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A SKETCH OF THE CRIMINAL LAW.

THE criminal law[1] may be considered under two great heads, Procedure and the Definitions of Offences. In a systematic exposition of the law such as a penal code, the part which defines crimes and provides for their punishment naturally precedes the part which relates to procedure, inasmuch as the only purpose for which the latter exists is to give effect to the former; but in an historical account of the growth of a body of law as yet uncodified, an account of the law of procedure naturally precedes an account of the law of crimes and punishments, because the institutions by which the law is administered have been as a matter of fact, and in the earlier stages of legal history must be in most cases, the organs by which the law itself is gradually produced. Courts of justice are established for the punishment of thieves and murderers long before any approach has been made to a careful definition of the words 'theft' and 'murder,' and indeed long before the need for such a definition is felt. For these reasons I begin this sketch of the criminal law by giving some account of the English courts of criminal jurisdiction. I then pass to the procedure observed in them, and thence to the definitions of crimes with which they have to deal.

The ordinary criminal courts in England are:—

(1.) The Queen's Bench Division of the High Court of Justice.

(2.) The Assize Courts.

(3.) The Central Criminal Court.

(4.) The Courts of Quarter Sessions.

Each of these courts has its own history. The administration of justice in England came, by steps which I need not try to trace, to be regarded as one of the great prerogatives of the king—perhaps as his greatest and most characteristic prerogative; and one of the most striking effects of the Norman Conquest was the degree to which it strengthened this prerogative and centralised the administration of justice. The prerogative was exercised in very early times through

[1] I have not referred to authorities, as they would have been of little interest to general readers. I hope, however, to treat the whole matter at length, and with full reference to authorities, in a work on which I have been engaged for many years, and which I hope will shortly appear, on the History of the Criminal Law. This articl may be regarded as an abridgment of parts of it.

the Curia Regis, from which in course of time were derived the King's Courts of Justice, the two Houses of Parliament, the Privy Council, and the different offices of State. The head officer of the Curia Regis was called the 'Capitalis Justiciarius Angliæ,' and his office was of such dignity that in the king's absence on the continent he acted as viceroy. The court also contained, amongst other officers, an indefinite number of 'justitiarii' who performed judicial and administrative duties when and where they were directed to do so by special writs or commissions.

The steps by which Parliament on the one hand, and the Privy Council and other executive offices on the other, came to be separated from the King's Court and to have an independent existence, need not here be noticed. The courts of justice were derived from it as follows: The life of the kings of England in early times can be described only as an incessant journey. King John, for instance (of whose movements an ephemeris founded upon official documents still in existence has been published), seems for years never to have lived for a week at a time at any one place. The king's officers, and amongst others his judges, travelled with him, and the unfortunate suitors had to follow as best they could. Evidence still exists of the intolerable hardships which this state of things produced. One of the articles of Magna Charta was intended to remedy them. It runs, 'Communia placita non sequantur curiam nostram, sed teneantur aliquo loco certo.' This was the origin of the great civil court, the Court of Common Pleas, which from that time forward was separated from the Curia Regis and was held as a separate fixed court of justice 'certo loco,' namely in Westminster Hall. The Court of Exchequer, which was originally a court for revenue business only, also became stationary about the same time—probably indeed it was always held at the place where the treasure was kept; but the legal business of the King's Court, not done in either of these courts, still continued for a time to follow the person of the king. By degrees, however, the old King's Court changed into the Court of King's Bench, which in its origin was the supreme criminal court of the realm, and had also jurisdiction over many matters connected with the royal prerogative, which in our days would not be regarded as forming part of the criminal law. As time went on it acquired or usurped civil as well as criminal jurisdiction, but from the very earliest times down to the year 1875 its position as the great criminal court of the realm remained unaltered. In that year all the superior courts of law were fused into the High Court of Justice, which may thus be said to be a return, after an interval of about six centuries, to the Curia Regis.

Though it is the supreme criminal court of the realm, the High Court of Justice rarely tries criminal cases in the Queen's Bench Division. It does so only when the matter to be decided seems likely to raise questions which possess some special interest, legal, political,

or personal. Little indeed is to be gained by such a trial, as such cases would otherwise be tried before the same judges and in precisely the same way in other courts. There are, however, some incidents peculiar to a trial before the Queen's Bench Division, one of which is that, if the charge is one of misdemeanour, an application for a new trial on the part of the defendant will be entertained. There is no court of appeal properly so called in criminal cases in this country; but informalities in the procedure may give occasion to a writ of error which may be taken up to the House of Lords, and questions of law arising on any trial may be brought before the Court for Crown Cases Reserved.

The great bulk of the more important criminal business of the country is done before the assize courts, the technical description of which is Courts of Commissioners of Oyer and Terminer and General Gaol Delivery, or the Central Criminal Court. The Assize Courts are of the highest antiquity. As I have already said, the Curia Regis contained an unascertained number of 'justitiarii' who used to be sent as commissioners to different parts of the country to perform judicial and other duties as occasion required. They were called from this circumstance 'justices in eyre' (*in itinere*), and, according to the terms of their commission, they tried either particular cases or all civil or all criminal cases (both or either) in a given area. In many instances, and for a considerable length of time, they investigated and superintended the whole internal administration of the country, and more particularly everything which affected either proximately or remotely any one of the infinitely varied rights of the king, especially those which affected his revenue.

By degrees, however, these fiscal and miscellaneous duties came to be performed by other means, and the duties of the justices of assize were confined to the local administration of civil and criminal justice. For this purpose the whole of England was in the time of Henry the Second, twelfth century, divided into six circuits, which have existed with singularly little variation down to our own time. The Central Criminal Court which sits every month for London and the neighbourhood was established in the year 1834. Before that time, for many centuries, the Lord Mayor and aldermen and the Recorder of the City of London had by charter the right of being upon all commissions of oyer and terminer and gaol delivery for the city of London and the county of Middlesex.

Criminal cases of minor importance are tried by the courts of quarter sessions, held four times a year (whence their name) by the justices of the peace of every county, and of such of the larger towns corporate as have, by their charters, courts of quarter sessions. These courts were first established in the fourteenth century in the reign of Edward the Third. For some centuries they could and did try all offences except high treason; and down to the end of the

sixteenth century, if not down to the civil wars in the middle of the seventeenth century, they used continually to pass sentence of death. In a single year in the reign of Queen Elizabeth no less than thirty-nine persons were hanged under the sentences of the Devonshire court of quarter sessions. After this, their powers were by degrees diminished in practice though not in theory, and throughout the eighteenth and during the early part of the nineteenth centuries (when nearly all crimes were nominally capital) the courts of quarter sessions were practically restricted to the trial of cases of trifling importance. When capital punishments were abolished in nearly every case except high treason and murder, the jurisdiction of these courts was considerably extended, and they can now try all offences except those for which the criminal can on a first conviction be sentenced to death or penal servitude for life, and some other specified offences (such, for instance, as libels) in which legal or constitutional questions of importance are likely to be involved.

The justices of the peace for the county are the judges of these courts, the chairman being only *primus inter pares*, and having no special authority. Two justices at least must be present to make a court. In boroughs, the Recorder who is appointed by the Crown is the judge. He is paid a salary by the corporation out of the property or rates of the town.

These are the ordinary English criminal courts. Besides them, there are others which are called into activity only on rare occasions. The House of Lords is a court of criminal jurisdiction, to which the House of Commons is the grand jury. The House of Commons can impeach any peer of any crime whatever, and it can accuse any commoner of any misdemeanour before the House of Lords. Impeachments are now extremely rare. Two instances only have occurred within the last century; namely, the impeachment in 1785 of Warren Hastings, and the impeachment in 1806 of Lord Melville. The control exercised by Parliament over public servants of all ranks is now so complete and efficient, that it would be difficult for any one to commit the sort of crimes for which people were formerly impeached. The proceeding at best is a very clumsy one. The impeachment of Warren Hastings lasted for more than seven years, though the number of days during which the court sat was not so great as the number of days in which the Court of Queen's Bench sat in the trial of the impostor Orton for perjury in 1873-4.

The House of Lords has also a personal jurisdiction in all cases of treason and felony over peers of the realm. If a peer is accused of committing felony, the procedure against him up to the time when the indictment is found is the same as in the case of any other subject. When he is indicted, the indictment is sent, if Parliament is sitting, before the House of Lords; if Parliament is not sitting, before a court composed of a certain number of peers presided

over by the Lord High Steward, who is appointed for the purpose, whence the court is called the Court of the Lord High Steward.

These courts are rather antiquarian curiosities than anything else. Since the accession of George the Third in 1760, there have been only three trials before the House of Lords sitting in this capacity; namely, the trial of Lord Byron (the poet's grand-uncle) in 1765, for killing Mr. Chaworth in an irregular duel; the trial of the Duchess of Kingston for bigamy in 1776; and the trial of Lord Cardigan in 1841 for wounding Mr. Tuckett in a duel.

These are all the courts ordinary and extraordinary which at present exercise criminal jurisdiction of any importance in England, but great historical and legal interest attaches to the criminal jurisdiction of the Privy Council. The criminal law of England in early times was vague and meagre, and the system by which it was administered (trial by jury) was open to every sort of corrupt influence. Indeed, the local power of the aristocracy during the fourteenth and fifteenth centuries was so great that trial by jury was in many cases a farce. There are many curious proofs of this in the Parliament Rolls and elsewhere. Under these circumstances the Lord Chancellor exercised in civil cases, and the Privy Council in criminal cases, powers which Lord Bacon compared to the powers of the prætors and censors in ancient Rome. The intervention of the Lord Chancellor in civil cases was accepted by the public, struck deep roots in English law, and introduced by degrees the system of jurisprudence which we call 'Equity,' and which has done much to correct the faults and to fill up the deficiencies of the common law. The Privy Council (sitting under the title of the Court of Star Chamber) tried to do the same with regard to the criminal law, and I have little doubt that if it had exercised its powers discreetly and fairly, it would have succeeded in doing so. It rendered, in fact, considerable services by punishing persons whose local influence enabled them to intimidate juries and so to set the ordinary courts at defiance, and by punishing a variety of offences which for different reasons were not regarded as crimes by the common law. Perjury by a witness, for instance, was not a criminal offence till it was treated as such by the Star Chamber.

Whatever may have been its merits, however, there can be no doubt that under James the First and Charles the First the Court of Star Chamber became oppressive in the highest degree, attempting by cruel and arbitrary punishments to put down the expression of all opinions unwelcome to the then Government. This brought about its abolition, which was effected by one of the first Acts of the Long Parliament in the year 1640. After the Restoration the Court of King's Bench took upon itself some of the functions of the Star Chamber, and in particular recognised and acted upon most of the additions which it had tacitly made to the original criminal law.

A remnant of the criminal jurisdiction of the Privy Council survived the destruction of the Court of Star Chamber, and still exists. In all cases arising in India or the colonies, an appeal lies from all courts of justice civil or criminal to the Queen, and such appeals are heard by the Judicial Committee of the Privy Council. Such appeals are hardly ever permitted in criminal cases; but sometimes a legal question of peculiar difficulty and novelty may arise which it is desirable to decide upon the highest authority, and in such cases the Judicial Committee of the Privy Council is the body before which it is heard. The Committee is not, strictly speaking, a court. It is a body of advisers by whose opinion Her Majesty is guided in the orders which she gives.

Such are the English courts of criminal justice. I will now say something of the procedure observed in them. The first step in criminal procedure is to secure the appearance of the person accused; the next, to examine and prepare the evidence against him. It would be of little interest to enter into detail upon the manner in which these operations are performed, and it would take more time and space than I can at present afford to relate their history, which is curious. I may, however, make one remark.

Preliminary proceedings before a justice of the peace are practically all but universal in English prosecutions, but theoretically they are not necessary. According to the theory of an English trial, the prisoner is accused not by the magistrate who commits him, but by the grand jury, and a prosecutor may still, if he chooses, prefer an accusation before a grand jury without giving notice to the accused person, and so as to prevent him from having any knowledge of the nature of the case against him till he is brought into court to take his trial. This course is so oppressive and so objectionable on public grounds that it is seldom taken, but it is still legally possible. The fact that it exists can be understood only by reference to the history of the English modes of accusation and trial, which is shortly as follows:—

At present there is in England only one mode of trying criminal cases of any importance, namely, that by jury. There are some few cases in which justices of the peace sitting without a jury may sentence offenders to as much as six months' imprisonment and hard labour, and there are one or two cases in which they may imprison offenders for a year; but these are exceptional.

Trial by jury is the survivor of several modes of trial which were in use at and for a considerable time after the Norman Conquest. Its history, though still obscure in detail, is now, as far as its main points go, well ascertained, and it is as follows: The early modes of trial depended on the early modes of accusation, which were two; namely, accusation by a private person, and accusation by public report.

Accusations by private persons were, I am inclined to think, the commonest mode of prosecution in early times. Such accusations were called 'Appeals,' a word which in this connection means simply accusation and not recourse from an inferior to a superior tribunal.

The nature of an appeal was as follows: The injured person was bound to use every effort to have the criminal arrested by raising the country, which was bound to pursue him 'with hue and cry.' If he could not be taken otherwise, his name was proclaimed, and he was called upon to appear at five successive county courts, and if he did not appear he was outlawed; the effect of which was in very early times that he might be put to death in a summary way, and afterwards that he was taken to be convicted. In the meantime the complainant had to register his complaint before the coroner, who was in ancient times something like a modern justice of the peace. If the person accused appeared, various proceedings took place, which ended at last, if the parties could not otherwise settle the matter, in trial by combat, which, however, was not permitted if the guilt of the accused person was considered to be so clearly proved as to be undeniable. Appeals had a long and curious history which I cannot now relate. They applied at first to many offences, but were at last restricted to cases of homicide in which the heir of the murdered person had a right, even after the person accused had been acquitted by a jury, to 'appeal' or accuse him. This strange procedure, though used but seldom, nevertheless continued to exist till the year 1819, when upon an appeal of murder the Court of King's Bench actually awarded trial by combat, which was not carried out only because the accuser was no match physically for the accused and refused to go on with his appeal as soon as the court held that the accused had a right, as it was called, 'to wage his body.' This case was the occasion of an Act of Parliament by which appeals were abolished.

As time went on, accusation by public report superseded appeals. This system of accusation was carried out by a body of persons who acted as public accusers, and who were the predecessors of the modern grand jury. The system worked thus: England was divided into counties, hundreds, and townships, each township being represented on all public occasions by the reeve, the predecessor of the parish constable, and four men. When the king sent his justices into any county on one of the eyres or circuits already mentioned, they were met by the sheriff, the coroners, the high bailiffs of the hundreds, and the reeves and four men from the townships. The principal persons of the county having been in some unascertained way chosen from this numerous body, they made a report to the justices of the persons within the county whom they suspected of any offence; these persons were arrested forthwith if they were not already in custody, and were at once sent to the ordeal (*urtheil*) whether of fire or of water. The ordeal of fire consisted in handling red-hot iron of a

certain weight, or walking over red-hot ploughshares placed at different intervals. The ordeal of water—which, strange to say, seems to have been more dreaded—consisted in being thrown into the water, when sinking was the sign of innocence, and swimming the sign of guilt. How any one without fraud escaped the one ordeal or was condemned by the other it is difficult to understand. I have sometimes thought that the water ordeal may have been like the Japanese happy despatch. If the accused sank, he died honourably by drowning. If he swam, he was either put to death or blinded and mutilated; but this is a mere guess. Many records still remain which end with the ominous words *eat ad juisam aquæ*, or *purget se per ignem*. If the accused person escaped from the ordeal, he was nevertheless banished. It was obviously considered that though it might have pleased God to work a miracle to save him from punishment, the bad report made of him by the local authorities was quite enough to show that he was a dangerous character who must leave the country.

Early in the thirteenth century ordeals fell into disuse, probably in consequence of their condemnation by the Lateran Council held in 1215. The result of this was that the report of the grand jury became equivalent to a conviction, or would have been so if means had not been found to avoid a result which even in that age was seen to be monstrous. The method adopted was apparently the introduction into criminal trials of a practice which had already been introduced in civil actions under the name of the Grand Assize.[2] This was the summoning of twelve persons from the place where the dispute arose who were to swear to their knowledge of the matter. The persons so summoned were called an assize, and afterwards a jury, and elaborate precautions were taken for securing the attendance of persons acquainted with the subject. When twelve persons were found willing to swear one way or the other, their oath was decisive. Even before ordeals were abolished a person accused by a grand jury was allowed as a special favour to purchase of the king the right of having a body of this kind (which in such cases was called an 'inquest') to 'pass upon him.' When ordeals were abolished, juries, or inquests, instead of being an exceptional favour purchased in particular cases, came into general use. The first jurymen were thus official witnesses, and not, as their successors are and have been for centuries, judges as to the truth of the evidence given by witnesses.

There is no more obscure question in the whole history of English law than the question how and when jurymen ceased to be witnesses and became judges. They were undoubtedly witnesses in the thirteenth century, and undoubtedly judges of the testimony given by others in the middle of the sixteenth century, and it seems probable

[2] The word 'assize' is used in a variety of senses in old English law. It means—1, a law; 2, a jury; 3, the sitting of a court.

that in the latter half of the fifteenth century they were judges in civil cases, but not to the same extent in criminal cases. Many curious traces of their original character remained long after the change had taken place. Thus for instance, as I have already observed, perjury by a witness was no crime in England till the seventeenth century; but perjury by a juryman, *i.e.* a wilfully false verdict given by a juryman, was theoretically punishable in some cases by a process called an attaint, which in practice was never put in force. The reason why the witness was not punished was that according to the theory described his appearance at the trial was accidental. The juror was the only witness whom the law recognised as such. The reason why the juror was not actually punished, though he was in theory liable to punishment, was that as time went on every one knew that whatever the theory of the law might be he was in fact dependent on witnesses and was not himself a witness, so that if his verdict was wrong it was impossible to say that it was not mistaken.

However this may have been, trial by jury in the modern sense of the word was fully established in England in the sixteenth century. From that time to this we have full reports of nearly all the most remarkable trials which have taken place in England, and it is possible to trace the gradual growth of the present system by comparing together the trials which took place at different times.

The result of such a comparison is to show that criminal trials in England have gone through several distinct phases. Down to the civil wars of the seventeenth century, the prisoner was interrogated as closely as a prisoner is in France at the present day; and though torture was never legalised in England, it was to a considerable extent in use under Queen Elizabeth, being employed principally in the case of persons accused of conspiring against her life.

The preliminary procedure was secret to a much later date. Indeed, though in practice it became public in the course of the eighteenth century, it was not till the year 1848 that a right was conferred by Act of Parliament on the accused to be present at the preliminary examination of the witnesses. A right to have copies of the depositions made by them was given in 1836.

In the second half of the seventeenth century, and especially towards the close of it, the procedure was not unlike that of our own day; but the furious passions of the times, and the corruption and partisanship of some of the judges, exhibited all its weak points in a terribly strong light. Some of its defects, and in particular the temptation to the judges to be corrupt, were removed at or soon after the Revolution, and in the course of the eighteenth century the general management of a criminal trial was closely assimilated to the course of a civil action. The present method of procedure may be considered as having been fully established with not more than one important exception by the beginning of the reign of George

the Third (1760). It is so well known that it is unnecessary in this place to give any account of it.

I must content myself with a very cursory glance at some other curious features in English criminal procedure. The whole subject of legal punishments as inflicted in England is full of curiosity. All common offences—murder and manslaughter, rape, robbery, arson, coining, and theft to the value of a shilling or upwards—were by the law of England punished by death from the early part of the thirteenth century to the year 1827. This, however, was qualified by a singular institution called benefit of clergy, by which first the clergy, then every man who could read, unless he was *bigamus*—*i.e.* unless he had been twice married, or unless he had married a widow (but no woman except till the Reformation—a nun); then all people, men whether *bigami* or not, or women who could read; then all people, whether they could read or not, were excepted for their first offence in nearly all cases, not only from the punishment of death, but from almost all punishment for nearly every offence, for, at common law, only high treason and perhaps arson and high-way robbery were excepted from the benefit of clergy. Side by side with the process by which benefit of clergy was extended to all persons, a parallel process went on by which large numbers of crimes were excluded from it, by being made, as the phrase was, 'felonies without benefit of clergy.' For instance, every one as time went on became entitled to benefit of clergy in cases of theft, but it was provided by successive Acts of Parliament that the theft of horses, sheep, and other cattle, stealing to the value of five shillings in a shop, and stealing from the person to the value of one shilling or upwards, should be 'felony without benefit of clergy.' This made the law terribly severe in appearance; but in practice it was seldom carried out, the judges being authorised to commute the sentences which they were obliged to pass—a power which they exercised very freely.

Between the years 1827 and 1861 capital punishment was abolished in all but four cases—treason, murder, piracy with certain aggravations, and burning dockyards or arsenals. The discretion entrusted to the judges as to the amount of secondary punishment to be awarded was also carried so far that minimum punishments were abolished in every case but one, so that there are many crimes for which an English judge can sentence a man, either to penal servitude for life, or to a single day's imprisonment without hard labour, or to any intermediate punishment. English criminal law has thus in the course of a little more than fifty years passed from being by far the most severe system in the world, to being the most lenient as far as the amount of punishment is concerned.

The great leading peculiarity which distinguishes English criminal procedure from the criminal procedure of every other country,

is to be found in the extent to which the control of criminal proceedings is left in private hands. Every one has a right to prosecute any one for any crime of which he is suspected, and, what is even more remarkable, every one has almost identically the same facilities for doing so. The police can do hardly anything which any private person cannot do, and the law officers of the Crown, the Attorney and Solicitor General, have hardly any power in conducting the prosecution of a State criminal, which the youngest barrister has not in prosecuting a fraud which concerns no one but the person defrauded. The Attorney General can stop prosecutions; but he hardly ever does so, and he can personally accuse any person of having committed a misdemeanour without resorting to a grand jury; but this is not a matter of much practical importance, especially in the present day.

It is hardly an exaggeration to say that criminal prosecutions in England form a branch of litigation over which private persons have nearly as much authority as the parties in civil proceedings have over such proceedings. This was not the result of any intention on the part of any one whatever. It was caused by the working of the institutions already described. The grand jury at first were no doubt public accusers, and in early times the coroners and justices of the peace acted to some extent as public prosecutors; but as time went on the grand jury reported only such matters as were represented to them voluntarily by private persons, and the coroners and justices of the peace came to occupy the position of preliminary judges, who could be set in motion only by private complainants, and thus the whole system came to assume its present character.

I now pass to that part of the criminal law which consists of the definitions of crimes and the apportionment to them of punishments, and which would form the matter of a penal code, as the branch of law which I have already described would form the matter of a code of criminal procedure.

The first subject to be mentioned under this head is that of the conditions of criminal responsibility, or, as it may otherwise be called, matter of excuse. It consists of the exceptions to the general rule that every one is responsible for every crime which he may commit. The exceptions recognised by English law are age, to some extent insanity, to some extent compulsion, to some extent necessity, to some extent ignorance of fact as distinguished from ignorance of law. The effect of such a maxim as 'Non est reus nisi mens sit rea' is given by including terms relating to the state of the offender's mind in the definitions of a large number if not of most crimes. This is done by the use of such words as 'wilfully,' 'knowingly,' 'fraudulently,' 'negligently,' and above all 'maliciously,' which has much in common with the *dolus malus* of the Roman law.

There is a good deal of indistinctness in this branch of the English criminal law, the word 'malice' in particular being made to bear a great variety of meanings. Thus, for instance, murder is defined as 'unlawful killing with malice aforethought,' and manslaughter as 'unlawful killing without malice aforethought.' 'Malice aforethought' is here interpreted to mean any one of several states of mind, such as an intention to kill, an intention to do grievous bodily harm, an intention to resist a lawful apprehension, recklessness as to killing, &c. In order that the publication of a libel may be criminal it must be 'malicious.' This means that it must be done without certain specified circumstances which justify or excuse it. So, again, mischief to property is, as a rule, criminal if it is 'wilful and malicious.' These words seem to mean little more than 'intentional and unlawful and done without a claim of right.' In popular language malice means ill-will to another which it is discreditable to feel. Thus envy would be described as a form of malice, but no one would apply that term to honest indignation excited by a wicked action. In law the word is generally used in senses so unnatural that it would be well if it were altogether disused. It does not occur in the Criminal Code Bill of 1878, or in that of 1879.

The law as to insanity is somewhat vague, but this, I think, arises rather from the defective state of our knowledge as to the disease than from any other cause. The law as to compulsion is also in an unsatisfactory state, but the subject is one of singularly little practical importance.

Next come the definitions of crimes. The crimes known to the law of England, and I suppose to the laws of other countries, may be reduced to a very few leading classes, namely:—

(1.) Offences against public tranquillity.

(2.) The obstruction or corruption of public authority.

(3.) Offences against public morals.

(4.) Offences against the persons of individuals and rights annexed to their persons.

(5.) Offences against the property of individuals and rights connected with property.

The history of these branches of English law is shortly as follows: With regard to most of them a few general names have been in common use from the most remote antiquity. These were applied to common cases of crime long before any precise definitions had been found to be needful, and the offences so named are called 'offences at common law.' Such words as treason, homicide, murder, rape, robbery, theft, are instances. These words were defined by different writers on legal subjects, and as, occasion required, by the decisions of courts of justice, which in England from a very early time were in many instances carefully recorded. Some of our reports go back as far as the thirteenth century. In some instances also the legislature

defined expressions which were considered dangerously vague and wide. This, however, was done very seldom indeed; almost the only instance I can remember of an attempt by Parliament to define common law offences, is the famous Statute of Treason passed in 1352, and still in force. New offences, however, were from time to time created by Act of Parliament, and special forms of common law offences were subjected to special punishments. For instance, though Parliament has never defined theft, it has made special provisions for the punishment of different kinds of theft, such as the theft of wills, of letters in the post office, of articles of the value of 5*l.* in a dwelling-house, of thefts by clerks and servants of the property of their masters, and the like.

This part of the criminal law of England is thus composed of two elements, namely, common law definitions and various rules connected with them, and parliamentary enactments which assume, though they do not state, the common law definitions and rules. Moreover, both the common law and the statute law have been illustrated and explained by a great number of judicial decisions which, as far as they go, are as binding as if they were laws. To understand these decisions properly, and to apply their principles to new combinations of facts, are amongst the most important of the duties which lawyers have to discharge. The decisions are exceedingly numerous, though I think they are less numerous on this branch of our law than on others. The statutes relating to crime are of all ages, and each particular statute has its own special history. Nearly all of them have been enacted at least three times over. The general history of this part of the subject is in a few words as follows: The first writer on the criminal law, whose works are in any sense of authority at the present day, was Bracton—a judge who lived in the latter part of the thirteenth century, in the reign of Henry the Third. His book *De Legibus Anglie* is by far the most comprehensive work on the subject written for several centuries, and the third book of it, entitled 'De Coronâ,' is the source of much of our existing criminal law. His definitions of crimes are in several instances taken, though with not unimportant modifications, from the *Digest*. For instance, he thus defines theft, 'Furtum est secundum leges fraudulosa contrectatio rei alienæ invito illo domino cujus res illa fuerit.' This omits the words which extend the Roman law definition of theft to temporary appropriations. Bracton's book served as the foundation for other works of less note, as, for instance, Fleta, and, to a less extent, Brittan; but no writer of anything like equal note dealt with the subject between his time and the early part of the seventeenth century, 350 years afterwards. About that time Coke wrote his *Institutes of the Law of England*, the third of which is devoted to the subject of criminal law. Coke had great technical learning and a character of great force and audacity; but he had no power of arranging or generalising his

knowledge, and not only was his style pedantic, but his mind never rose above a very trivial kind of acuteness. His book, however, shows fairly, though in a most disorderly manner and with many inaccuracies, what the law was in his day.

Coke was followed at the distance of about half a century by Sir Matthew Hale, a much more considerable personage, though he was far less conspicuous in the political history of his time. His *History of the Pleas of the Crown* is far superior to the third Institute, and is, I think, entitled to the first place amongst books on English criminal law. It is full of learning, especially historical learning, and in several parts shows powers of a higher kind.

Both Coke and Hale show conclusively what a crude, imperfect, meagre system the criminal law of their time was, and how little it had been improved by legislation. What can be said of a system under which it was a capital crime to steal a shilling, and a mere misdemeanour punishable with fine and imprisonment to run a man through the body with a sword with intent to murder him?

Neither Coke nor Hale notices the fact that the common law dealt only with a small number of the grossest and commonest offences, such as homicide, theft, and rape; nor the further fact that a large addition to the law was made by the decisions of the Court of Star Chamber, which treated as criminal a number of actions (such as attempts to commit crimes, conspiracies to commit crimes, perjury, some kinds of forgery) for the punishment of which the common law, properly so called, made no provision. After the abolition of the Court of Star Chamber the offences which it had been in the habit of punishing were treated as being offences at common law, though most of them were unknown to the system properly so called.

Any defects which the criminal law in Hale's time may have had on the side of undue lenity, were effectually removed by the legislation of the eighteenth century, under which innumerable offences were made felony without benefit of clergy. The excessive severity of this legislation and the capricious character which it gave to the execution of the law, excited great attention. At the same time the efforts of many reformers, of whom Bentham was the best known as a writer and thinker, and Romilly as a politician, directed much attention to the form of the law itself. The result was that between the years 1827 and 1830 a great mass of the then existing statute law was repealed, and the substance of it was re-enacted in a less fragmentary shape, the punishments for the different offences being in most cases considerably mitigated. The commoner offences were by this means dealt with by four or five statutes, which consolidated in whole or in part probably many scores or hundreds of earlier Acts.

This was a considerable improvement, but it was merely a first step towards a complete criminal code. Efforts were made to have

such a measure prepared, and a commission was opened which made many reports upon the subject of the criminal law between 1833 and 1861. After great delay five Acts of Parliament were passed in the year 1861, relating respectively to theft and offences in the nature of theft, malicious mischief to property, forgery, offences relating to the coin, and offences relating to the persons of individuals. These five Acts constitute the nearest approach to a penal code now in existence in England. They are very useful as far as they go; but they are extremely imperfect, first, because they assume and are founded upon the unwritten common law definitions and rules relating to crimes; and, secondly, because they deal only with offences against the persons and property of individuals, and leave unnoticed the subject of criminal responsibility and the definitions of offences against public order, offences consisting in the corruption of public officers, and offences against public morals and convenience. In other words, they leave unnoticed nearly half the matters which ought to be disposed of by a criminal code, and they do not deal at all with the subject of procedure, the law as to which is principally unwritten. There have thus been three sets of criminal statutes; namely, first, the unconnected, scattered enactments passed before the reign of George the Fourth in order to fill up the gaps in the old common law; secondly, the Acts passed between 1827 and 1833, which re-enacted the first set in a shorter form; and, thirdly, the Acts passed in 1861, which repealed and re-enacted, with some additions and improvements, the Acts of George the Fourth, and extended them to Ireland. Some others have been passed which I need not notice here.

I will now make a few observations[3] on the most important and characteristic of the definitions of each of the classes of offences which I have mentioned.

In the first place, I may observe upon these crimes in general that they are all classed as being either treason, felony, or misdemeanour. Treason is sometimes said to be a kind of felony.

Felonies were originally crimes punishable with death and forfeiture of goods, though this definition is not rigorously exact. Petty larceny and mayhem, though felonies, were not capital crimes, and piracy, though capital, was not a felony. So misprision of treason was not a felony though it involved forfeiture. All other crimes were misdemeanours, the punishment for which at common law was fine, imprisonment, and whipping at the discretion of the court. The great alterations made in legal punishments have made this classification altogether unmeaning. Many misdemeanours are

[3] In my *Digest of the Criminal Law of England* (*Crimes and Punishments*), Macmillan, London, 1877, I have arranged the existing law in the form of a Final Code. All the crimes referred to in the text are defined in it besides many others which I pass over. The definitions will be found at the pages referred to in the footnotes.

now liable by statute to punishments as serious as most felonies, and forfeiture of property as a punishment for crime was abolished in the year 1870. There are still a few distinctions in the proceedings appropriate to felony and misdemeanour, but the classification has for many years become a mere source of embarrassment and intricacy.

Passing to the definitions of crimes I come first to crimes[4] against public tranquillity. The most important of these is high treason—an offence of which the definition has played an important part in English history. Bracton has not on this occasion copied the language of the *Digest*; but down to the reign of Edward the Third high treason was a term little if at all less vague than 'majestas,' and its definition in the year 1352 by statute was regarded as a highly important security against oppression. It defined treason as consisting of three main branches,[5] namely: (1) Compassing or imagining the death of the king and displaying such compassing and imagination by any open act. (2) Levying war against the king. (3) Adhering to the king's enemies. The first of these heads has been interpreted to mean forming an intention in the mind, which intention is displayed by any open act. There is some ground for the opinion that the 'imagining' mentioned in the Act (which was in Norman French) really meant attempting; but the other interpretation has always been received and acted upon. This Act has remained in force for upwards of five hundred years, and its meaning has been the subject of vehement controversy. It was for centuries regarded as the law under which all attempts to make by force revolutionary changes in the Government must be punished; but it is obvious that such changes might be made without any direct attempt upon the king's life, and also without 'levying war' against him in the plain sense of the words. Hence at different stormy periods in English history—for instance, in the reigns of Henry the Eighth, Elizabeth, and Charles the Second—other acts were made treason, as, for instance, denying the king's supremacy over the Church, maintaining particular theological doctrines, speaking words of a seditious character, and the like. These, however, were regarded as stretches of power, and the Act of Edward the Third was regarded with almost superstitious reverence as containing the true constitutional theory on the subject. As it was found in practice too narrow for the purposes to which it was from time to time sought to apply it, the judges on many occasions enlarged it by 'construction' or interpretation. It was held, for instance, that every one who tried to lay any restraint on the king for

[4] See my *Digest*, part ii. p. 32.

[5] There are some others of less importance which I omit. It is treason *e.g.* to kill the Lord Chancellor or a Judge of the High Court whilst discharging the duties of his office. When the statute of treasons was passed, murder was clergyable, and the object was, that a man who murdered a judge on the bench should be hanged even if he could read, and if his wife had not before her marriage been a widow.

the purpose of making him change his measures, or who attempted to depose him, must be taken to 'imagine his death,' because deposed kings are often put to death. In the same way it was held that any riot having for its object the effecting by force any public general object, as, for instance, the repeal of an obnoxious law, was high treason by levying of war. These judicial interpretations or constructions were naturally unpopular, and juries sometimes refused to give effect to them. During the reign of George the Third accordingly an Act of Parliament was passed which gave them statutory authority during his life, but the greater part of this Act expired on his death in 1820. In the present reign, during the excitement produced in England and Ireland in 1848 by the continental revolutions of that year, another Act was passed which left untouched the Act of Edward the Third and the constructions put upon it by the judges, but re-enacted in substance the Act of George the Third, declaring, however, as to the greater part of it, that offenders against it should be guilty of felony and liable to penal servitude for life or any less punishment. It was, however, expressly declared that this should not in any way affect the older law. High treason accordingly at present is defined by the law of England twice over; namely, first by the Act of Edward the Third, upon which the judges have put a variety of constructions and interpretations; and, secondly, by the Act of 1848, which embodies these constructions and interpretations, but punishes the offender with secondary instead of capital punishment. Some indeed of the constructions in question which relate to attacks on the king's person are still treason by statute.

There are a variety of other Acts against political offences, some of which are strange and even antiquated. The only one of interest enough to be mentioned in such a sketch as this is the offence of seditious libel.[6] The crime is nowhere defined on authority. Practically it may be described as being any writing upon a political subject adverse to the existing state of things, and such that the jury think the writer ought to be punished. In the latter part of the last century this branch of the law was the subject of a great controversy between judges and juries. The judges held that it was the duty of the jury to convict the accused if it was proved that he had written or published the matter said to be libellous, and that such parts of it as were not stated in express words, but by way of allusion, abbreviation, or the like, had the meaning ascribed to them in the indictment, and that it was the duty of the judge to say whether the matter so published was or was not a libel. Juries were continually told by the counsel for accused persons that it was their duty to determine the whole matter—the criminality or innocence of the alleged publication as well as the fact that the matter alleged to be

[6] See my *Digest*, pp. 55-6, articles 91-94.

criminal was published. This controversy was decided in the year 1792 in favour of the jury by Fox's Libel Act. Political libels were prosecuted and their authors severely punished for many years after the passing of this Act; but it is, I think, more than thirty years since there has been a successful prosecution for a political libel in England, though there have been some within that period in Ireland.

I must pass very lightly over offences consisting in the obstruction or corruption of public officers in the discharge of their duties.[7] I may observe, however, that perversions of the course of justice by whatever means were anciently known by the general name of 'maintenance,' *i.e.* maintaining or supporting by unlawful means either party to any legal proceeding. All through the Plantagenet period this offence was common, and many Acts of Parliament were directed against it. It was one main object of the erection, or at least of the extension and development, of the powers of the Court of Star Chamber to deal with such cases. By degrees the offence of maintenance ceased to be prosecuted under that name, but different forms of the offence, such as attempts to corrupt or intimidate witnesses, or to exercise undue influence over jurors, are still occasionally punished. Bribery, perjury in its various forms, and conspiracies to defeat the course of justice also belong to this class.

On crimes against the morals, health, and general convenience of the public,[8] I will make only one observation. As I have already observed in passing, a large addition was made to the criminal law of England by the decisions of the Court of Star Chamber. When that court was abolished and after the restoration of Charles the Second, the Court of King's Bench not only recognised the decisions of the Court of Star Chamber, but to a certain extent considered itself as having succeeded to its authority as *custos morum*, and the judges claimed and exercised the power of treating as criminal any act which appeared to be at once immoral and opposed to the interests of the public. The publication of obscene books was first punished expressly on this ground. To some degree this power has been asserted even in our own day.

I now come to the great leading heads of the criminal law—the offences, namely, which are punished under one or other of the five Acts passed in 1861, and which affect the person or property of individuals. Offences against the persons of individuals[9] consist either in the destruction of life, the infliction of injuries short of death, or the infringement of rights inseparably annexed to the person, such as conjugal and parental rights and the right to a good reputation.

No part of the law of England is more elaborate or more difficult

[7] See my *Digest*, part iii. p. 70.
[8] See *ibid.* part iv. p. 95.
[9] See *ibid.* part v. p. 191.

to reduce to anything like order and system than the law relating to homicide in its different degrees.[10] The Act relating to offences against the person throws no light upon it whatever. It provides in a few words for the punishment of murder and manslaughter, but it assumes that the legal definitions of these offences are known. Of these definitions I have not space to write with anything like the fulness which they deserve. I will only say in general that upon a full examination of the different legal decisions which have been given by the courts, and the different expositions of the matter which have been made by writers regarded as authoritative, it will be found that the apparently simple definitions,[11] already given and quoted below, require, in order that they may be fully understood, that answers should be given to the following questions:—

First, what is homicide? Must a child be fully born before it can be killed, or is it homicide to kill a living unborn infant? Is it homicide to frighten a man to death, or to break a woman's heart by systematic unkindness which, operating on weak nerves, causes paralysis and death? Is it homicide to allow a man to die when you can save him without danger or serious trouble, *e.g.* by throwing a rope to a drowning man? If a person having the charge of a child or infirm person omits to render proper services whereby death is caused, is that homicide? If a physician causes his patient's death by mistaken treatment, is it homicide? If A injures B and B refuses to submit to a surgical operation and dies, has A killed B? Or suppose the operation is performed and B dies of the operation, has A killed B? Does it make any difference if the operation was unnecessary or was unskilfully performed?

Next, in what cases is homicide unlawful? The full answer to this question involves a statement of the law as to the cases which justify the use of personal violence, and in particular its use for self-defence, for the prevention of crimes, for the arrest of criminals, for the execution of legal process, and for the assertion of particular legal rights. A, a far stronger man than B, comes by force into B's house and stays there making a disturbance. B tries to remove him. A successfully resists. At what point if at any point may B shoot A or stab him with a knife?

When we have assigned, by answering these questions, a definite meaning to the expression 'unlawful homicide,' it becomes necessary to distinguish between the two classes into which it is divided by defining each of the words 'malice' and 'aforethought.' Does the word 'aforethought' imply premeditation extending over a day, an hour, a minute, or is it a practically unmeaning word? A variety of authorities show that it is practically unmeaning. If a man with a

[10] See my *Digest*, part v. pp. 138–155.

[11] 'Murder is unlawful homicide with malice aforethought.' 'Manslaughter is unlawful homicide without malice aforethought.'

loaded gun in his hand suddenly conceives and executes the intention to shoot dead an unoffending passer-by, his crime is regarded by the law of England as being, to say the very least, quite as bad as if he committed it after long deliberation.

As for the word 'malice' I have already described the strangely unnatural meaning which has been attached to it in relation to this matter. The most important of these meanings are (1) an intention to kill, (2) an intention to inflict grievous bodily harm, (3) an intention to commit any crime described as a felony, (4) knowledge that the act which causes death is dangerous to life and a determination to run the risk of killing. For instance, when a man intending to rescue a prisoner from a prison exploded a barrel of gunpowder against the wall of the prison and blew part of it down, destroying at the same time the lives of many people in the neighbourhood of the explosion, he was held to have acted with 'malice aforethought,' though he probably knew none of the people who were killed, and hoped, if he thought about the subject at all, that they might be absent at the time of the explosion or otherwise escape its effects.

The law relating to the infliction of bodily injuries short of death has in itself no special interest, but it has a curious history. In Anglo-Saxon times the laws provided a scale of fines or *weres* for bodily injuries almost surgically minute. Thus twenty shillings were to be paid to one whose great toe was struck off, and five to one who lost his little toe. Under the early English kings weres went out of use; but maiming, *i.e.* destroying any member of the body which might be used in fighting or which was essential to manhood, was a felony; but it was the only felony (except petty larceny) not punished with death, and it came to be treated as a misdemeanour only. I suppose that in ages when violence was extremely common people were left in this matter to defend and to revenge themselves. The effect of this was that till quite modern times the most violent attempts to murder were only misdemeanours. By degrees, however, public attention was attracted by particular acts of violence, and laws were passed for their punishment; but this legislation was occasional and fragmentary to an almost incredible degree. Thus, for instance, in the reign of Charles the Second the enemies of Sir William Coventry set upon him and gashed his face, and in particular his nose, in order to disfigure him. Hereupon an Act was passed (long known as the Coventry Act) which made it felony without benefit of clergy to cut a man's nose or face with intent to disfigure him. All this fragmentary and occasional legislation was thrown together, first in an Act passed in 1827, and afterwards in the Act now in force which was passed in 1861. The strangest instance of its character which can be given is that different provisions in the Act punish specifically seven different ways of attempting to commit murder, to which is added a further provision punishing in the same way all attempts to

commit murder by ways other than those specified. As the punishment is the same in all cases, a single provision punishing the attempt to commit murder would have been sufficient. The explanation of this intricacy is that at one time some of these acts were and others were not capital crimes.

The Acts which punish wilful injuries to property (of which burning houses, &c., are the most serious), forgery, and offences committed with the coinage, I pass over without any further observation than that they have the same elaborate and yet fragmentary and occasional character as the other Acts. The Act relating to forgery in particular exemplifies this in the strongest way. Forgery at common law was regarded only as a misdemeanour; but as commerce increased, and in particular as bills of exchange and other negotiable instruments came to furnish a supplementary currency, forgery came to be of more importance, and a succession of Acts were passed making it felony without benefit of clergy to forge deeds, bills, notes, and many other commercial papers. It became usual indeed, when any statute was passed which required almost any sort of document to be used, to make a special provision for punishing its forgery. The Forgery Act is an imperfect collection of these provisions. It is at once most elaborate, most minute, and quite imperfect. I think a very few general provisions might replace the whole of it.

The Act[12] most commonly in use, most important, and most remarkable, is the Act relating to theft and other offences consisting in the dishonest appropriation of property. It is a production which no one could possibly understand without being aware of the history of the law upon the subject, and of the common law theories upon which it is founded.

Bracton's definition of theft, as I have already observed, was taken almost verbatim from the *Digest*, but the whole theory of the English common law upon the subject differs widely from that of the Roman law. Most of the differences arise, I think, from the circumstance that the Roman lawyers regarded theft as a private wrong, whereas the common law treated it from very early times as a capital crime. The extreme severity of this view was mitigated in practice by several extraordinary doctrines, the inconvenience of which was recognised as time went on, and to some extent remedied by parliamentary enactments. I will mention the most important of these doctrines. The first was obviously intended to restrict the law to the class of things most likely to be stolen, and of which the theft was of most importance in a rude state of society, such as cattle, articles of furniture, money, stores of food, &c. It was that certain classes of things were not capable of being stolen. First of all it was considered that as it was a physical impossibility to steal a piece of land, so it

[12] See my *Digest*, pp. 194-266.

should be made legally impossible to steal anything which formed part of, grew from, or was permanently affixed to the soil. So far was this carried that it was not theft at common law to cut down a tree and carry it away, or to rip lead off a roof and melt it down. Coal forming part of a mine, even fruit on a tree, or growing corn was not capable of being stolen at common law. A second exception applied to title deeds, bonds, and other legal documents. As a legal right was physically incapable of being stolen, it was held that the evidence of a legal right, such as a deed or a bond, should be legally incapable of being stolen. When bank-notes first came into use they were not capable of being stolen, because they were only evidences of the holder's right against the bank, and were otherwise of no value. Again, many kinds of animals were not regarded as being capable of being stolen, because as old writers said 'they were not worthy' (as oxen and sheep were) 'that a man should die for them.' Such were dogs and cats and wild animals kept in captivity for curiosity like bears or wolves.

All these exceptions from the general rule as to theft are themselves subject to exceptions made by Act of Parliament, and the subexceptions are so wide that they are all but coextensive with the original exceptions. Thus the rule that documents which are evidences of rights cannot be stolen, is qualified by statutory exceptions which enumerate nearly every imaginable document which can fall within the exception, and provide special punishments for stealing them; and the same is true of the other excepted classes which I have mentioned.

Another rule of the common law has caused much greater intricacy and complication than this. This rule is, that it is essential to theft that there should be an unlawful *taking*. If a man gets possession of a thing lawfully, and afterwards misappropriates it, he is not guilty of theft. For instance, if having hired a horse honestly, the hirer rode away with him and sold him, he would not have been guilty of theft at common law, nor was it theft at common law to misappropriate a watch lent for use or entrusted to the misappropriator to be repaired. Nor, again, was a servant who received money on his master's account and spent it guilty of theft at common law.

It would not be worth while to attempt to give an account of the extraordinary intricacies and hardly intelligible technicalities into which these doctrines have run, and it would be hopeless to try to show to what extent they have been removed by statute. It is enough to say that there has been an immense quantity of legislation on the subject as occasional as minute, and as incomplete as the other legislation already referred to.

Even this, however, does not bring us to the end of the intricacies of the law of theft. As I have already observed, the old law

was comparatively simple. Theft or larceny (*latrocinium*), as it was called, was divided into grand and petit. Grand larceny was theft of things worth a shilling or upwards, and was punishable with death. Petit larceny was theft of things worth less than a shilling, and was originally punished by flogging and imprisonment. Grand larceny, however, was a clergyable felony; that is to say, offenders for the first offence were branded on the brawn of the thumb, and imprisoned for a short time and discharged. On a second conviction they were hanged. This was not considered severe enough for many forms of theft, and accordingly Acts of Parliament were passed excluding particular classes of thieves from benefit of clergy, as, for instance, those who stole to the value of forty shillings in a dwelling house, those who stole cattle, those who stole five shillings from a shop, and many others. These are the principal intricacies which were imported into this offence, either by the rules of the common law or by the course of parliamentary legislation. All of them must be borne in mind before the principle on which the Larceny Act of 1861 is drawn can be understood. It sweeps together all the exceptions to each of the common law rules already referred to, and it punishes with special severity every form of theft which in earlier times was excluded from the benefit of clergy. It also punishes various forms of fraud allied to theft, and provides for theft aggravated by personal violence, which is robbery, and for extortion by means of threats. It thus forms upon the whole one of the most intricate, unwieldy, and at first sight hopelessly unintelligible productions of a legislative kind that I have ever met with. It consists of 123 sections, and is, I should think, nearly as long as the *Strafgesetzbuch* of the German Empire.

I have now completed my very rough outline of the criminal law of England as it is. I may observe upon it in general, that it is surprisingly minute and distinct, and, when you have learnt it, so well ascertained that few questions arise on its meaning, but it is to the last degree fragmentary. It is destitute of any sort of arrangement, a great deal of it has never been reduced to writing at all in any authoritative way, and the part which has been is unintelligible to any one who is unacquainted with the unwritten definitions and doctrines of which it assumes the existence.

Of the plans for its codification which have attracted public attention in the course of the last three years, I have only to say that I am now fully convinced that the task of codification—which practically means giving literary form to large bodies of law—is one which a popular assembly like the British Parliament is quite incompetent to perform itself, and most unlikely to entrust to any one else. Parliament can no more write a law book than it can paint a picture, and a thorough revision and re-enactment in an improved form of the whole body of the criminal law would raise so many questions of various sorts, upon which great difference of

opinion exists, that I do not believe that any ministry is likely to encumber themselves with so extensive a measure, or that any Parliament is likely to pass it. I think, however, I am justified in saying that the Bills referred to prove the possibility (which in England has sometimes been denied) of drawing a criminal code, whatever may be the difficulty of passing it when it is drawn. I also think that they show what an immense quantity of sense and experience the criminal law of England contains, notwithstanding some undeniable defects in substance and defects of form which can hardly be exaggerated.

JAMES FITZJAMES STEPHEN.