A DIGEST

OF THE

CRIMINAL LAW

(CRIMES AND PUNISHMENTS).

BY

SIR JAMES FITZJAMES STEPHEN, K.C.S.I., Q.C.

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INTRODUCTION.

In 1874 a Bill for the Codification of the Law of Homicide, drawn by me, was introduced into Parliament by the Recorder of London, and was referred to a Select Committee. The Appendix to the report of the Committee contains a memorandum by the Lord Chief Justice of England, in which he said:

"I object to this bill, in the first place, as being a partial and imperfect attempt at codification.

"Though a strong supporter of codification, and deeply regretting that the law of England should be suffered to remain in its present state of confusion, arising from its being partly unwritten and partly in statutes so imperfectly drawn as to be almost worse than unwritten law, I think that any attempt at codification which is either partial or incomplete can only be productive of confusion and mischief. I object to the present bill as labouring under both these defects.

"The law relating to homicide forms only part of the law relating to offences against the person, while this, again, forms only a part of the Criminal Law in general.

"Many of the principles applicable to the branch now in question are common to the whole body of the Criminal Law. If introduced into the partial exposition of the law, they unnecessarily augment the bulk of the statute; if omitted, a question arises as to whether the omission is not intentional with a view to the exclusion of the principle or rule in the particular branch or department; and the more limited the branch of the law attempted to be dealt with the more marked, of course, the effect of the omission."

The Committee observed in their report:—"It has been strongly urged before your Committee that partial codification is a mistake, and that no measure should be passed until the whole of that branch of the law to which it belongs has been reduced to a series of simple and abstract propositions. Your Committee think that such a doctrine would be fatal to the prospect of producing any code." The Committee then proceeded to assign their reasons for thinking that the bill ought not to be proceeded with. It was accordingly dropped. I do not regret their decision, as I admit the force of the observations of the Lord Chief Justice, though I think they ought to be qualified by the remarks made upon them by the Committee. I felt, however, that the course taken by the Committee was a reason, not for laying aside the subject, but for attempting to exemplify the possibility and convenience of codifying the Criminal Law by performing, as a private enterprise, the work of making a Digest of it which might serve as a first step towards a Code. If properly executed, such a work would answer the Lord Chief Justice's objection in the only way in which it could be answered, that is to say, by complying, as far as it is possible for a private person to do so, with the condition which he considers essential to the utility of any attempt at codification—that it should be neither partial nor incomplete. Taken absolutely, this condition could be fulfilled only by a Code embracing the whole of the law upon every subject; but this, of course, cannot be the meaning of the Lord Chief Justice. Penal Codes have been enacted and have proved highly useful in many countries in which the law on other subjects has not been codified.

At all events, this work is the result of the fate of the Homicide Bill of 1874, and of other measures (especially Lord Coleridge's Evidence Bill of 1873) in which I have been concerned, and which, for various Parliamentary reasons, have not been proceeded with. It is in the nature of an appeal to the public at large from the judgment passed on the possibility of codification, not only by Parliament, but by many eminent members of the legal profes-

sion. The appeal is not made in a complaining spirit. On the contrary, I think that the codification of the law is a question which loses nothing by delay. I hope, for instance, that the subject of Homicide in this Digest is treated in a more satisfactory manner than it was in the Homicide Bill of 1874, and this is due to a considerable extent to the criticisms which were made upon that measure.

With regard to the general subject, I need not here repeat what I have said on other occasions on the subject of the present condition of the law: its substantial merits, its entire lack of system and arrangement, and the possibility of throwing it into a short systematic form. I have dwelt on these topics in prefaces to successive editions of my Digest of the Law of Evidence, and in a lecture on a Penal Code delivered very lately to the Congress of Trade Unions, and published in the *Fortnightly Review* for March 1877. On the other hand, I reserve for the new edition of my "General View of the Criminal Law" (which will form substantially a new work) what I have to say on the history of the Criminal Law, on its general characteristics, and on other subjects of the same kind. I confine myself, therefore, on the present occasion to a few observations on the contents of this Digest.

It is meant to be a complete statement of the whole of what I may call the working Criminal Law, but it does not take in every act which can in any sense of the word be regarded as a crime.

Disobedience to any statutory order is, generally speaking, a misdemeanor, but a book which comprised all statutory orders would be nearly co-extensive with the statute book itself.

Moreover, nearly every Act of Parliament contains sections rendering particular transgressions of its provisions punishable in various ways. This is sometimes effected by imposing penalties, to be sued for by the party aggrieved or by a common informer, sometimes by providing that persons who make false statutory declarations on particular subjects shall be liable to be punished as for perjury, that the omission to

perform particular statutory duties shall be a misdemeanor, and the like. It follows, indeed, from the very definition of law, that laws must be capable of being broken, and must be protected by sanctions if they are broken. It would be impossible to include these sanctioning provisions in a Penal Code, as many of them would be quite unintelligible if they were separated from the matter which they sanction. The Customs Act, *e.g.*, is full of penal sections which can be understood only in connection with the system which they are meant to enforce.

Moreover, in every system of legislation there must be a considerable number of offences which are dealt with as crimes in a sense so much less serious than that which is commonly attached to the word that they would not usually be so described. The Police Act, the Highway Act, and many other Acts inflict penalties of more or less severity for all sorts of petty offences, and the activity of Parliament adds to their number in almost every session. Speaking generally, the distinction between serious and inconsiderable offences coincides with the distinction between indictable offences, which may be compared to the French *crimes* and *délits*, and offences punishable on summary conviction, which may be compared to the French *contraventions*, and in some cases to the minor *délits*. As a general rule, I have confined myself to indictable offences, but it is a rule to which, for various reasons, I have made many exceptions. Thus, I have included offences relating to game and wild animals, partly because some of them are defined by the Larceny Act, being treated as thefts, and partly because the indictable and summary offences are mixed up together (see Chapter XLVIII.). Deer-stealing, *e.g.*, is indictable upon a second offence, the first offence being punishable on summary conviction (Article 386). On the other hand, I have not noticed the Wild Birds Protection Act, or the enactments intended to protect salmon rivers, as the offences which they create are punishable solely on summary conviction by very moderate fines. I have included the Vagrant Act, because an "incorrigible rogue" may be sentenced at the

quarter sessions to a year's hard labour, and it is impossible to define the expression "incorrigible rogue" without previously defining "rogue and vagabond," and "idle and disorderly person." The penalties, moreover, are exceedingly severe. On the other hand, I have omitted the offences defined in the Police Acts and the Highway Act as being too trifling to find a place in a Penal Code. The law as to assaults is a further illustration. The subject cannot be treated completely without giving the law as to summary convictions for assault (Chapter XXVIII.). So, too, having dealt with (Articles 394–5) the breaches of a shipowner's duty as to seamen as being indictable offences, I thought it best to include the duties of seamen to shipowners in the Digest (Articles 396–7), although breaches of them are punishable upon summary conviction only, as their omission would have given a one-sided view of the law. I regret this want of symmetry and principle, but it is impossible to give more of those good gifts to a legal system than it does in fact possess.

Upon the whole, this Digest is intended to give the whole of the law relating to each of those everyday offences which commonly occur in the administration of justice as fully and as shortly as is consistent with accuracy. I do not venture to say that it is quite complete, for the subject is so intricate and difficult that it would be rash to make such an assertion, but I do assert that it deals with every part of the substantive Criminal Law (as distinguished from the law of Criminal Procedure) which is dealt with in the text-books in common use, such as Russell on Crimes, Roscoe's Criminal Evidence, Archbold's Criminal Pleading, and the like, and with some others which, for various reasons, they omit.

Any offence not mentioned in these works would be rather an historical curiosity than a matter of practical importance. I fear, indeed, it will be found that the contents of my book err rather on the side of excess than on the side of defect. They include a great number of offences which have, on various grounds, become obsolete, and which ought to be repealed.

The works mentioned, and others of the same kind, have

both the merits and defects of English law-books in a conspicuous degree. They represent the result of an immense quantity of patient research, and of a minutely laborious and generally singularly accurate application of learning to a very unattractive subject, but they make no pretensions to any other merit. The last edition of Russell on Crimes contains (exclusive of indexes) 2672 closely printed royal 8vo. pages, and costs five guineas and a half. It is arranged in such a manner that its last editor takes credit for having improved it by transferring to the head of General Provisions "title Pleas of Autrefois Convict and Acquit, which was, in the former edition, in chapter 'Burglary,' and title 'Amendments at the Trial,' formerly under title 'Evidence.'" He adds: "The first chapter having been thus enlarged, it became advisable to decrease the size of the first volume, and it was thought that this might be conveniently done by transferring titles 'Bigamy' and 'Libel' to the third volume," where they are classed with a treatise on the Law of Evidence. The 18th edition of Archbold contains (exclusive of the index) 1012 very closely printed pages. I will say nothing of the arrangement, as I suppose no one ever paid the smallest attention to it, since the book was originally published more than fifty years ago. It has an arrangement, however, and a very perplexed one. A series of very able and learned persons, Lord Chief Justice Jervis, the late Mr. Welsby, and my friend Mr. Bruce, the stipendiary magistrate of Leeds, have devoted an infinite deal of trouble to the task of making it a complete magazine of every statute, every case, and every dictum of every text writer of reputation upon every subject connected with indictable offences and criminal pleading and procedure. It is an invaluable book of reference, but to try to read it is like trying to read a Directory arranged partly on geographical and partly on biographical principles. Roscoe's Criminal Evidence (8th edition) contains 1002 similar pages. As it does not deal with the subject of criminal pleading, it gives the cases more fully than Archbold. It is very complete and accurate, and is intelligibly arranged, as the matter is dealt with in alphabetical order.

The arrangement of my own work follows in the main that of the Indian Penal Code, and, I hope, explains itself. The only remark I have to make upon it is, that I have classed libel, bigamy, abduction, &c., with offences against the person, rather than offences against the property, of individuals, because reputation and parental and conjugal rights are inseparably annexed to the person, and cannot be transferred like rights of property.

The comparative brevity of the work has been obtained by the double process of extracting principles from cases, the facts being stated in the form of illustrations of the principles, and condensing the statutes. These processes may easily be made intelligible even to persons who are not lawyers.

It is not till a very late stage in its history that law is regarded as a series of commands issued by the sovereign power of the state. Indeed, even in our own time and country that conception of it is gaining ground very slowly. An earlier and, to some extent, a still prevailing view of it is, that it is more like an art or science, the principles of which are at first enunciated vaguely, and are gradually reduced to precision by their application to particular circumstances. Somehow, no one can say precisely how, though more or less plausible and instructive conjectures upon the subject may be made, certain principles came to be accepted as the law of the land. The judges held themselves bound to decide the cases which came before them according to those principles, and as new combinations of circumstances threw light on the way in which they operated, the principles were, in some cases, more and more fully developed and qualified, and in others evaded or practically set at nought and repealed. Thus, in order to ascertain what the principle is at any given moment it is necessary to compare together a number of decided cases, and to deduce from them the principle which they establish.

I will give a single illustration of this process. According to the original definition of theft, the commission of the offence requires a wrongful "taking." Suppose that A loses an article, and B finds it, and takes possession of it. Is this

such a "taking" as the definition required? The older authorities held that it was not. "If A find the purse of B in the highway, and take it and carry it away with all the circumstances that usually prove the *animus furandi*, as denying it or secreting it, yet it is not felony," says Hale.[1] The rule was probably one of the many devices which were employed in order to evade the atrocious severity of the ancient law of larceny. By degrees, however, its inherent absurdity led the judges (especially when the law became more humane) to explain it away. A series of decisions established distinctions as to the meaning of the expression "lost property." [2] It was held in several cases that things left in a hackney-coach by accident were not lost in such a sense as to excuse the hackney-coachman in taking them, and that a thing merely mislaid was not lost (as, for instance, a purse left on a stall in a market-place).

Most people would suppose that the result of such decisions would be to establish the principle, that any person who found things belonging to another, and subsequently appropriated them to himself, being aware of the fact that they were the property of another, would be guilty of theft. Such, however, was not the practical conclusion. The principle that the taking, and not the appropriation, constituted the crime of theft, determined the course of the decisions, even when they deviated from their original direction. By reason of it the judges finally decided that in cases of finding the question of theft or no theft depended upon the time when the knowledge necessary to a felonious intent was acquired, and that it might be stated thus: "Did the finder, at the time when he took possession of the goods, know, or had he reasonable ground to believe, that the goods belonged to another person, and that that other person could be found?" The question, whether after taking possession of them he obtained this knowledge or means of knowledge was held to be immaterial, inasmuch as an innocent taking could not be made criminal by reason of a subsequent guilty dealing with the thing taken.

[1] 1 Hale, P. C. 508. [2] 2 Russ. Cr. 166–9.

This for the time being is the law of the land, and it is very unlikely that it should be altered unless the Common Law definition of theft is entirely recast. The result may be thus illustrated: if a man picks up a £10 note in the street knowing that it is not his, but not knowing and not having reason to believe that the owner could be found, and if, half-an-hour afterwards, he obtains decisive proof of its ownership, he may after that convert it to his own use without committing any crime.

The principle must be regarded as at once distinct, complete, and unreasonable. It would never have been passed into law by any body of legislators. It is, indeed, hardly possible that persons acting in a legislative capacity should establish by law an obvious absurdity, but it is easy for successive generations of judges, none of whom are personally responsible for the law which they declare, to establish an unreasonable result by working out a principle, the imperfection and unreasonableness of which escaped notice till some special combination of facts brought it to light. It must, moreover, be borne in mind that the principle given above is not distinctly stated in any one place, or by any one writer of undoubted authority. In order to ascertain what it is it is necessary to examine Coke, Hale, Hawkins, East, and about thirty-four cases decided at different times within the last sixty or seventy years, an abstract of which cases fills something more than twenty pages of Russell on Crimes.[1] I have not taken the trouble to ascertain the length of the reports of these cases, but it must be very considerable. It is hardly possible to understand any one of them without reading it through and weighing all the circumstances. Every one of them contains statements which, though perhaps necessary to the full understanding of that particular case, are altogether unimportant for any other purpose. Each, again, must be considered in relation to all the rest, and although the result ultimately deduced from them may be short, the labour of obtaining that result is so great that no one could possibly perform it who had not

[1] 2 Russ. Cr. 165–187.

himself had a degree of experience of the actual working of the profession, which would in most cases indispose a man from taking the trouble of reducing his knowledge to the shape of a specific proposition. This is but a single illustration of the manner in which the law has grown up. I might multiply such instances indefinitely, but I forbear to do so, as they will suggest themselves to every reader of this work.

Difficult as the task of reducing the cases to order undoubtedly is, it would be wrong to exaggerate either its difficulty or its extent. Upon most of the important heads of Criminal Law the law may now be regarded as settled. This admits of easy proof.

The Court for Crown Cases Reserved was established by Act of Parliament (11 & 12 Vict. c. 78) in the year 1848. Since that time every doubtful question of any considerable importance which has occurred in the criminal courts has been reserved for consideration in it, and its decisions have been reported by a succession of reporters. The total number of volumes of reports published since the court was established in 1848 down to the end of March, 1877, is [1] eight, and something more. These eight volumes contain about 3800 pages, in which are reported about 624 cases. Of these cases only 132 have been reported since 1865, when the new system of law reporting was established, so that the decisions for the last twelve years have averaged just eleven a year; from 1848 to 1865 they averaged close upon twenty-nine a year. The Nisi Prius rulings reported (often in a very unsatisfactory way) in Cox's Criminal Cases are not

[1] *Viz.*

Dennison's Crown Cases	2 vols.
Dearsly	1 vol.
Dearsly & Bell	1 „
Bell	1 „
Leigh & Cave	1 „
Law Reports, Crown Cases Reserved ...	2 vols.
Law Reports, Crown Cases Reserved, in Queen's Bench Division	part of a volume.

The first 390 pages of 1 Dennison report decisions given by the judges before the Court for Crown Cases Reserved was established. The number of cases and pages given in the text is only approximate, but it is not far wrong.

very numerous. Three 8vo. volumes contain the reports for 1861-1874, and a large proportion of them are of little value. I think, indeed, that it is matter of regret that decisions, necessarily given with little consideration, and under great pressure, should be reported at all. [1] On the other hand, the number of persons committed for trial in the fifteen years, 1861-1875, was 268,952, or, on an average, 17,930 a year. The number of persons convicted was 201,603, or, on an average, 13,440 a year. It is thus obvious that, however confused the arrangement of the Criminal Law may be, its substance is so well ascertained, that less than one case in a thousand gives rise to any serious legal difficulty; and the figures given above show that the number of arguable points has greatly diminished since the Court for Crown Cases Reserved was established. If it were worth while to go into the matter more minutely, I could show that year by year the number of cases decided diminishes. The law may thus be regarded as ripe for codification, and this is one of the circumstances which have led me to feel that it is possible to reduce it to a short and systematic form.

The extraction of principles from decided cases forms only one branch of the process of making a digest of the law. It is necessary, in addition, to perform a similar operation upon the statutes. About one half of the criminal law is contained in different statutory enactments, and half of this half is comprised in what are known as the Consolidation Acts of 1861. These collectively form the nearest approach that exists in English law to a penal code. They are five in number, namely,—

24 & 25 Vict. c. 96 (Larceny);
c. 97 (Malicious Mischief);
c. 98 (Forgery);
c. 99 (Coinage);
c. 100 (Offences against the Person).

These Acts contain definitions of all the offences which

[1] These figures are taken from 'The Statesman's Yearbook' for 1877, p. 244.

can be committed against individuals, if offences connected with the coin are regarded (as I think they should be) as constituting private frauds, and not as constituting offences against the Government.

The Acts (of which the history may be seen in Mr. Greaves' preface to his edition of them) form the net result of the labours of two sets of commissions to inquire into and report upon the Criminal Law, which sate from 1833 to 1849, and again from 1854 (I think) till 1861, when the Consolidation Acts were passed. There can be no doubt that they have been of the greatest possible service to the administration of justice, and have proved to demonstration the possibility and advantage of measures of greater extent and completeness. They consolidate all the statutory provisions upon the different subjects to which they relate so effectually, that in the sixteen years which have passed since they were enacted less than thirty[1] decisions have been given upon their meaning by the Court for Crown Cases Reserved. Even this small number of decisions exaggerates the uncertainty of the law. Many of them relate to questions so minute that no care in drafting could possibly avoid their occurrence. Is this or that peculiar document a warrant or order for the receipt of money? Does a woman "abandon" her new-born child if she packs it up in a basket and sends it to the putative father by railway, labelling the basket "with care, to be delivered immediately"? I think it would be hard to find ten expressions in the Consolidation Acts which have been shown by judicial decisions to be obscure.[2] This must be regarded as conclusive proof of the skill with which the Consolidation Acts were drawn, when we consider that an enormous proportion of all the crimes which have been tried and adjudicated upon during that period were dealt with under their provisions.

[1] I have not thought it worth while to make an exact calculation on this subject, but having looked pretty carefully through the reports, I doubt if twenty such decisions could be referred to.

[2] There are, however, some notable exceptions; see, *e. g.*, Article 345 (*b*), representing 24 & 25 Vict. c. 96, s. 75. I do not, of course, refer to obscure or vague expressions re-enacted from earlier Acts.

At the same time it must, I think, be admitted that in style, in arrangement, and in substance, they are open to much objection.

In the first place, they assume the existence of great bodies of unwritten law. The Act relating to offences against the person assumes the existence of a body of law[1] specifying the cases in which the infliction of death or bodily injury may be justified or excused, and defining murder and manslaughter. The Larceny Act assumes and is based upon the existence of the body of law[2] which contains the definition of theft and embezzlement, and the intricate doctrines connected therewith, and the law as to what things are or are not capable of being stolen. The Forgery Act assumes the existence of an elaborate theory as to what constitutes an intent to defraud and a false document.[3]

In the second place the Acts are Consolidation Acts; that is to say, they are composed of the Acts which were in force when they were passed, re-enacted with very little alteration either in substance or in form. Some of these earlier Acts were so drawn as to require to be explained by judicial decisions, and though in some instances the effect of these decisions has been given in the consolidating enactment, this is by no means always the case.[4] In some instances the original language has been repeated, and the consequence has been that it is still necessary to study and understand the effect of all the decisions which have been given regarding it in earlier times. A striking instance of this is to be found in the section of the Larceny Act which defines the offence of obtaining goods by false pretences. The words of the Act are: "Whoever shall by any false pretence obtain, &c." The meaning of these words, as given by the cases upon the subject, is given in Articles 329-332, and, as may be seen by reference to those articles, fills several pages of

[1] Contained in Chapters XXI. to XXIV., both inclusive, of this work.

[2] Contained in Chapters XXXIII. to XXXVI. of this book, both inclusive.

[3] Stated in Chapter XLIII.

[4] Strong illustrations of this may be found in the law as to abduction, Article 262; obtaining goods by false pretences, Articles 329–332; and embezzlement by clerks and servants, Article 309.

print, which represent three sections of Acts of Parliament, two of which were required to amend or explain the first, and the principles established by a number of cases so great that a highly condensed abstract, or rather note, of them fills sixteen closely printed 8vo. pages in the last edition of Archbold (496-512).

The existence of the unwritten law affects not only the contents, but also the arrangement of the Consolidation Acts. I do not believe that any one who read the Larceny Act without being previously informed of the Common Law relating to theft would derive from his reading any notion whatever, except that it consisted of a confused and apparently irrational series of provisions regarding every kind of theft. "Why," he would naturally ask, "should an Act relating to the law of larceny begin with a series of enactments about larceny of living animals? Why should it be necessary to provide separately for the stealing of horses, the stealing of dogs, birds, and beasts ordinarily kept in confinement, the killing of birds or fish in water belonging or not belonging to a dwelling-house? Why, after spreading this matter over eighteen sections, should it be necessary to devote four sections more to the larceny of written instruments, and then to go on to consider in eight sections the subject of the larceny of things attached to or growing on land?"

The answer to these questions would be found in the theory as to what is and what is not the subject of larceny at Common Law, but no one who read the Act would find in it a single hint at that theory, and the consequence is that the Act fails to convey any information to any one who does not bring to its perusal a considerable amount of technical knowledge.

The Act is also so long that it is hardly possible for any memory to retain its different provisions, even if the reasons for their enactment were made apparent. One reason for its length is that one-half of its provisions relate to the subject of procedure, a subject in itself separate from, though closely connected with, the matter which ought to be contained in a Penal Code.

The style of the Acts is no less unfavourable to those who might wish to derive information from them than their length and their arrangement. Acts of Parliament are formed upon the model of deeds, and both deeds and statutes were originally drawn up under the impression that it was necessary that the whole should form one sentence. It is only by virtue of the provision contained in 13 & 14 Vict. c. 21, s. 2,[1] that a full stop can be introduced into an Act of Parliament at all. The effect of this rule of style has been to cause the sections of an Act of Parliament to consist of single sentences of enormous length, drawn up, not with a view to communicating information easily to the reader, but to preventing a person bent upon doing so from wilfully misunderstanding them. The consequence is that sections of Acts of Parliament frequently form sentences of thirty, forty, or fifty lines in length.

The length of these sentences is only one of the objections to them. They are as ill arranged as they are lengthy. According to the model adopted in the Consolidation Acts of 1861, the definition of the offence is interposed between the nominative case, "Whoever," which stands at the beginning of each section, and the verb, "shall be guilty of felony, and shall be liable, &c." As the definition generally contains qualifications of various kinds, and in many cases long lists of words almost, if not entirely, synonymous, the result is that when the reader has arrived at about the middle of the sentence he has forgotten the beginning of it, and finds himself involved in a multitude of words the grammatical connection of which with each other is often obscure and[2] doubtful, even on the most careful and patient examination. Of course an Act of

[1] "All Acts shall be divided into sections if there be more enactments than one, which sections shall be deemed to be substantive enactments without any introductory words." Before this Act was passed it was considered necessary that the Acts should run: "Whereas . . . Be it enacted . . . And be it enacted . . . And be it enacted," &c., &c., to the end.

[2] Let any one, for instance, read and try to construe 24 & 25 Vict. c. 98, ss. 13-16 (see Article 362), on making or being in possession of forged bank-note paper. Sections 27 and 28 (see Article 361) are still worse.

Parliament is meant to be studied, and not to be skimmed like a newspaper or a novel, and a student will see that many things which look like mere verbiage are really essential to the subject; but precision and explicit statement are so far from being irreconcileable with liveliness and perspicuity of style that they render those qualities doubly important. If you have to state a mass of uninteresting details, and if you wish to make them as little repulsive as possible, the least you can do is to put the nominative case near to the verb, to put the rule first and the exceptions afterwards, and to avoid saying the same thing over more than once when there is no real necessity for doing so. The subject must be dull, but the style may be lively. Each word may add to the sense, and may be put in the right place, whether the subject in hand is Paradise Lost or the Statute of Frauds. If an Act of Parliament were written in the same manner as any other book or pamphlet, not only would the whole framework and arrangement of the sentences be changed, but considerable portions of the matter would be thrown into the form of schedules or foot-notes. There is no real reason why this should not be done. The language of any ordinary composition, a newspaper article, a book upon a common subject, a merchant's or solicitor's letter, may, if necessary, be made quite as explicit as any Act of Parliament, and it is certain that such compositions are usually far more natural and easy to follow than those which parliamentary draftsmen put into the mouth of the legislature. In this Digest I have attempted to give what I may call a literary form to the Acts of Parliament which contain the Criminal Law, and especially to the Consolidation Acts. I have tried to give the precise effect of each enactment in the form which the author of an original work would give to his matter, having regard to the convenience of his reader. I offer the Digest, in short, as a literal translation of the Acts into the language of common life.

I have found it possible to shorten them very greatly, whilst I have preserved, not only their sense, but in almost every instance their very words. Some of the means em-

ployed are familiar to every parliamentary draftsman. In many cases an Act of Parliament may be abridged as readily and as safely as an algebraical formula. "Whoever with intent, &c., builds, agrees to build, causes to be built," &c., is the precise equivalent of "Whoever with intent, &c., builds; Whoever with intent, &c., agrees to build; Whoever with intent, &c., causes to be built," just as $(a + b)^3$ is the equivalent of $a^3 + 3a^2b + 3ab^2 + b^3$. I have made such substitutions wherever I could, but one or two are important enough to be specially noticed. Each section of the Consolidation Acts may, as I have already observed, be stated in the following form: "Whoever" (here follows the definition of the offence) "shall be guilty of felony (or misdemeanor), and being convicted thereof, shall be liable at the discretion of the Court to be kept in penal servitude for life" (or, as the case may be), "or for any term not less than three" (it ought now to be five) "years, or to be imprisoned for any term not exceeding two years with or without hard labour." The formula is varied in a variety of minor particulars, to which I need not refer, but it, or something equivalent to it, occurs in every section of each Act defining an offence.

This form admits of the following abridgments. In every, or in almost every, instance a statement of the maximum punishment to which an offender is liable is all that is really required, inasmuch as the minor punishments are, in nearly every instance, the same. The formula might, therefore, be advantageously replaced by the words "shall be liable to years penal servitude as a maximum punishment." The inconvenience of the length of the sentence may be remedied by the simple expedient of bringing together the nominative case and the verb governed by it, and by introducing full stops where they are wanted.

These changes give the following result:—

"Every one is guilty of felony and is liable on conviction thereof to a maximum punishment of years penal servitude who" (here give the definition of the offence). When this form has been adopted it will be seen that, inas-

much as many offences are visited with the same maximum punishment, the repetition of the formula may be avoided by collecting together all the offences which are liable to the same punishment, and putting them under one heading; thus—

"Every one is guilty of felony and is liable on conviction thereof to a maximum penalty of penal servitude for life who does any of the following things, that is to say—

(*a.*) Administers any poison, &c.

(*b.*) By any means whatever wounds, &c.

(*c.*) Shoots at any person, &c."

and so on.

The result of this mode of arrangement is, first, to give the point of the sentence at once, and, secondly, to save as many perhaps as nineteen or twenty repetitions of a long and wearisome form. It also has the collateral advantage, which is by no means slight, of introducing a rational, or, at all events, intelligible mode of arrangement into the Acts, inasmuch as it puts under one heading all the offences which, for whatever reason, subject the offender to the same maximum punishment. Thus, according to my arrangement, a single article (236) of the Digest comprises all the forms of wounding, &c., which subject the offender to penal servitude for life. They are eleven in number, and each of them corresponds to a separate section of the Offences against the Person Act. Ten needless repetitions are thus saved, and the precise equivalent of eleven sections scattered all over the Offences against the Person Act is given in one article, the title of which (Wounding and Acts endangering Life punishable with Penal Servitude for Life) explains the principle of arrangement. Another artifice, which can hardly be said to abridge the enactments, but which I think renders them much clearer, consists in throwing into foot-notes those parts of each enactment which ought to be treated in that manner. Thus, for instance, in the Act relating to malicious injuries to property, it is enacted in a section (sect. 11) which fills an 8vo. page, that all persons commit felony and are liable to penal servitude for life as a maxi-

mum punishment who being riotously and tumultuously assembled together unlawfully demolish, pull down, or destroy any one of a long list of buildings, public or private, or any machinery or mining plant of certain specified kinds, or who begin to do so. This is the exact equivalent of the whole of the interminable sentence in question with the exception of the list of public and private buildings and machinery which are introduced into the body of the definition, and which I put in the form of a note (Article 74).

By going through the whole of the Acts in this manner I have, I hope, succeeded in giving so much of them as relates to the definition of crimes in much less than half the space which they occupy in the Statute Book, and in a form which I hope contains nothing needlessly repulsive to the reader, although the nature of the subject prevents the matter from being attractive to any one who does not wish seriously to study the law. At the same time, by interweaving the Common Law with the Statute Law, and bringing the two into their proper relation, I have attempted to make the general nature of the system and the plan upon which it is arranged intelligible to any person of ordinary understanding and perseverance who cares to study the subject.

The object with which this work is written is twofold. I hope that, at all events, it will enable all persons interested in the administration of the Criminal Law to acquaint themselves with its provisions; but beyond and apart from that, it is intended to serve as the first step towards the enactment of a Penal Code. Such a code must, of course, consist of the existing Criminal Law of England re-arranged and amended. In order that such a re-arrangement and amendment may take place, it is absolutely necessary, in the first place, to know what the law is. This work expresses my understanding of it, and, assuming that I understand it correctly, I will proceed to say a few words upon the steps which will be necessary for the construction of a Penal Code.

In the first place, I think it is perfectly clear that it would be impossible to enact this Digest, or any other statement of the law as it is, into an Act of Parliament. It may contain

the materials for a Penal Code, but it also contains so much that is obsolete, so many needless technicalities and subtleties, so much that is clumsy, so many needlessly minute and irrational provisions, that if the Digest were enacted into a Code it would be altogether unworthy of the time and the country.

No one, I suppose, would wish to draw from the obscurity in which they are at present buried the laws relating to offences against religion (Chapter XVII.): no one would wish to give new force to the extraordinary provisions of the Act for the prohibition of secret societies (Article 86): no one can read without a feeling between amusement and perplexity the wonderful provisions contained in the chapters introductory to the law of theft, relating to possession, asportation, and the things which are the subject of larceny (Chapters XXXIII. and XXXIV.): no one can regard the provisions which represent the contents of the Consolidation Acts themselves with any degree of satisfaction. It is difficult to imagine anything more clumsy than a system which specifically forbids eight ways of attempting to commit murder, and then goes on to enact in general terms that any one who attempts to commit murder in any other way shall be subject to the same punishment (Article 233). This is merely one out of hundreds of instances of the same intricacy which may be referred to. For instance, in the Forgery Act (Chapter XLIV.) the forgery of an extraordinary number of documents is specifically provided for, and numerous arbitrary distinctions are made between the different punishments which are provided for them. The provisions of that Act and those of the Act relating to malicious injuries to property (Chapter XLVII.) might all be thrown into a very few broad general enactments.

As they stand, the Consolidation Acts faithfully reflect the vagueness of the ancient Common Law, and the minuteness of the Statute Law by which its gaps were gradually filled up. When Sir William Coventry's nose was slit as an act of revenge, an Act (22 & 23 Car. 2, c. 1) was passed which made it felony to slit people's noses. When a band of deer-stealers in Waltham Chase (called the Waltham Blacks, from

their habit of blacking their faces) committed a series of offences against keepers and others, an Act was passed (9 Geo. 1, c. 22) which made it felony to inflict various specified kinds of bodily injury, and it was so drawn as to make it doubtful whether it was not a necessary element of the offence that the offender should have his face blacked, or be otherwise disguised. When, in our own day, a certain number of criminals garotted people in the streets of London, an Act was passed providing that persons who garotted their neighbours should be subject to a punishment not inflicted for other crimes of a similar description. It is in this piecemeal manner that our Statute Law on the subject of crime has grown up, and one of the most important improvements which could be made by a Penal Code would consist in reducing it to some sort of order and system. I do not think that, with a correct Digest of the Criminal Law, the production of a draft Penal Code need be a matter of great time or difficulty. I must, however, observe that even if a draft Penal Code were prepared, it ought not, in my opinion, to be seriously discussed in Parliament until it had been laid for a considerable time before the public. No mere Parliamentary discussion would be sufficient to render such a work as good as it ought to be. Nothing short of prolonged public, and especially prolonged professional, criticism could detect the objections which might be made to such a Code, and suggest the different improvements which might be introduced into it. If such a Code were drawn, and were introduced avowedly in order to attract public attention to the matter, it might, after being subjected to public criticism for a year or two, be brought in with some chance of being accepted or rejected as a whole.

It must, however, be borne in mind that a Penal Code, when complete, would form only part of the Criminal Law. It could hardly be rendered efficient unless it were accompanied or closely followed by a Code of Criminal Procedure. About half of the Consolidation Acts consist, as I have already observed, of provisions relating to this subject. They all have reference to the existing definitions of crimes,

and, indeed, a considerable number of our present definitions of crimes have to be deduced from the old forms of indictment for them. The two subjects can hardly be treated independently, and before any serious effort could be made to introduce a Penal Code it would be necessary to have a Digest of the Law of Criminal Procedure, and a Code of Criminal Procedure founded upon that Digest.

These considerations convince me that it must, under any view of the case, be a work of years to obtain a real codification of the Criminal Law; but, in the meantime, much may be done in the way of amendment, not only of the Law of Crimes and Punishments, but also of the Law of Criminal Procedure, and I am not without hope that the Digest which is now submitted to the public may afford facilities for that operation.

By throwing the whole law into a systematic form, it enables an attentive reader to criticise it as a whole, and to appreciate the character and effect of the amendments which it requires. One of Bentham's heaviest and best founded complaints against the law in general was that it was so intricate and technical that no one but an experienced lawyer could say what would be the effect of any particular alteration proposed in it. This, as he justly observed, made it almost impossible to reform it in any satisfactory way without, as a first step, sweeping it away, so as to obtain a *tabula rasa*. This was for obvious reasons considered to be out of the question, and the result is that the question has, so to speak, hung fire ever since he directed attention to it early in this century. Most of the gross absurdities, and every trace of the cruelty which used to disgrace our law, have been removed, but it is still as intricate and unintelligible as ever.

Assuming the correctness of the statement contained in this book, I will proceed to criticise the component parts of the law in a very general way, and to point out a certain number of amendments which, if made, would not only improve the law, if nothing else were done to it, but would render possible the construction of a Penal Code.

The first part of the Digest, which relates to the law of punishments, represents the result of the prolonged controversies on the punishment of death, on transportation and penal servitude, on prison discipline, on flogging, reformatory schools, and kindred topics which have attracted so much attention of late years. A lawyer's opinion on such subjects is, as such, of no special value. And I shall say nothing on the subject beyond pointing out a few defects in the law which are apparently due to imperfect drafting, ill-advised amendments, or some other accidental cause, and which do not touch the main principles of the subject. The most prominent of these are as follows:—

The punishment of death is now inflicted for treason (Articles 51–61), murder (Article 223), piracy with wounding, &c. (7 Will. 4 & 1 Vict. c. 88, s. 2 (Article 105)), and burning dockyards, &c. (12 Geo. 3, c. 24 (Article 376)). The 31 Vict. c. 24, which enacts that executions are to take place in gaols, refers to executions for murder only. Surely this ought to be extended to all cases.

Upon a conviction for felony the Court may award £100 or less "for any loss of property suffered by any person through or by means of such felony" (33 & 34 Vict. c. 23, s. 4 (Article 16 (*b*)). Why not allow of compensation for injuries to the person as well? Would it not be better still to enact (possibly with a few special reservations as to offences like libel) that whenever any person was tried for any crime, any one injured by it might claim damages and prove the amount after the prisoner's conviction, before the jury which had convicted him?

The provisions as to punishments for felony after a previous conviction of felony (7 & 8 Geo. 4, c. 28, s. 11, the various Acts relating to penal servitude, and the 24 & 25 Vict. c. 96, s. 7 (as to larceny)) have come to be very confused, and are not, I think, altogether consistent (see Articles 19 and 32). I doubt whether, by the letter of the law, a man might not be sentenced on a second conviction for simple larceny to be kept in penal servitude for life and to be thrice publicly whipped. These sections might be advan-

tageously repealed, and re-enacted in a simple form and according to their real meaning.

The 9 & 10 Vict. c. 24, s. 1, was intended to do away with minimum punishments, but it is so worded as not to effect that purpose completely. Its words are, "in all cases where the Court is now (June 1846) by law empowered or required to award a sentence of transportation exceeding seven years" it may pass instead a less sentence. The words "exceeding seven years" should be struck out. There are several statutes (*e.g.*, 37 Geo. 3, c. 123, as to unlawful oaths (Article 84)) which require a sentence of seven years transportation to be passed. In those cases the Court would be bound to pass an equivalent sentence of penal servitude, and would have no power to pass a sentence of imprisonment. There are also still a few statutes requiring a fixed term of imprisonment to be awarded (*e.g.*, 9 Will. 3, c. 35 (Article 163)). The Act ought to be made general, and to give power to pass minor sentences in all cases whatever. The offence specified in Article 168 is the only one in which a minimum punishment has been deliberately sanctioned of late years. I should not propose to interfere with it.

It might be worth while to enact that no one should be sentenced to whipping except under the provisions of an Act of Parliament. The power of sentencing a person to be whipped for a misdemeanor at common law has never been formally taken away, and, I suppose, still exists, though it must be very many years since it was exercised.

The general classification of crimes, as treason, felony, and misdemeanor, is extremely inconvenient and capricious. The severest of secondary punishments (imprisonment for life and forfeiture of goods) is inflicted for the misdemeanor of misprision of treason. The misdemeanor of conspiring to murder subjects an offender to ten years penal servitude, and many misdemeanors are punishable by penal servitude for seven years. All common misdemeanors are put by statute upon the same footing as felonies in regard to the summary arrest of the offender (see, *e.g.*, the Larceny Act, 24 & 25 Vict. c. 96, s. 103), and this removes the only sub-

stantial distinction between the two classes of offences. It would be difficult, though perhaps not impossible, to remedy this defect by a mere amending Act. If the law were codified, it would be easy to remove the distinction by enacting that all crimes should henceforth be of the same nature, and by annexing a schedule to the Code of Criminal Procedure showing in what cases a summary power of arrest should be permitted. The Indian Code of Criminal Procedure contains a schedule which shows how appearance is to be compelled, and whether or not bail is, as a rule, to be taken, in regard to every offence defined by the Penal Code.

Chapter II., entitled "General Exceptions," intentionally omits an examination of certain legal doctrines, too vague to be thrown into the form of propositions, the consideration of which I reserve for the new edition of my General View of the Criminal Law. I have said nothing as to the doctrine of intention, as to the sense of the word "malice," or as to the maxim, "*Non est reus nisi meus sit rea.*" These topics will find a more appropriate place in a commentary on the law than in the statement of the law itself, but I may make one or two remarks on the rules which are included in that chapter.

The law relating to insanity (Article 27) is often said to be in an unsatisfactory state, and I think that this is true to some extent, but only in a very restricted sense. The theory of the law is plain enough. Certain mental elements —will, knowledge, intention—are essential to criminality. Prove their absence and criminality is disproved. The difficulty is, that medical science does not enable us to say how this theory is related to facts. If medical men could tell lawyers precisely how A's mind was affected in relation to a particular act by the mental disease under which A was labouring when he did that act, the lawyer could tell whether or not the act was a crime; but this is just what medical men cannot tell. Generally they can only say that A did in fact labour under a particular disease with the nature of which they are very imperfectly acquainted, but how that disease may have been related to any particular action of A's in

most instances they cannot tell at all. The law can hardly be improved till medical knowledge on the subject has made great advances.

The rule (Article 30) which raises a presumption that a married woman committing a crime in her husband's presence acts under his coercion, and that that coercion excuses her, is an anomaly which, as I believe, originated in the wish to give some women a sort of rough equivalent for the benefit of clergy from which they were excluded till the reign of Queen Anne (see Note II. in the Appendix). It seems to me monstrous that if a husband and wife of mature age, and their daughter of, say, eighteen, commit a theft together, the wife should be presumed to act under the husband's coercion and should be excused by it, whereas direct proof that the daughter acted under the most stringent coercion from her parents is no excuse at all. The present law never works anything but injustice, and not much even of that. I think it ought to be repealed simply. An additional reason for doing away with it is that it is very uncertain upon the cases and authorities how far the rule extends.

The law relating to principal and accessory (Chapter IV.) seems to me to have become altogether obsolete. The old law was (shortly) that there were no accessories in treason, because of the extreme gravity of the crime, and none in misdemeanor, because it was not worth while in misdemeanors to draw the distinction. The distinction was thus reserved for cases of felony—that is to say, for capital cases as to which it was thought desirable to temper the excessive cruelty of the law by the uncertainty of its execution. The subtleties connected with the subject have been for the most part removed, and I do not see why the phraseology should be retained. As I understand the matter, Article 44 gives the effect of 24 & 25 Vict. c. 94; and if I am right in this supposition, it would be easy by a general enactment to banish the words "accessory before the fact" and "principal in the second degree" from the Criminal Law, and so to suppress a totally useless and rather difficult part of it.

Part II. relates to offences against public order. The law relating to high treason (Articles 51–61) is in a strangely intricate and technical state. I have expressed it simply, and I hope correctly. I do not think the judicial constructions put upon some of the branches of 25 Edw. 3, by the judges add much to the security or stability of the Government. No jury would be likely in these days to find a man guilty of a constructive intent to kill the Queen, or of a constructive levying of war. Nor, since the passing of 11 Vict. c. 12 (Article 62), is it likely that any jury would be asked to do so. I do not think there would be any real difficulty in recasting the law in a rational form, but the subject is one on which people's feelings might easily become excited, and though happily the practical importance of the subject is, and is likely to continue to be, small, excited discussions, which might leave the law in an even less satisfactory state than it is in at present, might be a greater evil than the continuance of a state of the law which, if clumsy, has, at all events, the cardinal merit of being efficient.

Chapter VII., which relates to violent breaches of the peace, calls for little remark; I may observe, in passing, that an error of some sort has crept into the drafting of 39 & 40 Vict. c. 36, ss. 188-9, which punishes unlawful assemblies for smuggling purposes. I have explained it in a note to Article 76. Some of the provisions as to unlawful petitioning seem to be obsolete. The maintenance of 57 Geo. 3, c. 19, s. 23 (Article 80), appears to me to answer no other purpose than that of giving disorderly people an opportunity of displaying a little cheap courage and safe disregard for the law by holding public meetings in Trafalgar Square whilst Parliament is sitting. The singular provision contained in Article 81 obviously exists only because it is forgotten.

Chapter VIII. relates to unlawful oaths and associations. The Secret Societies Acts (39 Geo. 3, c. 79, and 57 Geo. 3, c. 19 (Article 86)) are full of provisions quite unsuited to these times and liable to great abuse; and the provisions of the Catholic Emancipation Act (10 Geo. 4, c. 7, ss. 28, 29

(Article 90)) about Jesuits and monks, are habitually set at nought. The law as to seditious words, libels, and conspiracies (Articles 91, 92) has not been put in force for many years; but it might, of course, be necessary to enforce it, and I do not think it is in itself unreasonable.

Chapter IX., which relates to offences against foreign powers, contains one provision (Article 98) which is clearly monstrous and might as well be repealed, the offence being left to be punished as an ordinary misdemeanor. The Foreign Enlistment Act (Articles 100–103), which makes up the bulk of the chapter, has been so lately fully considered, and was drawn with so much care, that no remark arises upon it, except that it admits of a little abridgment, which would be an advantage in a Penal Code.

Chapter X. deals with offences committed on the high seas, namely, piracy and slave-trading. The law relating to piracy is founded partly on the law of nations (Article 104), which, so far as I know, does not define the offence of piracy with any sort of precision, and partly on statutes (Articles 106–112) passed in the early part of the eighteenth century, which are a monument of the proportions which highway robbery on the sea had attained at that time. The Act which punishes slave-trading is exceedingly elaborate, and I think no one could understand it without a degree of study which would never be bestowed on it, except for some special purpose. I think it will be found that Articles 113–117 are the precise equivalent of it.

Of the offences defined in Part III. (abuses and obstructions of public authority) I have little to say. Most of them are common law offences of rare occurrence, but some statutory offences relating to parliamentary and municipal bribery are included in Chapter XIII. The statutes are modern and drawn with much care and precision, and do not appear to require any amendment.

The offence of perjury, which is defined in Chapter XIV., is treated in a very unsatisfactory way by the existing criminal law. I have given some account of the subject in Note VII., pointing out various matters which have not

found their way, at all events, into the common text books. The Indian Penal Code punishes, not perjury, but the offence of giving false evidence, which, I think, is the true way of dealing with the subject, as the real subject of punishment is misleading the Court, and not the impiety of breaking an oath. I think the solemnity of an oath would be rather increased than otherwise by treating it as a solemn conscientious sanction, superadded to but independent of the temporal sanction for giving false evidence. But be this as it may, three alterations in the existing law appear to be urgently required.

First, perjury, or giving false evidence, with intent to obtain property, or with intent to procure the conviction of a person for an offence punishable with death or penal servitude, ought to be punishable with penal servitude for life. It is a crime infinitely more odious and dangerous than robbery, and may be made the instrument of a crime morally equivalent to murder in its most horrible form.

Secondly, the law which requires the false matter to be "material to the question depending in the proceeding" in which perjury is committed ought to be repealed. It arose, as I think I have shown in Note VII., out of a mere blunder of Lord Coke's, and has now been nearly explained away by *R.* v. *Gibbon*, L. & C. 109, and other cases. Surely, the plain sense of the matter is that if a man gives evidence in a court of justice he is bound to tell the truth, not merely upon material points, but upon every point on which he is questioned.

Thirdly, each separate false assertion should constitute a distinct offence. When a man invents an odious calumny on an innocent lady in order to back up a monstrous lie as to his own identity, common sense would say that he commits two distinct crimes. As the law now stands, he only supplies matter for two assignments of perjury in relation to the one offence of breaking one oath.

I think that the offences of champerty, maintenance, and being a common barrator (Article 141) ought to be abolished for the reasons given by the Criminal Law Commissioners in

their 5th Report, p. 39. It might be provided that this should not affect the validity of any contract involving champerty or maintenance.

At all events, the statute 12 Geo. 1, c. 29, s. 4 (Article 141, last paragraph), ought to be repealed. This Act (which has been forgotten) is, perhaps, the most iniquitous in the statute book. It provides, that if any person practises as a solicitor or agent in any suit or action after having been convicted of forgery, perjury, or common barratry, he may be sentenced to seven years transportation "upon an order to be made by the judge of the court in which the suit was brought, who shall, upon complaint or information, examine the matter in a summary way in open court."

The law relating to escapes and rescues (Chapter XV.) is in an intricate state, but nothing except a complete re-enactment and re-casting of it would be worth doing.

Part IV. relates to offences consisting of acts injurious to the public at large.

Chapter XVI. (undefined misdemeanors) puts, I think for the first time, into a distinct shape the claim (if I may call it so) which courts of justice have virtually made, by many of their decisions, to a sort of qualified legislative power, for the purpose (to use the words of Pollock, C.B.), of "repressing what is a public evil and preventing what would become a public mischief." If I had omitted this chapter I should not, I think, have given a faithful representation of the law as it is, but I am, of course, aware that its insertion may give rise to controversy. I believe, however, that what I have stated is strictly true, and that the chapter represents the most important part of what has been often described with approbation as the "elasticity" of the Common Law. I might have given many other illustrations of the exercise of this quasi-legislative power by the judges besides those which I have mentioned.

Chapter XVII., which relates to offences against religion, and Article 170, which relates to ecclesiastical censures for immorality, will probably be read with surprise by many persons. The whole of this law is practically obsolete, and

might be repealed with advantage, though, of course, not in such a way as to diminish the ecclesiastical obligations of the clergy of the Church of England. As to blasphemy at Common Law, it would, perhaps, answer all practical purposes if the right to institute prosecutions for the offence were to be confined to the Attorney-General. Such a provision would render the definition of the offence comparatively unimportant. My own personal opinion is that blasphemy (except in the form of cursing and swearing, and the use of profane language in public places) ought not to be made the subject of temporal punishment at all, though, of course, if it tended to produce a breach of the peace it might be dealt with on that ground. The statute 9 & 10 Wm. 3, c. 35 (Article 163), has never, I believe, been enforced, and is obviously unsuited for these times.

I have no particular remark to make on the laws relating to disorderly houses, public nuisances, and vagrancy, except that it seems singular to employ the criminal law for the purpose of testing the liability of a parish to repair a highway, or the right of a particular person to erect a telegraph pole by the side of a road. I do not know, however, that this involves any particular inconvenience, except in respect of some slight differences between civil and criminal procedure, and the rules of evidence as applicable to them.

Parts V. and VI. of the Digest contain, as I have said already, the provisions of the Consolidation Acts and those branches of the Common Law which are necessary to be known in order to understand them. The composition of the introductory chapters (Chapters XXI. and XXII., and XXXIII.–XXXVI.), which contain the common law upon these subjects, has been by far the most difficult part of this work. As to Chapters XXI. and XXII., I do not know that any attempt has been made by any previous English writer to collect the principles of the law upon the subject of the infliction of death or bodily injury into a single connected whole. I have spared neither thought nor labour in the effort to make my statement of the law complete and correct. This is not the place to explain the nature of the

difficulties with which I have had to contend, nor the manner in which I have dealt with them. I may, however, observe in general, that though the law appears to me to be in the main not unreasonable, it is so fragmentary and has to be collected from so many different sources, that I am by no means sure that I have succeeded in my undertaking. Part of it bears the traces of a state of manners which has long since passed away, and seems cumbrous and obscure. It is expressed in Article 200 relating to private defence. It ought to be simplified if the law were codified; indeed, it seems, as it is, to be half obsolete.

The definition of homicide is, I think, reasonable, except in so far as the definition of a human being may be considered to err on the side of mercy. Physically, I suppose, a child ought to be regarded as a human being as soon as it has an independent circulation at latest. Probably the wish to avoid convictions for infanticide has led to the establishment of the definition given in Article 218.

The rules in Article 221 seem to be irrational, with the exception of the last, which is that causing death by perjury in a court of justice is not murder. I think this (if indeed it is the law) is right, because the offence lies in the perjury and the intent by which it is accompanied, and not in the result produced. A man executed after false evidence had been given to secure his conviction might be guilty of the crime charged against him. Besides, if the offence were treated as murder, it would be impossible to prove the commission of the offence without examining both the judge and the jury who tried the first case as to the effect produced on them by the perjured evidence. Moreover, it seems incongruous to treat a legal execution as being in any sense of the word a murder by any person. I think, however, that the fact that no special punishment is provided for so atrocious a crime is a blot on the law, and, as I have already said, I would punish it with the utmost severity. I do not myself think that death would be too severe a punishment for perjury in a capital case coupled with an intent to procure the prisoner's conviction.

The definitions of manslaughter and murder (Article 223)

are, I hope, correct. They have cost me untold trouble, as may be seen by reference to Notes XIII. and XIV. They show, I think, that the law is very nearly reasonable, and might be made quite reasonable by a slight amendment, to the effect that homicide should not be deemed to be murder only because the act causing death was accompanied by an intent to commit a felony or to resist an officer of justice in the execution of his duty. It is a question of minor importance whether causing death accidentally by an unlawful act, *i.e.*, causing death by an unlawful act not intended, and not likely to cause either death or grievous bodily harm to the person killed, ought to be a crime in any case. If a man is intentionally killed under a mistake, or accidentally killed by an act recklessly done which puts him in danger, it is of course another matter. If A shot at B supposing B to be C, and killed B, this ought, no doubt, to be murder, because A clearly intended to kill the man at whom he shot. His opinion, that the man at whom he shot was C and not B, was his motive for shooting at that man, but did not affect his intention. Again, A shoots at B with intent to murder B. C, who is standing by, is killed. This, too, ought to be murder, because if you shoot at one of two men standing together you are likely to kill the other; but suppose the gun had burst and killed C when standing at a distance from B? In this case it seems to me that the offence committed is not the murder of C (whose death is a mere accident), but the attempt to murder B.

The crime of manslaughter might, I think, be properly subdivided into three different offences punishable with different degrees of severity. That is to say, manslaughter, which but for provocation would have been murder, which might subject the offender to penal servitude for life as a maximum. Manslaughter by the intentional infliction of bodily harm neither likely nor intended to kill, which might be called by some such name as killing by a common assault, and manslaughter by negligence, which might be called killing by negligence. As matters stand, a surveyor who causes the death of a man by leaving dirt on the road which

upsets his carriage, commits the same offence and is liable to the same punishment as a man who returns a blow by a stab with a knife or a shot from a pistol.

I have little to say which need be said here as to the particular crimes against the person contained in the 24 & 25 Vict. c. 100 (Chapters XXV.–XXIX.) They are, as it seems to me, defined with excessive minuteness, and might be greatly simplified if a Penal Code were drawn. I have pointed out in the foot-notes one or two defects in the law. I may add to them the observation that it seems singular that no negligent acts causing, not death, but injury or danger to life or limb, should be punishable except acts endangering railway passengers and furious driving (Article 240). Negligence in regard to machinery connected with mines and manufactures, or in regard to explosive substances, is at least equally dangerous and blameable.

The law as to rape is not in a satisfactory state. The definition of the crime given in Article 254, is founded upon a variety of cases which had produced a definite, though not a completely satisfactory, result. Very lately a case has been decided which throws the whole subject into confusion. This is *R.* v. *Flattery*, in which it was held by the Court for Crown Cases Reserved that a man who persuaded a girl to allow him to have connection with her by pretending that it would be of use to her medically or surgically was guilty of rape. This appears to be directly opposed to no less than five cases in which it had been held that it is not rape to obtain connection with a married woman by personating her husband. The Court, indeed, announced their intention, as I am informed, to reconsider these cases if the occasion should arise.

The natural indignation which such abominable acts produce tends to justify this decision, but I think it is to be regretted, because it is difficult to see how far the principle ought to extend.

If it be said that a consent obtained by fraud is no consent, where is the doctrine to stop? Is seduction under a promise of marriage, or bigamy, the woman believing the

man to be unmarried, to be regarded as rape? Such a doctrine will surely involve an objectionable legal fiction.

I think the difficulty might be met by a statutory enactment punishing with the same severity as rape the offence of personating a husband, or obtaining a woman's consent to connection on the pretence of medical or surgical treatment. It is difficult to imagine any other kind of fraud by which such a purpose could be effected other than the frauds which usually accompany seduction. As to bigamy, I have always thought that it is at present punishable far too lightly in cases in which the woman is deceived. In such a case the pretended husband has inflicted an injury as cruel and heartless as rape, and he ought to be punished accordingly.

I may draw attention here to a strange mistake in the drafting of 38 & 39 Vict. c. 94, s. 3. See Article 256 and note.

The law relating to theft and cognate offences is in a state of excessive intricacy and technicality on account of the faulty definition of theft, and of the antiquated doctrines as to the things which are the subject-matter of larceny by which its form is determined. It could not be put into a completely satisfactory state without being entirely recast on the principle of making the fraudulent conversion, and not the fraudulent taking, the offence. If this were done it would be well to consider whether the law ought not to be made far more severe as against mercantile and other frauds and breaches of trust than it is at present. I cannot here discuss this important subject; but Article 304 and the other articles to which it refers show how imperfect the law is as it stands at present. It is enough for my present purpose to observe that the most glaring defects of the law might be removed by sufficiently simple amendments, which might be made at once. An unprofessional reader would hardly believe how much the law would be simplified in practice by an enactment that embezzlement and obtaining goods by false pretences should be and be treated as theft for all intents and purposes. Embezzlement is already declared to be theft by 24 & 25 Vict. c. 96, ss. 68, 70 (Articles 297, 309), but the practice of drawing an indictment as for a distinct

offence has become so inveterate that it has been provided by statute (24 & 25 Vict. c. 96, s. 72) that a person indicted for embezzlement may be convicted of larceny, and that a person indicted for larceny may be convicted of embezzlement if upon their trials they appear to have committed those offences. Section 88 of the same Act provides, as to the offence of obtaining goods by false pretences, that an offender shall not be acquitted if it turns out that he committed larceny. It has, however, never been provided that if it turns out that a man charged with theft really obtained the goods by false pretences he can be convicted of that offence.

The effect of these provisions is that the question whether an offence is larceny, embezzlement, or false pretences must still be decided, and that if the decision is wrong justice will be defeated. If a judge or chairman directs a jury to convict of embezzlement, if they convict at all, when in fact the man has committed theft, or if he is indicted for larceny when he ought to have been indicted for obtaining goods by false pretences, the conviction is quashed.

A very large proportion of the questions which come before the Court for Crown Cases Reserved turn upon the distinctions between these three offences, which are really distinctions without a difference, and the whole, or nearly the whole, learning of possession turns upon the distinction between theft and embezzlement. Besides this, indictments for obtaining goods by false pretences are extremely long and intricate, and in many cases miscarriages of justice have occurred from a defect in the statement or proof of the false pretence by which the goods, &c., were obtained. If the distinction was entirely removed, as it would be by the course I suggest, a great mass of cases and much useless nicety and intricacy might be forgotten.

This, however, is only one of the sources of intricacy in the law of theft. Another, which I think has caused almost as much confusion, is to be found in the state of the law as to the things which form the subject of larceny (Chapter XXXIV.). It is as it stands in the absurd state of a series of broad antiquated rules qualified by exceptions almost

co-extensive with those rules. The rules and exceptions are as follows:—

1. *Common Law Rule* (Article 291). Living wild animals cannot be stolen.

Statutory Exception (Articles 385, 386). Except, in a sense, deer, and, more or less, hares and rabbits (24 & 25 Vict. c. 96, ss. 11–17, and see 9 Geo. 4, c. 69, and 1 & 2 Will. 4, c. 32, as to game).

2. *Common Law Rule* (Article 290). Domestic animals cannot be stolen nor wild animals kept in confinement for curiosity, like bears and monkeys, for "they are not worthy that a man should die for them," unless, indeed, they are hawks, used for the "solatium vitæ" of princes and nobles. Moreover, animals of "a base nature" cannot be stolen.

Statutory Exception (Article 328 (*a*)–(*e*)). Dogs may be stolen, also all domestic animals, also all animals usually kept in confinement (24 & 25 Vict. c. 96, ss. 18–22).

Here the exception very nearly blots out the rule, though I think it would still be difficult to say whether ferrets or rats are capable of being stolen or not.

3. *Common Law Rule* (Article 288). No chose in action can be stolen.

Statutory Exception (Article 323). By 24 & 25 Vict. c. 96, s. 27, any one who steals any valuable security, except a document of title to land, is guilty of the same felony as if he had stolen the thing for which it is a security.

I regard the Common Law rule as intrinsically the most absurd principle still influencing the law. It is in short this:—We will make it legally impossible to steal the evidence of a right, although it is physically possible to do so, because it is physically impossible to steal the right itself. This overlooks the obvious truth, that if it were physically possible to steal a right there would be no reason why rights should not be the subject of larceny.

This absurdity is still the law of the land, although it has been rendered practically almost innocuous by the exception.

The exception, however, leaves the Common Law principle in force, and it occasionally works injustice. For instance,

in *R.* v. *Watts* (Dear. 326) it was held that an unstamped building agreement could not be stolen. It has been held that a pawnbroker's ticket (*R.* v. *Morrison*, Bell, 158), and a railway ticket (*R.* v. *Boulton*, 1 Den. 508), can be stolen, but the principle upon which these decisions proceed is by no means clear.

4. *Common Law Rule* (Article 287). Land, and things fixed thereto, or growing therefrom, and documents of title, cannot be stolen.

Statutory Exception (Articles 327, 328). By 24 & 25 Vict. c. 96 (s. 28), documents of title to land, (31), fixtures (32–38), all trees, vegetables, shrubs, &c., living or dead, except only shrubs, &c., under the value of 1*s.*, and all minerals, are the subject of larceny. The exception here blots out the rule, except as to shrubs, &c., under the value of 1*s.*

The result is substantially, that all the Common Law rules have been repealed by statutory exceptions nearly, but not quite, co-extensive with them.

The great and unmeaning intricacy of this arrangement is a considerable evil, the quibbles to which it occasionally gives rise are also evils, and there is a third evil which is not the less serious because it is little known. It has been held on several occasions that the distinction between what is the subject of larceny at Common Law and by Statute must be borne in mind in interpreting the statutes. Thus, for instance, it was decided in a late case that the words "by any false pretence obtains from any person any chattel, money, or valuable security" includes only chattels which were the subject of larceny at Common Law, and that therefore a man who obtained by false pretences two pointers worth £5 each committed no offence (*R.* v. *Robinson*, Bell, 34).

According to this case a man might obtain by false pretences any amount of growing timber, coal in a mine, or valuable fixtures without committing any offence at all. To take the commonest and vulgarest illustration, a thief finding out that repairs are going on in a house, pretends to be the plumber's man, and so gets leave to carry off leaden pipes, which he sells to a receiver of stolen goods as old lead;

another, by some analogous fraud, gets leave to dig up a bed of growing potatoes, or to remove a number of valuable plants from a nursery garden; these acts are not offences according to *R.* v. *Robinson*. Cases of this kind disgrace the law, and lead those who accidentally become aware of them to suppose that such cases are far more common than they really are, and to overlook the real merits of the system, just as one act of gross rudeness or fraud will do a man's character more harm than years of good behaviour will efface.

There is one branch of the law on this subject which I would not interfere with on account of the delicacy of the questions with which it is connected, I mean the law relating to living wild animals, the most important branch of which is the law relating to game. This branch of the subject I would leave just as it is, the rest I would deal with by abolishing once for all the Common Law principles, instead of making exceptions to them. Such a step would leave the penal part of the law unaltered; it would take out of it a vicious principle, which has caused great confusion, and it would render it possible in drawing a Penal Code to dispense altogether with more than ten sections of the Larceny Act, which answer no other purpose than that of partially removing the confusion.

The law as to larceny by bailees used to be exceedingly absurd. A conversion by a bailee was not larceny unless before converting the property the bailee did some act determining the bailment. This has been reduced to a rational state for the most part by 24 & 25 Vict. c. 96, s. 3 (Article 300). But the strange proviso, "this section shall not extend to any offence punishable on summary conviction," at the end of the section, ought, I think, to be repealed. It did not occur in the original Act, 20 & 21 Vict. c. 54, s. 4, but was added in the Act of 1861, according to Mr. Greaves "to prevent the clause applying to the class of persons employed in the silk, woollen, or other manufactures liable to be summarily convicted under sundry statutes." It seems to me that this is open to several remarks.

First, if the section would have repealed the Acts in

question but for the proviso the mischief was already done when it was passed, for the 20 & 21 Vict. c. 54, s. 4, was in precisely similar terms, except that it did not contain the proviso. It therefore repealed whatever was capable of being so repealed.

Next, the Acts in question are Acts which subject to penalties workmen "purloining" (the word "stealing" was obviously avoided on account of the old rule as to larceny by a bailee) materials entrusted to them by their employers.

As these statutes were rendered necessary by a defect in the old law, why should they be maintained when that defect is removed? If it is said because the Acts in question provide for a summary procedure, which is convenient, the answer is that the Criminal Justice Act (18 & 19 Vict. c. 126) has provided a summary jurisdiction for all cases of petty theft. I do not see why a working tailor who steals a bit of cloth from his master should be dealt with in any other way than any other petty thief.

Thirdly, judging from the Acts mentioned in the index to the Revised Statutes on this subject, I should think that most of the enactments referred to had been already merged (if such a process is possible) in the statutes relating to embezzlement. At all events the proper course would seem to be to declare expressly that the summary penalties intended to be retained should be retained, for the proviso, as it stands, certainly raises a doubt whether, if a messenger was brought before a magistrate charged with stealing a parcel entrusted to him of less value than 5*s*., and if it appeared that he had stolen it without doing any act to determine the bailment, the magistrate ought not to dismiss him.

Upon the law as to forgery, coining, and malicious mischief (Chapters XLIV., XLVI., XLVII.), I have nothing to say which need be said at present. All those Acts would admit of very great abridgment and condensation, if they were redrawn as chapters in a Penal Code. They subdivide the different offences, and distinguish between the punishment allotted to substantially identical offences in a manner

which makes them very long and intricate, but they are not perplexed by any of the unreasonable Common Law principles which introduce so much confusion into other parts of the law, and they have been most carefully drawn.

The law relating to offences connected with restraints of trade and the breach of particular duties created by contract (Chapter XLIX.), is so modern, and has been in some cases the subject of such vehement and such very recent controversy, that no one would think of re-opening the discussions connected with it from the point of view of a mere lawyer. I may, however, observe that 38 & 39 Vict. c. 86, s. 7, clause 1 (the Conspiracy and Protection of Property Act, 1875), has introduced into the law of England an offence of an entirely new character, and of the greatest possible importance, unless, indeed, it is to be restricted by the reference to the general purport of the Act to the case of masters and servants. The enactment in question makes it a misdemeanor to intimidate any person or his wife or children (? child), with a view to compel him to abstain from doing or to do any act which he has a legal right to do, or abstain from doing, wrongfully and without legal authority.

The enactment seems to have been taken from section 503 of the Indian Penal Code, which punishes criminal intimidation. I suppose, however, it would be construed in connection with the other provisions of the Act. It can hardly have been the intention of Parliament to provide that if a father tells his grown-up daughter that if she marries A B he will never speak to her again, and disinherit her, he is to be liable to £20 fine and three months hard labour.

If these observations should have the effect of drawing the attention of the Government or of Parliament to the subject to which they relate, it would be an easy matter to throw them into the form of a bill for amending the Criminal Law, and if such a bill were passed, it would be a long step towards a Penal Code.

The amendments required in the law of Criminal Procedure are far more numerous, and would go far deeper than those which are required in the law defining crimes and

punishments. I cannot, however, enter upon this subject, until I am able to bring out (as I hope to do in the course of the year) a Digest of the Law of Criminal Procedure.

In conclusion, I have to express the obligation under which I am to my friend Mr. Horace Smith (of the Midland Circuit), the editor of the last edition of Roscoe's Criminal Evidence, for much valuable assistance in the preparation of this work, and especially for the Index to it.

J. F. S.

4, Paper Buildings, Temple.
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