion has lasted down to our own days, and has given rise to judgments in the House of Lords which are not easily reconcilable.<sup>4</sup>

(ii) So soon as the application of the action on the case to remedy a nuisance had begun to widen the conception of a nuisance, the difficulty arose of drawing the line between those species of damage which are *absque injuria*, because they are only the necessary result of the legitimate user of a man's property, and those species of damage which will support an action, because they are the result of an improper or excessive user of that property.<sup>5</sup> As early as 1410 this difficulty arose in the Gloucester Grammar School Case.<sup>6</sup> The masters of an ancient grammar school sued the defendant who had set up a rival school, and had, by his competition, lowered the fees which they were formerly able to charge. It was held that, though there would have been a good cause of action if the profits of an incorporeal hereditament, such as a franchise of fair ferry or mill, were disturbed by the setting up of a rival fair ferry or mill, in the absence of such a franchise, no action lay for damage occasioned by legitimate competition.<sup>7</sup> This

<sup>1</sup> "The plaintiff could not have an action for stopping of this way, because his coal mine was near it; for though it is a convenience to him, yet the situation does not give him any greater right to the way than any other of the king's subjects . . . the case of 27 H. 8, 27 is no authority for this action; for there Baldwin, Chief Justice, was of opinion against the action, and his opinion has been held law ever since," Iveson v. Moore (1700) 1 Ld. Raym. at pp. 492, 493.

<sup>2</sup> "If a highway is so stopped that a man is delayed in his journey a little while, and by reason thereof he is damnified, or some important affair neglected; this is not such a special damage for which an action on the case will lie; but a particular damage to maintain this action ought to be direct and not consequential; as for instance, the loss of his horse, or by some corporal hurt, in falling into a trench in the highway," Paine v. Partrich (1692) Carth. at p. 194 *per* Holt, C.J.

<sup>3</sup> Iveson v. Moore (1700) 1 Ld. Raym. at pp. 489, 491 *per* Gould and Turton, JJ., with whom, after a fresh argument at Serjeants' Inn, the other judges agreed, *ibid* at p. 495.

<sup>4</sup> Ricket v. Metropolitan Ry. Co. (1867) L.R. 2 H. of L. 175; Lyon v. Fishmongers Co. (1876) 1 A.C. 662; Pollock, Torts (12th ed.) 410 n. 1.

<sup>5</sup> "Hankford. Dampnum puit estre absque injuria, coment si j'ay un molyn, et mon vicine leve un auter molyn, peront le profite de mon molyn est diminish, j'averai nul action vers luy, uncore il est damage a moy *quod Thirning concessit*," Y.B. 11 Hy. IV. Hil. pl. 21.

<sup>6</sup> *Ibid*

<sup>7</sup> "Nient semble, pur ceo que in vostre cas vous avez frank tenement et enheritance en le Market, mes icy le plaintiff ont nul estate en le Schoolmastership etc., mes pur le temps non certain, et il sera encounter reason, que un Master sera disturbe a

was quite in harmony with the principle recognized by the common law that, except as restrained by rules of the statute or common law, trade ought to be free.<sup>1</sup> The principle was restated by Holt, C.J., in *Keeble v. Hickeringill*;<sup>2</sup> but with the qualification that, if violent or other illegal means were used by the defendant to further his interests at the expense of the plaintiff, an action would lie.<sup>3</sup> We shall see that the application of this principle has, like the application of the principle that trespass or case will lie if a man is damaged by menaces to his tenants or servants,<sup>4</sup> helped to develop a very important branch of the law of tort in modern times.<sup>5</sup>

The only other important wrong to property which need here be mentioned is the tort of deceit. We have seen that in the Middle Ages its scope was very narrow, but that it was widened by the application to it of the action on the case.<sup>6</sup> We have seen that this action on the case for a deceit was applied chiefly to deceits in the performance of certain contracts, and that it played some part in the development of the action of assumpsit.<sup>7</sup> The earliest development of deceit was therefore in connection with contracts.<sup>8</sup> As deceit on the case could be brought, either for the breach of an express warranty, or for damage occasioned by a statement known to the maker to be false, it was perhaps natural that the conception of deceit as an independent tort, consisting in making a false statement with knowledge of its falsity to the damage of another, did not readily emerge. But we have seen that the conception of deceit was, during this period, being rendered more precise by cases turning mainly upon the contract of sale;<sup>9</sup> and it was the analysis of the nature of deceit in these cases which helped the courts in 1789, in the case of *Pasley v. Freeman*,<sup>10</sup> to allow an action in tort for a false and fraudulent statement which caused damage to another,<sup>11</sup> though there was no contractual relation between the deceiver and the person deceived.<sup>12</sup>

tenir Schole ou luy pleist, sinon que le fuit en cas ou un University fuit corporate, et Escholes fondus sur ancien temps, et en case d'un molyn (comme jeo disoy avant) si mon vicine levy un molyn, auters que soloient moulder a mon molyn, alent a l'auter molyn, peront mon tolne est amenus, pur cel cause jeo n'avera my action," Y.B. 11 Hy. IV. Hil. pl. 21 *per* Hankford, J.; "et l'opinion del Court fuit que le brieve ne gist my."

<sup>1</sup> Vol. iv. 350.

<sup>2</sup> (1707) 11 Mod. 74, 130; 3 Salk. 9; Holt, 14, 17, 19; the best report of Holt, C.J.'s judgment is that taken from his MSS. in 11 East 574 note.

<sup>3</sup> 11 East at p. 576.

<sup>4</sup> Above 423.

<sup>5</sup> Below 431.

<sup>6</sup> Vol. iii 407-408.

<sup>7</sup> Ibid 429 and n. 3.

<sup>8</sup> Ibid 407-408; above 68.

<sup>9</sup> Above 68-69.

<sup>10</sup> (1789) 3 T.R. 51.

<sup>11</sup> Especially the broad statement of Croke, J., in *Baily v. Merrell* (1616) 3 Bulatr. at p. 95 that "when these two (fraud and damage) do concur and meet together, there, an action lieth," which was cited by Buller, J., 3 T.R. at p. 56, and by Lord Kenyon C.J., at p. 64.

<sup>12</sup> Grose, J., in his dissenting judgment, 3 T.R. at p. 53, said, "When this was first argued at the bar . . . I confess I thought it reasonable that the action should lie; but, on looking into the old books for cases in which the old action for

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### (3) *Wrongs to domestic relations.*

We have seen that in the Middle Ages the peculiar status of wards, infants, wives, and servants was very much more emphasized than it is in modern law.<sup>1</sup> We have seen too that the law of property, and the remedies for the infringement of proprietary rights, were then much more highly developed than the law of contract, and the remedies for breach of contract.<sup>2</sup> It is in the period when these ideas were predominant that the law relating to these kinds of wrongs originated; and all through the history of this branch of the law they have made their influence felt. It is this fact which helps to account for the unsatisfactory state of some of our modern rules.

It was in the case of the ward who was heir to property that the proprietary character of the father's or guardian's rights were most evident. The law knew a writ of right of wardship;<sup>3</sup> and it very early adapted the writ of trespass to the purpose of protecting the father's or the guardian's rights, by the invention of writs for the ravishment of the ward.<sup>4</sup> But on this branch of the law the long life of feudal wardship, and the great value of the feudal incident of marriage, exercised a very unfortunate effect.<sup>5</sup> These two reasons led the law to take the view that what it protected was not the rights of the parent or guardian as such, but the pecuniary interest which the parent or guardian had in the marriage of his heir. It followed, therefore, that these remedies were not available for the abduction of any child, but only for the abduction of a child who was an heir. Trespass, it was said in *Barham v. Dennis*,<sup>6</sup> was based upon a proprietary interest, and in a son or daughter a father had no property. It was only available, therefore, to protect the father's proprietary interest in the child's marriage.<sup>7</sup> For this reason the courts

deceit has been maintained upon the false affirmation of the defendant, I have changed my opinion. The cases on this head are brought together in Bro. tit. Deceit pl. 29. and in Fitz. Abr. I have likewise looked into Danvers, Kitchins, and Comyns, and I have not met with any case of an action upon a false affirmation, except against a party to a contract, and where there is a promise, either express or implied, that the fact is true which is misrepresented."

<sup>1</sup> Vol. iii 61-65, 215 (wards), 513-520 (infants), 520-533 (wives); vol. ii 460-463 (servants).

<sup>2</sup> Ibid 355-356, 590.

<sup>3</sup> Vol. iii 17.

<sup>4</sup> Ibid 17, n. 1, 27.

<sup>5</sup> For these incidents see vol. iii 61-66, 516.

<sup>6</sup> (1600) Cro. Eliza. 770.

<sup>7</sup> "They held also that the father should not have an action for the taking of any of his children which is not his heir; and that is by reason the marriage of his heir belongs to the father . . . and by reason of this loss only the action is given unto him. . . . But for the taking of a son or daughter not heir, it is not upon the same reason, and therefore not alike. Here the father hath not any property or interest in the daughter, which the law accounts may be taken from him," *ibid* at p. 770; and it would seem from *Gray v. Jefferies* (1587) Cro. Eliza. 55 that this remedy was only available when one took the heir and married him, and that it did not lie for the loss of the marriage for any other reason, or for injuries to the child, even if these injuries occasioned the loss of the marriage.

refused to recognize that the father had the same kind of proprietary interest in his child as he had in his servant<sup>1</sup> or his wife.<sup>2</sup> The result was that his interest in his children was unprotected unless the child happened to be his heir.

One of the judges, indeed, in *Barham v. Dennis* was prepared to take a more liberal view. "The father," said Glanville, J.,<sup>3</sup> "hath an interest in every one of his children to educate them, and to provide for them; and he hath his comfort by them; wherefore it is not reasonable that any should take them from him, and to do him such an injury, but that he should have his remedy to punish it." If his view had prevailed, the development of this branch of the law would have been infinitely more satisfactory. As it did not prevail the law was driven to find a remedy, by the application to the relation of parent and child, of the writ provided to protect the relation of master and servant; and the result is, as Sir F. Pollock has pointed out, that the development of the law has been "halting and one-sided."<sup>4</sup> No doubt this device helped to mitigate the hardship of the law, more especially as very slight acts of service were, in later law, allowed to be sufficient to support an action.<sup>5</sup> But it did not afford a complete remedy. If, for instance, the child was too young to be capable of service, no action would lie for injuries to it.<sup>6</sup>

It is the application of this remedy to the relation of parent and child which is still used to give a remedy to a parent for the commonest and most flagrant injury to his rights as a parent—the seduction of a daughter. It would seem that it was in the middle of the seventeenth century that this particular application of trespass was made. In 1653, in the case of *Norton v. Jason*,<sup>7</sup> the plaintiff brought Case forentering his house, assaulting his daughter, and getting her with child. Rolle, C.J., gave it as his opinion that, "although the daughter cannot have an action, her father may, although not for entering into his house, because it was with his leave, nor for assaulting his daughter, and getting her with child,

<sup>1</sup> Below 429.

<sup>2</sup> Below 430.

<sup>3</sup> Cro. Eliza. at p. 771.

<sup>4</sup> Torts (12 ed.) 226.

<sup>5</sup> In Y.B. 22 Hy. VI. Mich. pl. 49, p. 31, Newton, C.J., lays it down that the relation of master and servant cannot be presumed from the relation of parent and child—"Si jeo porte bref de *Transgressio quare filium meum et haerodem in servicio meo existentem rapuit*, jeo voille bien que cel bref ne vaut: le cause est, tout soit il [rapuit] mon fitz et heir, il n'est encluse en ce qu'il est mon servant: car il poit servir ou luy plest"; but the later law was not so strict, see *Weedon v. Timbrell* (1793) 5 T.R. at p. 361 *per* Ashurst, J.; *cp.* *Jones v. Brown* (1794) 1 Esp. 217; *Evans v. Walton* (1867) L.R. 2 C.P. at p. 619 *per* Bovill, C.J.; in the last named case Bovill, C.J., says, "no evidence of service is necessary beyond that which the law will imply as between parent and child"—a view of the law quite contrary to that of Newton, C.J.

<sup>6</sup> *Hall v. Hollander* (1825) 4 B. and C. 660; but Bayley, J., thought that the father might have Case for expenses occasioned by the child's cure—a view which has been followed in the United States, Street, Legal Liability i 268 n. 7.

<sup>7</sup> Style 398.



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because this is a wrong particularly done to her, yet for the loss of her service caused by this he may have an action." But, he added, "it is a pretty case and fit to be argued." There is another case of 1664 in which the plaintiff brought, not Case, but trespass quare clausum fregit;<sup>1</sup> but this form of action was obviously inapplicable, as Rolle, C.J., had pointed out, if the entry was by the leave and licence of the father. These cases, however, made it clear that the principle on which the modern action for seduction rests had been reached. It was laid down in 1664 that, if trespass quare clausum fregit was brought, the damages were not limited to the loss of service, but that the injured feelings of the parent could be taken into account, as an aggravation of the wrong done in breaking his close.<sup>2</sup> If, on the other hand, Case was brought per quod servitium amisit, the injured feelings of the parent could be considered in assessing the damages for loss of service.<sup>3</sup>

The courts have thus done their best to adapt this remedy to the case of seduction. But the incompleteness of the remedy is here even more marked than in other cases of injuries to children. For, in the oft-quoted words of serjeant Manning,<sup>4</sup> "the quasi-fiction of *servitium amisit* affords protection to the rich man whose daughter occasionally makes his tea, and leaves without redress the poor man whose child is sent unprotected to earn her bread amongst strangers."

Of the remedies given by the law for the abduction of a servant I have already spoken.<sup>5</sup> We have seen that they were supplemented by the provisions of the Statutes of Labourers. They rested at bottom on the idea that the master had a quasi-proprietary interest in his servant's services; and that idea is connected with ideas as to the status of a servant, which originated in the rules of law applicable to villein status. We have seen, too, that these rules were made the foundation in *Lumley v. Gye*<sup>6</sup> of an entirely new development of the law. In that case the real right of the master to his servant's services, was in effect given to all persons entitled to the benefit of any contract; for it was laid down that it is an actionable wrong to interfere, without just cause or excuse, with any existing contractual relation.

The same principles as were applied to the servant were applied

<sup>1</sup> *Sippora v. Basset* 1 Sid. 225.

<sup>2</sup> "Quant ceo est ex turpi causa come fuit icy, l'accion poet esse done in evidence sur tiel general declaration south les parolles (alia enormia), et le reason est, quia le ley ne voet compell le party de monstre ceo de record. Mes en tous auter cases de trespass le special matter pur que damages serra done doit estre plead," 1 Sid. 225; cp. *Russell v. Corne* (1704) 2 Ld. Raym. at p. 1032 per Holt, C.J.

<sup>3</sup> *Bennett v. Allcott* (1787) 2 T.R. at pp. 167-168 per Buller, J.

<sup>4</sup> Note to *Grinnell v. Wells* (1844) 7 M. and Gr. at p. 1044.

<sup>5</sup> Vol. ii 462-463; vol. iv 383-385.

<sup>6</sup> (1853) 2 E. and B. 216; vol. iv 384-385.

to the wife. The husband's interest in his wife's consortium, unlike the parent's interest in the consortium of his children, was considered to be sufficiently proprietary to support an action of trespass.<sup>1</sup> This is quite distinct from the right which the husband had, jointly with his wife, to sue for wrongs committed against her.<sup>2</sup> The latter right depended upon the incapacity of the wife to sue in her own name.<sup>3</sup> It was the incapacity of the wife to consent, which was the principle upon which the husband was allowed to bring the particular form of the action of trespass or action on the case, known as the action of criminal conversation, against one who had committed adultery with his wife.<sup>4</sup>

(4) *Wrongs connected with commerce and industry.*

Certain of the wrongs with which I have dealt in this and preceding chapters bear witness to the growing importance of commerce and industry. Some aspects of the law of defamation, of malicious abuse of the process of the courts, and of nuisance, the development of the conception of deceit, and the development of the idea of conversion—all afford illustrations. In addition, there is a solitary case of 1580 or 1595, in which an action of deceit was maintained for counterfeiting another's trade mark.<sup>5</sup> But much the most important instance of this influence on the law of tort is the beginning, at the close of this period, of the modern doctrine of employer's liability, with the history of which I shall deal in the following section.<sup>6</sup> Indeed, if we except this doctrine, it may I think be said that the growth of industry and commerce has not, during this period, exercised so great an influence on the law of tort as might have been expected. The explanation of this phenomenon is, it seems to me, somewhat as follows:—

We have seen that during the whole of this period all branches of commerce and industry were minutely regulated by the Legislature.<sup>7</sup> Wages were in theory fixed by the justices; and combinations to alter the rates of wages thus fixed were illegal.

<sup>1</sup> *Guy v. Livesey* (1619) Cro. Jac. 501; *Hyde v. Scysson* (1620) *ibid* 538.

<sup>2</sup> *Hyde v. Scysson* (1620) Cro. Jac. 538; *Russell v. Corne* (1704) 2 Ld. Raym. 1032.

<sup>3</sup> Vol. iii 526; cp. vol. v 315.

<sup>4</sup> See *Galizard v. Rigault* (1702) 2 Salk. 552, where the right to bring this action is assumed by Holt, C.J.; Street, *Legal Liability* i 264; as Mr. Street has pointed out, *ibid* 269 n. 1, "the idea in allowing trespass for assault and battery to be used in an action for seduction is that the girl's consent to the act of intercourse is irrelevant as against her father, just as the consent of the wife is irrelevant as against her husband, in an action for criminal conversation"; cp. Pollock, *Torts* (12th ed.) 227 n. i, and 228 n. i.

<sup>5</sup> Cited by Dodderidge, J., in *Southern v. How Popham* 144, as decided 22 Eliza; but in Cro. Jac. 471 it is said to be decided 33 Eliza.; as Mr. Street has pointed out, *op. cit.* i 418-419, it was not till the eighteenth century that this branch of the law began to develop.

<sup>6</sup> Below 472-482.

<sup>7</sup> Vol. iv 314-407; vol. vi 313-360.

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Forestalling and regrating were offences known to the law. The corn laws tended to keep uniform the price of corn. There were many regulations and restrictions both as to apprenticeship and modes of manufacture. The difficulties placed by the Legislature on the assumption of corporate form,<sup>1</sup> tended to prevent the formation of large combines of manufacturers. In addition, in certain localities there still existed restrictions imposed by local bye-laws, under the authority of powers conferred by mediæval charters. When, in the course of the nineteenth century, nearly all the restrictions imposed by these multifarious laws were swept away under the influence of the doctrine of laissez faire, a number of new problems were set to the law of crime and tort. We have seen that one, and perhaps the most important of these problems, arose in connection with the crime and the tort of conspiracy.<sup>2</sup> But the same causes which led to the growth of this branch of the law of tort, led also to the growth of other branches. The principle of cases like *Garret v. Taylor*,<sup>3</sup> and more especially of *Keeble v. Hickeringill*,<sup>4</sup> and the exact definition of the new tort resulting from the decision in *Lumley v. Gye*,<sup>5</sup> all assumed great importance in cases which turned on the legality of certain activities of Trade Unions of employes and combinations of employers. Indeed, the fact that the common law could, from the basis of the principles contained in the Year Books and cases of this period, construct a body of law which was fitted to regulate the new industrial problems, to which the era of laissez faire had given rise, is perhaps the strongest illustration, in modern times, of the adaptability, and of the practical character of the principles evolved by a system of case law.

### *The Effects of these Developments on the Growth of the Law*

We can, I think, distinguish three important effects of these developments on the growth of the law.

Firstly, the development of the substantive law in and through the forms of action, made it sometimes unreasonable, and sometimes excessively technical. The manner in which the fiction of per quod servitium amisit was used to supplement the defective character of the remedies given for wrongs to domestic relations, is the strongest instance of the evolution of an unreasonable set of rules.<sup>6</sup> The manner in which the rights of the parties were made dependent upon the correct appreciation by the pleader of the

<sup>1</sup> Above 219-221.

<sup>2</sup> (1621) Cro. Jac. 567; above 423.

<sup>3</sup> (1707) 11 East 574 note; above 426.

<sup>4</sup> (1853) 2 E. and B. 216; above 429.

<sup>5</sup> Above 384, 392-397.

<sup>6</sup> Above 428-429.

right form of action<sup>1</sup>—more especially, in later law, on the often fine distinction between Trespass and Case;<sup>2</sup> and the impossibility of joining two causes of action which fell under different forms,<sup>3</sup>—are both striking illustrations of the technical character of its rules.<sup>4</sup>

But secondly, the growth of specific torts, and the definition of the essential characteristics of these torts, helped to concentrate attention on the substantive rules of the law of tort. In the mediæval period the law of tort was largely contained in the rules as to the competence of various forms of action—Detinue and various forms of Trespass, Case and the various forms of Case. During this period, the law was acquiring a number of substantive rules, which are independent of adjective law; and this new importance of the rules of substantive law will increase during the eighteenth and early nineteenth centuries. This meant that the problem of distinguishing *damna cum* from *damna sine injuria* was presented to the courts in a somewhat different form. We have seen that, in the Middle Ages, the growth of the action on the case had brought this problem before the courts;<sup>5</sup> and in the law of this period and later it was often before the courts. But, while in the Middle Ages it was regarded rather as a problem relating to the competence of actions, in later law it is regarded as a problem relating to the substantive rights of the parties. It may be that, in many cases, "discussions of legislative principle have been darkened by arguments on the limits between trespass and case, or on the scope of a general issue"; and that "in place of a theory of tort we have a theory of trespass."<sup>6</sup> For all that, it is true that, during this period, the law is much nearer to a theory of tort than it was in the Middle Ages.

Thirdly, these developments necessitated a thorough revision of the mediæval principles of civil liability for wrong. We have seen that many of the later developments of the older torts, such as assault and battery, involved a consideration of the intention of the defendant;<sup>7</sup> an intention to deceive was the essence of deceit; and malice was an essential element in the tort of malicious

<sup>1</sup> Maitland, *Forms of Action* 298, 351-362.

<sup>2</sup> "We must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion," *Reynolds v. Clarke* (1726) 1 Str. at p. 635 *per* Lord Raymond, C.J.; this dictum was cited with approval by Blackstone, J., in *Scott v. Shepherd* (1773) 2 W. Bl. at p. 897; see also *Savignac v. Roome* (1794) 6 T.R. at p. 130 *per* Grose, J.

<sup>3</sup> "A man who had been assaulted and accused of theft in the market place of his town was obliged, if he wished for redress for the double wrong, to issue two writs and to begin two litigations, which wound their course through distinct pleadings to two separate trials," Bowen, *Administration of Justice in the Victorian Period*, *Essays A.A.L.H.* i 518.

<sup>4</sup> For other illustrations in other branches of the law see vol. i 634 and n. 2, 645.

<sup>5</sup> Vol. iii 408.

<sup>6</sup> Holmes, *The Common Law* 78.

<sup>7</sup> Above 422.

prosecution.<sup>1</sup> The large mass of wrongs to person and property remedied by actions on the case, were coming to depend on the question whether the defendant had acted negligently to the damage of the plaintiff, and not merely on the question whether he had caused him damage by his act. Commercial necessities were showing that the mediæval rules as to the master's liability for the acts of his servants were too narrow. Of the manner in which all these causes transformed the mediæval principles of civil liability I shall speak in the following section.

## § 6. THE PRINCIPLES OF LIABILITY

### *Criminal Liability*

We have seen that during the mediæval period criminal, unlike civil liability, was based upon the presence of a *mens rea*. We have seen, too, that the rules as to the possible defences to a criminal charge, and as to incapacities which would excuse from guilt, or mitigate punishment, were growing more precise; and that this growing precision was partly the cause, and partly the effect of the firmness with which the central principle of the criminal liability—the need for a *mens rea*—had come to be grasped.<sup>2</sup> During this period, (1) the nature of this *mens rea* in relation to various specific crimes was being analysed and elaborated; and (2) the same process of analysis and elaboration was taking place with reference, both to the incapacities which would excuse from guilt, and to some of the defences which might be made to a charge of crime. Under these two heads, therefore, I shall sketch shortly the development of this branch of the law.

#### (1) *The requirement of mens rea.*

It was well settled in the sixteenth century (in spite of the opinion to the contrary held in the fourteenth century)<sup>3</sup> that a mere intention to commit a crime, unaccompanied by any overt act, entailed no criminal liability. "The imagination of the mind to do wrong," it was said in *Hales v. Petit*,<sup>4</sup> "without an act done, is not punishable in our law, neither is the resolution to do that wrong which he does not, punishable, but the doing of the act is the only point which the law regards; for until the act is done it cannot be an offence to the world, and when the act is done it is punishable." And by an act was meant a voluntary act, so that, "if A by force takes the arm of B, and the weapon in his hand, and

<sup>1</sup> Above 391.

<sup>2</sup> Ibid 373 and n. 4.

<sup>3</sup> Vol. iii 372-375.

<sup>4</sup> (1563) Plowden at p. 259.

therewith stabs C, this is murder in A, but B is not guilty."<sup>1</sup> In fact, the manner in which the common law courts adopted the Star Chamber's view as to the criminality of attempts to commit crimes,<sup>2</sup> and treated these attempts as common law misdemeanours,<sup>3</sup> removed the chief reason for reviving the dangerous doctrine that a mere intent to commit a crime entailed liability.

To produce criminal liability, therefore, there must be both an act and a guilty intent. It followed that if one killed another accidentally he did not commit murder—"for it is the will and intention that is regularly required, as well as the act and event, to make the offence capital."<sup>4</sup> So in the case of larceny, "as it is *cepit* and *asportavit*, so it must be *felonice* or *animo furandi*, otherwise it is not felony, for it is the mind that makes the taking of another's goods to be a felony or a bare trespass only."<sup>5</sup> It followed also that, though ignorance of law never excused from criminal liability,<sup>6</sup> ignorance of fact might, if it negated any sort of guilty intent.<sup>7</sup> This principle was applied in 1639, in the case of *R. v. Levett*,<sup>8</sup> where the accused, under the mistaken but justifiable impression that a person in the house was a burglar, killed her.

The more difficult question now arises, what is the nature of this guilty intent which the law requires as a condition of criminal liability? The answer in general terms is that it is different in different classes of crimes—in 1503, for instance, Marowe saw that the guilty intent required for murder was different from that required for larceny;<sup>9</sup> and that, in certain classes of crimes, the law has specified certain kinds of acts, and ruled that the doing of them amounts to the guilty intent required by the law for the commission of these crimes. We have seen that in other branches of the law there was a tendency in this direction, which was partly due to the difficulty of proving intent, where the parties to an action were not competent witnesses;<sup>10</sup> and no doubt the tendency was emphasized in the criminal law from motives of public policy. The safety of the state and its citizens made it necessary that the meagre mediæval rules should be extended. The result

<sup>1</sup> Hale, P.C. i 434, citing *Reniger v. Fogossa* (1551), Plowden at p. 19: but it was only physical violence which operated in this way—"if it be only a moral force, as by threatening, duress, or imprisonment etc. this excuseth not," *ibid*; see below 443-445.

<sup>2</sup> Vol. v 202.

<sup>3</sup> Kenny, Criminal Law 82.

<sup>4</sup> Hale, P.C. i 38.

<sup>5</sup> *Ibid* 508.

<sup>6</sup> *Ibid* 42.

<sup>7</sup> "But in some cases ignorantia facti doth excuse, for such an ignorance many times makes the act itself morally involuntary," *ibid*.

<sup>8</sup> (1639) Cro. Car. 538.

<sup>9</sup> De Face, *Oxford Studies in Social and Legal History*, vol. vii 378.—"Et nota que en mort de home lentent de celui que fait le morte ne fait le felony come il fait de Theft. . . . quar si home entende de bater ascun person et en cete baterie il tua une autre, ceo est felony nient obstante son entent ne fut de luy occider. Mes en ascun cas de mort de home entent ferra le felony."

<sup>10</sup> Vol. iv 481-482.

is that the *mens rea* or guilty intent required by the law, though it originated in the idea that accompanying the act there must be an element of moral blameworthiness, though it still connotes such moral blameworthiness, has become a very technical notion. Its assumption of this technical form is mainly the work of this period of our legal history. Let us take as illustrations of this process the manner in which it has come to be defined in relation to murder, manslaughter, and larceny.

It is clear that Coke was stating a well settled principle when he says of the "malice prepensed" or "malice aforethought" which is necessary for murder, that it exists "when one compasseth to kill wound or beat another and doth it sedato animo"; and that this malice was "so odious in law," that "though it be intended against one, it shall be extended towards another."<sup>1</sup> So far as the compassing is a compassing to kill, this definition gives us the natural meaning of the term; but in the statement that a compassing to wound or beat, and still more in the statement that a blow intended for another, will, if death ensues, amount to malice aforethought, we are departing from the natural meaning of words. But this extension was still further extended in the course of the sixteenth century. It was held by a majority of the judges in 1536,<sup>2</sup> that, if a person was killed accidentally by one of the members of a band engaged on a felonious act, all could be held to be guilty of murder. The judges in this case were not unanimous;<sup>3</sup> but it was the opinion of the majority which has prevailed.<sup>4</sup> A fortiori malice was implied if A assaults B with intent to rob him, and in the course of the struggle A kills B.<sup>5</sup> "He that doth a cruel act voluntarily," said Holt, C. J., "does it of malice prepensed."<sup>6</sup> This idea was further extended to cover the case where an act likely to cause damage had caused death, though there was no intention to hurt anyone.<sup>7</sup> It was not difficult to conclude from this that murder was committed, if death had ensued as the result of doing any unlawful

<sup>1</sup> Third Instit. 51, citing inter alia Bracton's dictum at f. 155a that "*si quis unum percusserit et occiderit, cum alium percutere vellet in feloniam, tenetur*"; this was no doubt the source of Marowe's similar statement, above 434 n. 9. Halloway's Case (1629) Cro. Car. 131; Hale, P.C. 1466; we have seen that Marowe states the law even more widely.

<sup>2</sup> Mansell and Herbert's Case, Dyer 128b—a mob had assembled in order to assault and rob a house, and a woman coming out of the house was killed by a stone thrown by one of the mob at another person.

<sup>3</sup> The dissentient judges were evidently reluctant to extend the meaning of malice; they said, "no malice was intended against the woman, and murder cannot be extended beyond what was intended."

<sup>4</sup> Above 329; Hale, P.C. i 441-442.

<sup>5</sup> Ibid 465; Coke, Third Instit. 52.

<sup>6</sup> R. v. Mawgridge (1707) Kelying at p. 127; cf. Coke, Third Inst., 62—"if it be voluntary the law implieth malice."

<sup>7</sup> See R. v. Hull (1664) Kelying, 40; Foster Crown Law, 262-263; Kenny op. cit. 135-136.

act.<sup>1</sup> This wide rule was, however, narrowed down by Foster to the case when the unlawful act was also felonious and malum in se—e.g. if A, intending to steal B's poultry, shoots at them and accidentally kills C.<sup>2</sup> But it is probable that even this mitigated form of the rule would not now be followed.<sup>3</sup> Another extension recognized in this period is, however, still part of the law—the case where a person kills an officer of the law, or magistrate, in the regular<sup>4</sup> execution of his duty, though he had no intention of killing him.<sup>5</sup> In these ways, through the decisions given in this period, the particular *mens rea* known as malice aforethought which was needed to make homicide murder, was so extended that it has come to be, as Professor Kenny has said, merely an "arbitrary symbol."<sup>6</sup> "For the malice may have in it nothing really malicious, and need never be really aforethought."<sup>7</sup>

Manslaughter is said by Hale to be "the voluntary killing of another without malice express or implied."<sup>8</sup> But this does not mean, as Professor Kenny points out,<sup>9</sup> that there is no *mens rea*. It merely means that the guilty intention is of a different character. The character of the guilty intent required was, it would seem from Hale, elucidated chiefly by cases which drew the line between murder on the one hand, and a merely accidental killing on the other. Some of these cases depend on the fact that the person who caused the death has been careless—e.g. the case of the builder who drops a piece of stone without due warning;<sup>10</sup> and often the question whether murder or manslaughter has been committed will depend on the degree of carelessness shown.<sup>11</sup> Others depend on the fact that, though there was no intention to cause death, the death was in fact caused by the accused in the course of doing an

<sup>1</sup> "If the act be unlawful it is murder. As if A meaning to steal a deer in the park of B shooteth at the deer, and by the glance of the arrow killeth a boy that is hidden in a bush: this is murder, for that the act was unlawful, although A had no intent to hurt the boy nor knew not of him," Coke, Third Instit. 56.

<sup>2</sup> Crown Law, 258-259—"The rule I have laid down supposeth that the act from which death ensued was *malum in se*. For if it was barely *malum prohibitum*, as shooting at game by a person not qualified by statute law to keep or use a gun for that purpose, the case of a person so offending will fall under the same rule as that of a qualified man."

<sup>3</sup> Kenny, *op. cit.* 137-138.

<sup>4</sup> Cook's Case (1639) Cro. Car. 537; Hale, P.C. i 458.

<sup>5</sup> Young's Case (1586) 4 Co. Rep. 40a; Mackalley's Case (1612) 9 Co. Rep. at ff. 68a, 68b; Hale, P.C. i 457 seqq.

<sup>6</sup> *Op. cit.* 132.

<sup>7</sup> *Ibid.* 132-133 as Stephen, J., said in *R. v. Serné* (1887) 16 Cox C.C. at p. 312, "the words malice aforethought are technical. You must not, therefore, construe them or suppose that they can be construed by ordinary rules of language. The words have to be construed according to a long series of decided cases, which have given them meanings different from those which might be supposed."

<sup>8</sup> P.C. i 466.

<sup>9</sup> *Op. cit.* 115—"we shall better avoid confusion of language if we say, 'without any of those *more guilty* forms of malice which amount to murderous malice.' For malice, in its wide legal sense (that is to say *mens rea*) is essential to every crime."

<sup>10</sup> *R. v. Hull* (1664) Kelyng 40.

<sup>11</sup> Above 435 n. 7.



unlawful act—e.g. playing at an unlawful game<sup>1</sup>—but an act not sufficiently unlawful to make the homicide murder.<sup>2</sup> Others depend on the fact that the death occurred in the course of a sudden quarrel which negatived the idea of premeditation;<sup>3</sup> and, for the same reason, a homicide committed under severe provocation will generally be manslaughter, if done in the heat of the moment.<sup>4</sup> Here again, therefore, the *mens rea* required by the law may be of the most various kinds, and of all degrees of moral guilt. It is for this reason that manslaughter is said to be “an elastic crime,” “for the degrees of guilt which may accompany it extend from the verge of murder to the verge of excusable homicide.”<sup>5</sup>

In the case of larceny it is the intention to steal which makes all the difference between the felony and a bare trespass. But whether this intention is present or not must be judged by the circumstances of the case. Hale considered that it was possible to illustrate, but not to define, “all the circumstances evidencing a felonious intent.”<sup>6</sup> From that day to this, the reported cases have gone on illustrating these circumstances, till it is possible to lay down one or two general rules; and, even when Hale wrote, one or two of them had emerged. Thus, it was no felony to take A’s horse from a common for a ride, when the horse was restored to the common at the end of the ride.<sup>7</sup> Similarly, if my servant takes my horse and uses him for his own occasions, it is no felony if he returns him; but if, while on his journey, he sells him as if he were his own, “that act of selling” is declarative of his first taking to be felonious.”<sup>8</sup> Again, “if A, thinking he hath a title to the horse of B, seisseth as his own, or, supposing that B holds of him, distrains the horse of B without cause, this regularly makes it no felony but a trespass, because there is a pretence of title, but yet this may be but a trick to colour a felony, and the ordinary discovery of a felonious intent is, if the party doth it secretly, or being charged with the goods denies it.”<sup>9</sup>

These illustrations show that the growth of the criminal law is largely bound up with the elaboration and differentiation of the different sorts of mental attitude, which is needed to constitute a *mens rea* in different classes of crimes; for, when this elaboration

<sup>1</sup> Hale, P.C. i 472-473.

<sup>2</sup> See Kenny, op. cit. 110; it is on this principle that one who kills another in a duel is guilty of murder, vol. v 199-201.

<sup>3</sup> Coke, Third Instit. 55; above 303.

<sup>4</sup> Coke, Third Instit. 55; Royley’s Case (1612) Cro. Jac. 296; Maddy’s Case (1671) 1 Vent. 158.

<sup>5</sup> Kenny, op. cit. 124.

<sup>6</sup> “But in cases of larceny the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to prescribe all the circumstances evidencing a felonious intent, or the contrary, but the same must be left to the due and attentive consideration of the judge and jury,” P.C. i 509.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

and differentiation have been made, we have gone a long way to defining the most essential features of these different crimes. We shall now see that this same process has helped the law to attain some more definite rules as to the various incapacities which will excuse from guilt, and has had some influence on the law as to some of the defences which can be made to a charge of crime.

(2) *Incapacities and defences.*

The three incapacities of which I intend to speak shortly are infancy, insanity, and drunkenness.

*Infancy.* It would seem that the modern rules relating to the incapacity of infants were first settled in the case of capital offences—treason and the felonies. We have seen that it was well settled in this period that a child below the age of seven could not be guilty of a felony, that between seven and fourteen there was a rebuttable presumption to the same effect, and that over fourteen his capacity was regarded as normal.<sup>1</sup> In fact, from that time to this, there have been a few instances in which children of under fourteen have been convicted, and one or two in which they have even been executed;<sup>2</sup> and Hale testifies to the fact that so many crimes were committed by youths between fourteen and twenty-one, that, "if they should have impunity by privilege of such their minority, no man's life or estate could be safe."<sup>3</sup> With regard to crimes under the degree of felony, the law was not by any means so certain. In the case of crimes of violence, such as riot or battery, the same rule as that applicable to felony was enforced in Hale's time.<sup>4</sup> But then, as now, the misdemeanours covered a wide field, and some of them, then as now, were remote from the sphere of crime. For this reason, in certain of these cases, the law adopted the rule applicable to the proprietary or contractual capacity of infants, and exempted them from liability if they were under twenty-one. Thus for mere nonfeasance (unless the liability were *ratione tenurae*) they were exempt, because laches could not be imputed to them.<sup>5</sup> Similarly, if the law imposed a penalty for a wrongful dealing with property, but the penalty could be regarded as only collateral to the main purpose of the law, viz. to discourage such dealings with property, an infant under twenty-one escaped.<sup>6</sup> But these exemptions are now probably obsolete;

<sup>1</sup> Vol. iii 372.

<sup>2</sup> Hale, P.C. i 26-27; Bl. Comm. iv 23-24; Kenny, op. cit. 50-51.

<sup>3</sup> "Experience makes us know, that every day murders, bloodshed, burglaries, larcenies, burning of houses, rapes, clipping and counterfeiting of money, are committed by youths above fourteen and under twenty-one; and if they should have impunity by the privilege of such their minority no man's life or estate could be safe," P.C. i 25.

<sup>4</sup> Ibid 20.

<sup>5</sup> Ibid; see R. v. Sutton (1835) 3 Ad. and E. at pp. 601-603.

<sup>6</sup> "When the corporal punishment is but collateral, and not the direct intention of the proceeding against the infant for his misdemeanour, there in many cases the infant

and for all ordinary misdemeanours the rule is the same as in the case of felony.

*Insanity.*—"No felony or murder," says Coke,<sup>1</sup> "can be committed without a felonious intent and purpose . . . ; but furiosus non intelligit quid agit, et animo et ratione caret, et non multum distat a brutis, as Bracton saith, and therefore he cannot have a felonious intent." For this reason insanity was a bar either to the institution or the continuance of criminal proceedings. We have seen that it was settled in the mediæval period that madness, if it existed when the crime was committed, negatived liability.<sup>2</sup> It was further settled in this period that, if a person of sound mind commits a crime and becomes mad before his arraignment, he cannot be arraigned; "and if such person after his plea and before his trial, become of non-sane memory, he shall not be tried; or, if after trial he become of non-sane memory, he shall not receive judgment; or, if after judgment he become of non-sane memory, his execution shall be spared; for were he of sound memory, he might allege somewhat in stay of judgment or execution."<sup>3</sup> In spite of some doubts as to whether these rules were applicable to high treason, if it took the form of an attempt to kill the king,<sup>4</sup> these rules were recognized to be of universal application in the seventeenth century.

There remain the much more difficult questions, (i) what the law will regard as such insanity as will totally exempt from criminal liability; and (ii) how it will treat what may be called cases of partial insanity, that is cases where a person is clearly not sane, and yet not wholly bereft of reason. No part of the criminal law is so fluid as this, largely because it is a question partly belonging to legal and partly to medical science; and because the latter science has, as medical knowledge advances or the fashion in medical theory changes, adopted very variable views on this matter.<sup>5</sup> On two points however the law has been clear from the seventeenth century onwards. Firstly, it is not necessary, in order to escape liability, that the accused should

under the age of twenty-one shall be spared, though possibly the punishment be enacted by Parliament. If an infant of the age of eighteen years be convict of a disseisin with force, yet he shall not be imprisoned. . . . If an infant be convict in an action of trespass vi et armis, the entry must be *nihil de fine, sed pardonatur quia infans*," P.C. i 21.

<sup>1</sup> Beverley's Case (1603) 4 Co. Rep at f. 124b.

<sup>2</sup> Vol. iii 372 and n. 9.

<sup>3</sup> Hale, P.C. i 35.

<sup>4</sup> Coke said in Beverley's Case (1603) 4 Co. Rep. at f. 124b that, "in some cases *non compos mentis* may commit high treason as if he kills or offers to kill the king"; but this is contrary to what he says in Third Instit. 6; and that it is not law is shown by 33 Henry VIII. c. 20 (see vol. iv 499-500), as is practically admitted by Coke, loc. cit. and by Hale, P.C. i 35, 37; but Hale, P.C. i 37, though he proves it to be a baseless exception, refused to deny it "because it tends so much to the safety of the king's person."

<sup>5</sup> On the whole subject see Stephen, H.C.L. ii chap. xix,

have been found a lunatic by inquisition.<sup>1</sup> "The trial of the incapacity of a party indicted or appealed of a capital offence is, upon his plea of not guilty, by the jury upon his arraignment, who are to inquire thereupon touching such incapacity of the prisoner, and whether it be to such a degree as may excuse him from the guilt of a capital offence."<sup>2</sup> Secondly, the law presumes every one to be sane till the contrary be proved.<sup>3</sup>

(i) The first question—what the law will regard as such total insanity as will exempt from all liability—is, as Hale says, a question of fact. But on the question how this question of fact shall be answered the law has given very different answers at different periods. Professor Kenny says,<sup>4</sup> "At one time a view prevailed that no lunatic ought to escape punishment unless he were so totally deprived of understanding and memory as to be as ignorant of what he was doing as a wild beast. But, ever since the epoch-making speech of Erskine in defence of Hadfield (in the year 1800),<sup>5</sup> a view at once more rational and humane has prevailed, which bases the test upon the presence or absence of the faculty of distinguishing right from wrong." Later, a still more precise test was evolved. Did the accused know the nature of the act which he was doing, and, if he did know it, did he know it was wrong? If so, and if the act was contrary to law, he is punishable.<sup>6</sup> This test was suggested in reference to persons suffering from insane delusions, i.e. the partially insane; but it obviously supplies a test for coming to a conclusion whether or not any person is wholly insane.

(ii) The second question—the treatment to be accorded to cases of partial insanity—is far more difficult. Hale is evidently at a loss how to deal with these cases. In cases of recurrent intervals of madness, indeed, there is no difficulty. If during these intervals the person affected is wholly mad, the rule as to

<sup>1</sup> As to this see vol. i. 474-475.

<sup>2</sup> Hale, P.C. i 33.

<sup>3</sup> Ibid.

<sup>4</sup> Op. cit. 53, citing *R. v. Arnold* (1724) 16 S.T. at p. 765, where Tracey, J., said, "it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or wild beast; therefore I must leave it to your consideration, whether the condition this man was in, as it is represented to you on one side, or the other, doth show a man who knew what he was doing, and was able to distinguish whether he was doing good or evil, and understood what he did."

<sup>5</sup> 27 S.T. 1282; Stephen H.C.L. ii 159.

<sup>6</sup> *M'Naghten's Case* (1847) 10 Cl. and Fin. at p. 210; as is there said, "the mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong: which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged"; as can be seen from the way in which Tracey, J., used this test in *R. v. Arnold*, above n. 4, the new test set out by the judges in *M'Naghten's case* is more favourable to the accused, and better calculated to give effect to the modern ideas as to the treatment to be accorded to the insane.

total insanity applies.<sup>1</sup> But if the accused is not wholly destitute of reason, he inclines to the view that such insanity will not excuse in the case of any capital crime—"for doubtless, most persons, that are felons of themselves, are under a degree of partial insanity, when they commit these offences." On the whole, he can only recommend that each case should be treated on its own merits, and concludes with the somewhat fatuous suggestion that, as such persons have generally as great understanding as a child of fourteen, they should be treated accordingly.<sup>2</sup> But, in spite of this, Hale's treatment of the subject is, as Stephen says, "marked by his ordinary shrewdness and judgment, and does recognize, though faintly and imperfectly, the main divisions of the subject";<sup>3</sup> and Blackstone<sup>4</sup> could add little to his statement.

No authoritative pronouncement on this subject was made till 1843; and then the test suggested was, as we have seen, whether the accused knew the nature of the act he was doing, and whether he knew that it was wrong. It followed from this that, if a person was labouring under a partial delusion, and was not in other respects insane, "he must be considered in the same situation as to responsibility as if the facts with respect to which the delusions exist were real."<sup>5</sup> Since 1843, however, the law has developed, because the discoveries of medical science have revealed more of the infinite complexities of the problem of insanity. Thus it is now recognized that, to the mind of a madman, there may be a connection between his delusion and his crime, which is not apparent to a sane person; and that account should be taken of the effect of insanity upon emotion and will power.<sup>6</sup> These considerations have led to a more merciful administration of the law, than a literal following of the rules laid down in 1843, would justify. It is obvious that the development of this branch of the law must, to some extent, depend upon the development of medical science.

*Drunkenness.*—The rule laid down in the sixteenth century was short and clear—drunkenness was no excuse for crime, but rather an aggravation of the offence. "If a person that is drunk," it was said in 1551,<sup>7</sup> "kills another, this shall be felony, and he shall be hanged for it, and yet he did it through ignorance, for when he was drunk he had no understanding nor memory; but in as much as that ignorance was occasioned by his own act and folly, and he might have avoided it, he shall not be privileged thereby"; and Coke,<sup>8</sup> Hawkins<sup>9</sup> and Blackstone<sup>10</sup> lay down the law in the same way. Hale, however, allows two modifications of

<sup>1</sup> Hale, P.C. i 30-31.

<sup>2</sup> H.C.L. ii 150-151.

<sup>3</sup> M'Naghten's Case (1843) 10 Cl. and Fin. at pp. 209-211.

<sup>4</sup> Kenny, op. cit. 55-56.

<sup>5</sup> Beverley's Case (1603) 4 Co. Rep. at f. 125a; Co. Litt. 247a.

<sup>6</sup> P.C. Bk. i cap. i § 6.

<sup>7</sup> Ibid 30.

<sup>8</sup> Comm. iv 24-25.

<sup>9</sup> Reniger v. Fogossa, Plowden at p. 19.

<sup>10</sup> Comm. iv 25-26.

this rule. Firstly, if the intoxication was not caused by his own fault, as where it was caused by "the unskilfulness of his physician or by the contrivance of his enemies"; and, secondly, if by habitual drunkenness "an habitual or fixed phrensy be caused."<sup>1</sup> In the first case it would seem that, if the effect of the intoxication was such that a temporary or a permanent insanity were caused, the person so affected was to be treated as if he were insane. But there seem to be no cases of this kind in the books; and, as we shall see immediately, the development of the law as to the effect of drunkenness on criminal liability has removed the necessity for this exception. Probably at the present day drunkenness, whether caused by the accused's own fault or not, will have the same effect on his liability for a crime committed while in that state. At most the fact that the drunkenness was not caused by his own fault, would, if did not excuse from liability, be a ground for a mitigation of punishment. In the second case the accused is, as Hale says,<sup>2</sup> treated as insane. But at the present day this treatment is accorded, both in the case where the insanity is "fixed and habitual," and where it is merely temporary. "Drunkenness," said Stephen, J.,<sup>3</sup> "is one thing, and the diseases to which drunkenness leads are different things; and if a man by drunkenness brings on a state of disease which causes such a degree of madness even for a time, as would have relieved him from responsibility, if it had been caused in any other way, then he would not be criminally responsible."

It is in respect of the effect of drunkenness, which does not fall under either of these two heads, that the law in the nineteenth century has departed from the older rule.<sup>4</sup> If drunkenness does not amount to insanity, the drunkard can, unlike the madman,<sup>5</sup> be tried and convicted.<sup>6</sup> But, under the influence probably of the contemporary modifications which were taking place in the law as to insanity,<sup>7</sup> the judges began to think that drunkenness should be allowed to modify or negative criminal liability in certain cases. But exactly what these conditions were, and how in principle they should operate, was for some time not very clear. There are some loose dicta in the earlier cases;<sup>8</sup> but in the middle and the latter

<sup>1</sup> P.C. i 32.

<sup>2</sup> Ibid.

<sup>3</sup> R. v. Davis (1881) 14 Cox C.C. at p. 564.

<sup>4</sup> "The law stood as thus expressed for many years, and, as far as we know, the point was first decided in a contrary sense in *R. v. Grindley* decided in the year 1819," *R. v. Meade* [1909] 1 K.B. at p. 898.

<sup>5</sup> Above 439.

<sup>6</sup> See *Director of Public Prosecutions v. Beard* [1920] A.C. 479.

<sup>7</sup> Above 440-441.

<sup>8</sup> Thus in *R. v. Grindley*, 1 Russell, Crimes (7th ed.) i 88 n. b. Holroyd, J., said that the fact that party was drunk, was a material fact to be considered in coming to a conclusion whether or not an act was premeditated; but this was repudiated by Park, J., in *R. v. Carroll* (1835) 7 C. and P. at p. 147, who said that Holroyd, J., had retracted

half of the nineteenth century, it was coming to be thought that, "where intent is of the essence of a crime with which a person is charged, that intent may be disproved by showing that at the time of the act charged, the prisoner was in a state of drunkenness, in which state he was incapable of forming the intent."<sup>1</sup> But in 1909, in *R. v. Meade*, the rule was laid down more broadly. It was said that the presumption that a man intends the natural consequences of his acts, may be rebutted by showing that his mind was "so affected by the drink he had taken, that he was incapable of knowing that what he was doing was dangerous, i.e. likely to inflict serious injury."<sup>2</sup> But in 1920, in the case of the *Director of Public Prosecutions v. Beard*,<sup>3</sup> the House of Lords put the law on a clear and logical footing, by holding that, in as much as a *mens rea* of one sort or another is, with very few exceptions,<sup>4</sup> a necessary constituent of all crimes, the true rule is that, if the drunkenness has produced in a person accused of a crime, an incapacity to form the particular intent necessary for the commission of that crime, he cannot be convicted;<sup>5</sup> and that it is only in these circumstances that drunkenness, not amounting to insanity, is a defence.<sup>6</sup>

Let us now turn to certain defences which rest ultimately on the fact that, in the circumstances, no *mens rea* is imputable. These defences are coercion, compulsion, and necessity.

*Coercion*.—This, as Hale points out,<sup>7</sup> is not usually a defence. The doctrine of ministerial responsibility had, when Hale wrote, been well established, and prevented the royal command from being an excuse for the commission of crime.<sup>8</sup> It was also clear that neither the command of a parent to his child, nor of a master to his servant, was any defence.<sup>9</sup> The only relationship which could give rise to this defence was that of husband and wife. We have seen that, during the mediæval period, it was recognized that, if a married woman committed certain crimes under the coercion of her husband, she escaped from liability.<sup>10</sup> This rule was

his opinion; in *R. v. Monkhouse* (1849) 4 Cox C.C. at p. 56 Coleridge, J., ruled that drunkenness might be a defence, "if such as to prevent his restraining himself from committing the act in question"; cp. *Director of Public Prosecutions v. Beard* [1920] A.C. at p. 495.

<sup>1</sup> *R. v. Meade* [1909] 1 K.B. at p. 898.

<sup>2</sup> At p. 898.

<sup>3</sup> [1920] A.C. 479.

<sup>4</sup> Vol. iii 374.

<sup>5</sup> "The difficulty has arisen, largely because the Court of Criminal Appeal used language which has been construed as suggesting that the test of the condition of mind of the prisoner is, not whether he was incapable of forming the intent, but whether he was incapable of foreseeing or measuring the consequences of the act," [1920] A.C. at pp. 503-504.

<sup>6</sup> It is said, Kenny, op. cit. 61, that it "may produce such a mistake of fact as will in itself excuse an otherwise unlawful act"; *sed quare* whether a mistake so produced, unless it negatives the necessary intent, can or should have any effect on the drunken man's liability.

<sup>7</sup> Hale P.C. i c. vii.

<sup>8</sup> *Ibid* 43-44; vol. vi 101-103, 267.

<sup>9</sup> Hale, P.C. i 44.

<sup>10</sup> Vol. iii 530-531.

extended during the latter part of the seventeenth century. As thus extended, it runs as follows:—Whenever any one of a certain limited number of crimes is committed by the wife in the presence of her husband, she is presumed to have committed it under the coercion of her husband, and for that reason escapes liability.<sup>1</sup> Hale's<sup>2</sup> opinion was that the reason for thus extending the law, and allowing coercion to be presumed from the mere presence of the husband, was probably "because the judges wished to give to married women some sort of rough equivalent for the benefit of clergy enjoyed by their husbands."<sup>3</sup> But the limits of the rule are uncertain. It does not apply to treason or murder,<sup>4</sup> nor to misdemeanours specially connected with the management of the house;<sup>5</sup> and it can be rebutted by proof that the wife was the active partner in the crime.<sup>6</sup> Moreover, taken in connection with the non-admissibility of this defence in other cases, it may, as Stephen points out, produce obviously unjust results. If a husband, wife, and their child of fifteen commit larceny, though it be proved that the child acted under threats by the father, and that no threats were offered to the wife, the child will be convicted, and the wife will escape.<sup>7</sup>

*Compulsion.*—Hale lays it down that "in times of war and public rebellion, when a person is under so great a power, that he cannot resist or avoid, the law in some cases allows an impunity for parties compelled, or drawn by fear of death, to do some acts in themselves capital, which admit no excuse in the time of peace."<sup>8</sup> The defence, therefore, is not available in time of peace. There are apparently only two cases in which Hale's principle has ever been put forward as a defence.<sup>9</sup> The result is that the law

<sup>1</sup> Stephen, *Digest of the Criminal Law* *Art.* 30; Kenny, *op. cit.* 71-72; it is fairly clear from the authorities which are collected by Stephen, *op. cit.* 332-336, that the rule, in its modern form, is not much older than Hale; Hale, *P.C.* i 45-46, admits that there is authority against this form of it, and states it only as "the modern practice and fittest to be followed"; it is probable that Bacon had something to do with the establishment of the practice; he says in his *Maxims* (*Works* Ed. Spedding vii 344) "where baron and feme commit a felony, the feme can neither be principal nor accessory; because the law intends her to have no will, in regard of the subjection and obedience she owes her husband"; but this, as Stephen says, "goes infinitely beyond his authorities."

<sup>2</sup> "Otherwise for the same felony the husband may be saved by the benefit of clergy, and the wife hanged," *P.C.* i 45-46.

<sup>3</sup> Stephen, *H.C.L.* ii 106; it was only a rough equivalent, for, as Hale says, *P.C.* i 46, "in manslaughter committed jointly by husband and wife the husband may have his clergy, and yet the wife is not on that account to be privileged by her coverture."

<sup>4</sup> Hale, *P.C.* i 45.

<sup>5</sup> "A wife may be indicted together with her husband, and condemned to the pillory with him for keeping a bawdy house; for this is an offence as to the government of the house, in which the wife has a principal share," Hawkins, *P.C.* Bk. i Cap. i § 12.

<sup>6</sup> *R. v. Cruse* (1838) 8 C. and P. 541.

<sup>7</sup> *H.C.L.* ii 106. <sup>8</sup> *P.C.* i 49; vol. iii 372.

<sup>9</sup> *R. v. M<sup>c</sup>Growther* (1746) *Foster*, *Crown Law* 13; *R. v. Crutchley* (1831) 5 C. and P. 133; Stephen, *H.C.L.* ii 106.



relating to it is, as Professor Kenny says,<sup>1</sup> "both meagre and vague."

*Necessity.*—That certain kinds of public necessity will excuse what would otherwise be a breach of the law, has long been a recognized principle. Some illustrations of this principle have been worked out into elaborate rules—the rules, for instance, as to the measures which may be taken in self-defence,<sup>2</sup> or to arrest criminals,<sup>3</sup> and the rules which are summed up under the misnomer martial law.<sup>4</sup> Lord Mansfield once suggested that an extraordinary case might arise, in which imminent danger might excuse the deposition of a colonial governor by his council;<sup>5</sup> and his statement was approved by the court in *R. v. Dudley*.<sup>6</sup> But naturally the limits of this principle are and must be vague; and cases like that suggested by Lord Mansfield, will probably be decided upon political, rather than upon strictly legal, considerations. In cases which turn upon private rather than on public necessity the law has always been very reluctant to admit this defence. There are one or two dicta in the sixteenth century pointing to its admission in certain cases;<sup>7</sup> but it is now settled that no private necessity is, as a general rule, allowed as an excuse for the commission of a crime against some third person. A man who is assaulted and in peril of death, has no right to kill an innocent third person in order to effect his escape;<sup>8</sup> and a man who is in dire necessity for clothes or food or drink, has no right to steal to satisfy his needs.<sup>9</sup> It is just possible to imagine exceptions to this general rule—but no case so far has occurred in which the validity of such an exception had been admitted.<sup>10</sup> As Stephen says,<sup>11</sup> "these cases cannot be defined beforehand, and must be adjudicated upon by a jury afterwards, the jury not being themselves under the pressure of the motives which influenced the alleged offenders."

<sup>1</sup> Op. cit. 73.

<sup>2</sup> Vol. iii 312-314, 377-378, 598-604.

<sup>3</sup> Vol. i 578; vol. vi 52-54.

<sup>4</sup> *R. v. Stratton* (1779) 21 S.T. at p. 1224.

<sup>5</sup> (1884) 14 Q.B.D. at p. 285.

<sup>6</sup> "If a man steal viands to satisfy his present hunger, this is no felony nor larceny," Bacon, *Maxims, Works* (Ed. Spedding) vii 343; for which there is some authority in the argument of *Reniger v. Fogossa*, Plowden at p. 19.

<sup>7</sup> "If a man be desperately assaulted and in peril of death, and cannot otherwise escape, unless to satisfy his assailants' fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact: for he ought rather to die himself than kill an innocent," Hale, P.C. i 51; *R. v. Dudley* (1884) 14 Q.B.D. 273. This rule is not inconsistent with Bacon's dictum, *Works* vii 344, that, if a shipwrecked sailor on a plank thrust another off to save himself from drowning, he commits no crime; he does no bodily harm to the other, and what he does is in self-defence; see Kenny, op. cit. 76 n.

<sup>8</sup> Hale, P.C. i 54-55; Bl. Comm. iv 31-32; as Blackstone points out, the poor law makes such a permission quite unnecessary.

<sup>9</sup> See Kenny, op. cit. 76 n.

<sup>10</sup> H.C.L. ii 109-110.

In these various ways the law, starting from the idea that a *mens rea* or element of moral guilt is a necessary foundation of criminal liability, has so defined and elaborated that idea in reference to various sorts of crimes, that it has come to connote very many different shades of guilt in different connections. But, though *mens rea* has thus come to be a very technical conception with different technical meanings in different contexts, it has never wholly lost its natural meaning; and, because its natural meaning has never been wholly lost sight of, the necessity for its presence, in some form, has supplied the principle upon which many of the circumstances, which will negative criminal liability, are based. These, in their turn, have been so developed that they have become the foundation of different bodies of technical doctrine; and in these ways a large part of our modern criminal law has been developed. We shall now see that the very different developments which have taken place in the rules of civil liability, have likewise created no inconsiderable part of our modern law of tort.

#### *Civil Liability*

During the mediæval period the principle which underlay the law as to civil liability can be stated somewhat as follows:<sup>1</sup> A man is liable for all the harm which he has inflicted upon another by his acts, if what he has done comes within some one of the forms of action provided by the law, whether that harm has been inflicted intentionally, negligently, or accidentally. A man acts at his peril. This absolute liability for damage caused by an act which comes within one of the forms of action, even though the damage is the result of pure accident, was restated by Bacon at the end of the sixteenth century;<sup>2</sup> and it was used by Hale in the seventeenth century to point the contrast between criminal and civil liability.<sup>3</sup> It was logically followed out (i) in respect to the defences open to a defendant, and (ii) in respect to a person's liability for the acts of his servants. (i) A defendant could escape from liability if he could prove that his act was, in the circumstances, permitted by the law, either in the public interest, or in the necessary defence of his person or rights of property; or that the act, which was the immediate cause of damage, was done, not by himself, but by the plaintiff; or that it was unavoidable by reason of an 'act of God.'<sup>4</sup> (ii) As a defendant was liable only for his acts, he could not as a rule be held liable for any tort committed by his servant, which he had not commanded or

<sup>1</sup> See vol. iii 375-377.

<sup>2</sup> Ibid 375.

<sup>3</sup> Ibid 376-377.

<sup>4</sup> Ibid 377-379, 380.