A GENERAL VIEW

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BY

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PREFACE.

THE first edition of this book was published in the year 1863, and I was asked for a second edition as far back as 1874; but on beginning to prepare it I found myself met at every step by the difficulty that I was unable to refer to any work in which the contents of the Criminal Law as it is, were shortly stated. This first suggested to me the scheme of writing such a work, and I accordingly wrote my *Digest of the Criminal Law, Crimes and Punishments*, which was published in 1877. In consequence of this work I proposed to the then Government to prepare a Code of Criminal Law and Procedure, and upon this I was engaged from 1877 to early in 1879, first as an independent draftsman, and afterwards as a member of the Criminal Code Commission of 1878. The Bill drawn by me, and settled by the Commission of which I was a member, has been more than once under the consideration of Parliament, but time has never been found for its full discussion. In 1883 I published a *History of the Criminal Law*, and, with the assistance of my eldest son, a *Digest of the Law of Criminal Procedure*. Of these works I think I may fairly say that collectively they constitute a pretty complete account both of the actual contents of the Criminal Law of England, and of the various circumstances which led to its assumption of its present form.

The *History* is, however, too long and elaborate for general purposes, and in particular for the purpose of an introduction to the two *Digests;* and I have been informed that my first work, the *General View of the Law of England*, is still in request, as a first book on Criminal Law, amongst students at the Universities and elsewhere, although it has become so rare as to be in practice unobtainable. I have accordingly re-written it, giving an account of the subject, which contains in a very moderate compass the essence of what I have learnt during a long and greatly varied experience of thirty-six years as a barrister, a member of the Indian Council, an author, a draftsman, and a judge.

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CHAPTER I.

PLAN OF THIS WORK.

A CRIME, in the strict legal sense of the word, is an act forbidden by law under pain of punishment. Most of the acts which fall under this definition are grossly wicked actions, forming attacks upon person, or upon property, or upon public order; but the definition itself includes many actions which would not in popular language be described as crimes. Some things which in other countries are treated as matters of civil administration are dealt with in England as offences against the criminal law. The law of nuisances is perhaps the strongest illustration of this. A variety of civil obligations—such as the obligation of repairing a road or a sea-bank, the obligation of not interfering with erections intended for the public convenience, and many other matters of the same sort—are enforced by indicting those who are guilty of a trespass or a negligence which might involve punishment, but to which no one would attach the idea of moral guilt. It must be remembered also that, although all actions punish-

CHAP. I. able by law may be regarded as crimes, they may also be regarded from a completely different point of view. Nearly every crime is not only a crime, but is also an individual wrong or tort, and may be dealt with as such. Assaults and some kinds of frauds are generally so dealt with. Every libel may be the subject of an indictment, but much the more usual remedy for it is a civil action. Crimes may also produce effects which bring them under the notice of courts of justice for other than criminal purposes. Bigamy, for instance, and some other crimes, are grounds for the civil remedy of divorce. Arson by a person insured would be a good defence by an insurance company to an action brought upon a policy. In these cases crimes would be judicially proved before courts of justice, but would be viewed by the court neither as crimes nor as torts, but simply as acts affecting the status or the money liability of persons other than the criminal. These illustrations show both that the consequences charged upon an act by law, and not the nature of the act itself, is the specific difference by which crimes are distinguished, and that the criminality of an act is distinct from its moral character, although, as a rule, the moral atrocity and infamy of any given action is the main reason why it is treated as a crime.

Again, there are several branches of law which cannot properly be described as a part of the criminal law, but are very nearly related to it. The most remarkable of these is the law relating to what are described as penal or *qui tam* actions.[1] These are cases in which particular matters, principally connected with the enforcement of some special Act of Parliament, are made liable to penalties which may be claimed by private persons or public authorities who choose to sue for them. Innumerable instances might be given of

[1] The phrase is derived from the old form of information, which ran thus: A. B. (the plaintiff's name) "*qui tam pro se quam pro domino Rege*," &c.

these. One well-known case gave rise to an action brought against Mr. Bradlaugh for having voted and sat in Parliament without taking the oaths then prescribed for a person who did sit and vote. Other instances are to be found in the Municipal Corporations Act, which imposes penalties on those who act as members of Town Councils without being duly qualified, or who, being such members, accept any contract with the Corporation. CHAP. I.

Though closely allied with the criminal law properly so called, these enactments cannot be said to form a part of it. They all depend upon special Acts of Parliament, relating to an immense variety of subjects quite unconnected with each other, and illustrating no general theory or principle.

Many crimes in the full sense of the word are properly speaking only sanctions meant to enforce Acts of Parliament relating to subjects which have little to do with crime. Such, for instance, are sections of the various Marriage Acts, which forbid, under pain of penal servitude, certain irregular marriages; sections in numerous Acts which make certain false declarations equivalent to perjury; sections which appoint special punishments for the forgery of particular documents; and an infinite variety of others. Of these I say nothing. They belong rather to the particular subjects to which the Acts of Parliament containing them refer than to the criminal law in the common sense of the phrase.

Similar observations may be made on a large number of enactments, such as breaches of police regulations contained in particular Acts of Parliament, and enforceable in a summary manner by magistrates. Such, to mention a very few, are the series of sections of the Metropolitan and of other Police Acts; the series of sections in the Highway Act as to offences in the use of highways; sections relating to offences connected with the destruction of sea-birds and fishing in rivers; sections in the Vagrant Acts, the Public Health

CHAP. I. Acts, and a vast number of others too various and not interesting enough to require mention here. I do not notice these.

In early times the distinction between crimes and civil injuries was even less well defined than it is now. Thus, by the Statute of Westminster the first (3 Edw. I. c. 20), it was enacted amongst other things that a trespasser in a park should pay heavy damages to the party and be imprisoned three years, besides incurring other penalties.[1]

Thus the object of this work is to give a general view of the criminal law of England, exclusive of penal actions; of offences punishable by summary proceedings before magistrates; and of special offences intended as sanctions for special statutory institutions; and including all acts commonly known as crimes. The arrangement of the work is as follows. I begin with an historical introduction, setting forth the steps by which the criminal law reached its present condition. I then proceed to give an account of certain general principles relating to crime, and of certain general exceptions which are virtually contained or implied in the definition of every crime. These may collectively be called the conditions of criminality. They include the subjects of age, sanity, compulsion, necessity, ignorance of law, and ignorance of fact. I then proceed to the question of the parties to the commission of crimes, and to the steps taken towards a crime—incitement, conspiracy, and attempts. From this I pass to the definitions of particular crimes, treating successively of crimes which affect public order, abuses and obstructions of public authority, offences which are regarded as injurious to the public at large; offences against the person, the parental and conjugal rights, or the reputation of individuals; and lastly offences against property, by way either of force or of fraud. I next give a sketch of the subject of criminal

[1] *History of the Criminal Law*, iii. 275.

procedure, and of that of the law of evidence in relation to criminal cases. Upon all these subjects I mention only the leading points and principles, and I give references at every point both to my *History of the Criminal Law* and to my *Digest* of those parts of it which relate respectively to crimes and punishments and to procedure. The whole contains the essence of what I have to say upon the subject, and will, I think, enable anyone who wishes to acquaint himself with the criminal law, either for professional or for other purposes, to learn all the leading details necessary to be known upon the subject, and to know where to find further information upon it. CHAP I.

CHAPTER II.

HISTORICAL INTRODUCTION.—THE CRIMINAL LAW DOWN TO THE CIVIL WARS.

CHAP. II. THE history of the criminal law of England can in a certain sense be traced back to the very earliest period—certainly far beyond the Conquest; though nearly the whole of it, as it now exists, whether we look at its definitions or at the laws of procedure, is much more recent. It contains some small traces of connection with the criminal law of Rome, but they are few and unimportant, and appear to me to have been introduced into the system by English or at all events Anglo-Norman writers many centuries after all traces of the Roman authority in Britain had absolutely passed away.

The earliest body of criminal law known in England is contained in the laws of a succession of kings, beginning with King Ethelbert, and ending with the work called the *Leges Regis Henrici Primi*, a compilation made in the reign of Henry I. of the various laws and customs then in force; not a code enacted by that king. These different bodies of law vary in several important particulars, but, speaking generally, they re-enact each other with variations, and may be regarded in the light of so many new editions of a single very imperfect code, with amendments, additions, and expansions suggested by the various changes which took place in the course of about five hundred years, from Ethelbert

to Henry I., some of which were in force only in particular parts of England. CHAP. II.

The *Leges Henrici Primi* are the latest in date, and are the most instructive as to the general scheme and spirit of these bodies of law. The work itself is, as I have said, a compilation. What authority it possessed, or by whom it was made, does not appear. It contains a great number of matters which are to be found in the earlier laws, and it fairly represents their spirit. A few scraps of Roman law have found their way into it, but taking the system, such as it is, as a whole, it seems to give a not unfair account of the ancient English law as it was long before the Conquest. It is a slovenly composition, full of inconsistencies, repetitions, and unnecessary distinctions; and, like the other early laws, it is remarkable for the complete absence of anything which can be said to approach to the statement of a legal principle. There is abundant reference to crimes, and to the manner of prosecuting them, but the definitions of crime are scanty, and no clear account of the mode in which a crime is to be prosecuted is to be found in any part of the work. Like all the other early laws, it assumes throughout that its readers are acquainted with the general character of the legal institutions and modes of trial then existing, and, with some few exceptions, with the meaning of the various names which are given to the different crimes; but inasmuch as these are the very points of which we know least, and of which we have to inform ourselves by comparing the different allusions which are made to them, the result, on the whole, is obscure and unsatisfactory. The following, however, may be taken as a short description of the main points which these various laws disclose.

The early English definitions of crime may be passed over shortly. They can hardly be said to exist at all, and indeed are rather names than definitions, though the names are

CHAP. II. sometimes explained; as, "Stredbreche est si quis viam frangat concludendo vel avertendo vel fodiendo;" "Forestel[1] est si quis ex transverso incurrat vel in via expectet et assalliat inimicum suum." Sometimes no definition is given, but the meaning of the name may be inferred from the context of different places in which it is used. Thus *ofer-hynes*, or *overseunesse*, appears to have been something in the nature of a contempt of court, or disobedience by an officer of justice to lawful orders. Some slight attempts are made to classify different kinds of homicide, but in this part of the law nothing is to be found which is on any account remarkable.

The interesting part of the early English criminal law is its procedure, which throws considerable light on the state of society in which it existed. A crime in any moderately civilized state of society is an event recognized as one which is to be if possible prevented, and, at all events, punished, by the public force upon public grounds; but in the earliest period of English history crimes seem to have been regarded as private wrongs, revenged rather than punished by those who were injured by them, first by private war, afterwards by summary execution, and then by a public administration of justice slowly organized in such a way as to bear many traces of the rough system, if so it can be called, which it gradually superseded.

Of private war it is enough to say that traces of it are to be found in many of the earlier English books of law, and in those of the Conqueror, who regarded trial by battle as a modified form of it. It is also shown by the laws which punish the breach of the king's, the lord's, or the Church's peace. These were originally confined to particular times and places, which implied that peace was the exception and war the general rule.

[1] *Fore*, before; *stellan*, to leap.

CHAP. II.

The law of summary execution, or *infangthief*, was a short step nearer to the regular administration of justice. It consisted in the privilege conceded to the lords of townships of putting to death in a summary way people who committed theft or robbery in their bounds. This privilege was common, and was frequently used, certainly till the reign of Edward I., as appears by the Hundred Rolls. One or two stray instances of it survived till a much later period, especially in the forests. The Halifax "gibbet law" was enforced so lately as 1658.

These summary methods of criminal procedure, if they deserve the name, were overshadowed and greatly restrained from a very early period by a general and regular system, which, however, bore strong marks of the characteristics of the system which it superseded. This was the system which depended ultimately upon the king, and was exercised through the authorities of the shire or county, the hundred or wapentake, and the tithing, parish, or township. For each shire there was an earl or alderman, and a sheriff or viscount; in the hundreds there were chief bailiffs; every township or tithing was represented on all occasions by a reeve and four men. There were numerous exceptional "liberties," or districts which stood outside the general system, but with similar officers of their own.

The courts were held in and for the counties and hundreds, and in and for the franchises. The hundred court was simply the county court sitting in and for the hundred, as the sheriff's *tourn* or circuit. The court consisted of the representatives of the different tithings, the four men and the reeve in the jurisdiction, and the business transacted was of two kinds, administrative and judicial. The administrative business bearing on the subject of criminal law was what ultimately came to be called "view of frank pledge," which was slowly developed from that of "*borhs*" or sureties.

CHAP. II. In the maturity of the system all men were bound to combine themselves into associations of ten, each of whom was security for the good behaviour of the rest. The business of seeing that these associations were kept in order and enforced by fines was one of the chief agenda of the local courts, and was a principal means of police administration. It became obsolete many centuries ago, but a petty criminal jurisdiction which was annexed to it still survives under the same name in small manor and local courts. A full account of this jurisdiction is given in 18 Edw. II., A.D. 1325, which is called "the statute for view of frank pledge." It marks a date at which the old system of frank pledge had become so completely obsolete that the extent of the jurisdiction which inherited its name had become uncertain.

The business of prosecuting criminals was one of which it is impossible to give a perfectly distinct account for the reasons already assigned. It was unlike a modern criminal trial, both in the object aimed at and in the way in which that object was attained.

The character of the proceedings cannot be understood without an explanation of four technical terms. These are *borh*, *wer*, *bot*, and *wite*.

Borh meant a pledge or security. Everyone was bound, as early as the days of Cnut, to have "*borhs*" who would "hold and lead him to every plea," *i.e.* produce him in court when he was wanted, as a bailsman does in the present day.

Wer was a price or value set on a man according to his rank in life, and was employed for many purposes. If the man was killed, his relations were paid the amount of his *wer*. If the man was convicted of theft, he might have to pay his own *wer* to the king. If the man was outlawed, his sureties (*borhs*) had to pay his *wer*.

Bot was compensation to a person injured by a crime. The *wer* was in some cases the measure of the *bot*; for

instance, if the injury consisted in killing a relation, the persons whose relation was killed received by way of *bot* or compensation the amount of his *wer*. In many cases the *bot* was fixed according to the nature of the injury; *e.g.* in Alfred's laws, the *bot* for the loss of the great toe is twenty shillings, of the second fifteen shillings, of the middle toe nine shillings, of the fourth toe six shillings, and of the little toe five shillings. CHAP. II.

Wite was a fine to the king for a crime. The *wer* might be the measure of the *wite* as well as of the *bot*; as, for instance, if the criminal was outlawed his *borhs* had to pay his *wer* to the king as *wite*.

The proceedings consisted of two steps—accusation and trial.

Accusation might be either by the four men and the reeve of a township, or by a sort of judicial committee of twelve—which seems to have been instituted as a representative body for judicial purposes, and may have had to do with the origin of grand juries—or by a private person.

The accused person was "led to the plea" by his *borh*, who, as well as his lord if he had one, and two thanes of the hundred, had to swear that he "had not paid thief-gild" since a certain time, which being done, he had to clear himself either by compurgation or by ordeal. Compurgation consisted in getting a number of witnesses, greater or less according to circumstances, to swear to his innocence. The compurgators were collectively called the *lad*. There were rules as to the relative value of oaths and as to their number, and there are a few traces of the existence of witnesses to facts, but nothing satisfactory can be said about them. These compurgators might be dispensed with if the accused performed the single ordeal, viz. handling a pound-weight of red-hot iron, or putting his hand up to the wrist into boiling water. If the oath "burst," *i.e.* if the witnesses were not forthcoming or

CHAP. II. would not swear, the accused went to the triple ordeal, handling three pounds-weight of red-hot iron, or plunging the arm into boiling water to the elbow.

If the ordeal failed, the accused was convicted, and had on a first conviction to pay *bot* and *wite*—compensation to the party injured, and a fine to the king—and to find *borhs* or sureties for his future good behaviour. On a second conviction he was put to death or mutilated. A certain number of offences were *bot*-less or inexpiable, and for these death or mutilation was inflicted on the first conviction.

These institutions lasted for a considerable time after the Conquest, though they were gradually superseded by others. Ordeals are mentioned in the Assizes of Clarendon (A.D. 1164) and Northampton (A.D. 1176), and their disuse formed, as will appear hereafter, a step in the history of trial by jury.

These are the main features of early English criminal law. I pass to the effects of the Conquest upon it. Remotely, the Conquest may be regarded as the origin of most of the great institutions the development of which forms the subject of the political history of England; but the Conqueror and his sons walked to a great extent upon the ancient ways, and governed by the old methods, though with a continual effort to renew and reinvigorate them. Several entirely new additions were made by the Conqueror himself to the English criminal law. [1] He separated the ecclesiastical from the temporal jurisdiction. [2] He established trial by battle, and [3] he abolished capital punishment. The first of these changes

[1] Stubbs's "Charters," 85.

[2] "Si Anglicus homo compellet aliquem Francigenam per bellum de furto vel homicidio vel aliqua re pro qua bellum fieri debeat vel judicium inter duos homines habeat plenam licentiam hoc faciendi."—THORPE, i. 488.

[3] "Interdico etiam ne quis occidatur aut suspendatur pro aliqua culpa sed eruantur oculi et testiculi abscidantur et hoc præceptum non sit violatum super foris facturam meam plenam."—STUBBS, *Charters*, p. 84.

had most important effects, to be noticed hereafter. Of the second I will at present say only that it survived nominally till 1819, and most probably had some effect in discrediting ordeals. The last seems merely to have expressed a personal feeling, for if capital punishments were discontinued in William's time they were soon afterwards resumed, and there are instances of such punishments even under him. CHAP. II.

The great thing, however, which the Conqueror did was to invigorate the Royal authority in all its functions, and thus to lay the foundation of the great judicial and administrative reforms of Henry II., which determined the character of the English administration of justice from his time to our own.

This was done in various ways, but in particular by two institutions—the King's Court and the Inquest. The King's Court, or Curia Regia, was at once a Parliament, a Supreme Court of Justice, and a Supreme Board of Revenue and Administration. Of the way in which these functions were separated and distinguished it is not necessary to speak in detail in this place. It is enough to say that the Court of Queen's Bench, now the Queen's Bench Division of the High Court of Justice, and the courts held before the Justices of Assize, which to this day are the great criminal courts of England, are directly descended from the Curia Regia. It is owing to their influence that the criminal law of England has always retained its uniformity, whatever other faults it may have had, and has almost invariably been administered to the satisfaction of the public even under the most trying circumstances, and that the criminal courts have had sufficient authority by their decisions to develop, with some assistance from a few writers of law books, a crude collection of names of offences into the most elaborate and complete body of criminal jurisprudence in the world. This, however, was not the immediate result of the Conqueror's institutions. Henry II. had much more influence than the Conqueror in remodelling the

CHAP. II. courts. The hundred court, or sheriff's *tourn*, continued to be the great criminal court till Magna Charta, when it was restricted to the less important criminal cases. Ch. 24 provided, "Nullus vicecomes constabularius coronatores vel alii ballivi nostri teneant placita coronæ nostræ."

Pleas of the Crown and pleas of the sheriff are carefully distinguished by Glanville, who wrote under Henry II. Capital cases "quæ scilicet crimina ultimo puniuntur supplicio aut membrorum truncatione" were pleas of the Crown. Thefts, though capital, were pleas of the sheriff, "pro defectu dominorum," *i.e.* unless there was some local franchise to which they belonged; so that it is probable that in this as in some other cases Magna Charta enacted existing practice into positive law.

The Inquest, unknown, I believe, before the Norman Conquest, was in its ultimate result quite as remarkable as the Curia Regia. It was simply an inquiry held before one or more persons appointed to make it, into facts which the king wished to know for the purposes of his government. These inquiries were taken before justices, of whom an indefinite number were attatched to the King's Court, and who were employed as occasion required for services defined by Commissions issued from time to time.

The inquests by which the information recorded in Domesday Book was collected supply the most striking and memorable illustration of the nature and working of this institution. Commissioners were sent all over England. The sheriffs and bailiffs brought before them people locally acquainted with the matters to be recorded. They gave their information upon oath, probably after making inquiry of the parties interested, and their returns formed a record of all the matters on which the administration of the executive government, and particularly the collection of the feudal and territorial revenue of the

Crown, depended. These inquests were the real origin of trial by jury, and the intermediate position of the members of the inquest between judges and witnesses explains the history of that mode of trial and its strong and weak points. CHAP. II.

Assizes, in our sense of the word, are the direct descendants of the *itinera* or eyres, which were first reduced to a system, by no means unlike our circuits, in the time of Henry II. The business of these eyres was to hold inquests in every part of the country as to crimes, as to civil suits, and as to a vast variety of matters connected with revenue, feudal services, &c., specified in the Commissions under which the justices sat, and varying from time to time according to circumstances.

The history of the eyres and of the different Commissions issued to them is very curious.[1] It is sufficient for my present purpose to say that the revenue and miscellaneous business being provided for in various ways, the assizes remained as an institution for the administration of criminal and civil justice by the holding of inquests, which were gradually developed into trial by jury.

It would be difficult to trace out in full detail the process by which trial by jury, as we understand it, was developed from the old inquests, but the general nature of the process may be stated with great confidence. No perfectly distinct account can be given of the proceedings before a justice in eyre as they originally were, but it is clear that the first step was to call together the principal persons of the county, and to require them to report upon the crimes which had been committed in the county since their last appearance. They would naturally present the persons who had been previously arrested or held to bail by the sheriffs, the constables, afterwards by the coroners, and at a later period still by the

[1] *History of the Criminal Law*, i. 97–111.

CHAP. II. justices of the peace, as well as those whom they knew or suspected by their own information. How the functions of the petty jury came in, or who the petty jurors originally were, is by no means clear. Whether the four men and the reeve from the particular township in which a crime was committed were originally fined for it, or whether any sort of general pannel was provided, and if so, how, are matters which cannot now be discovered, nor can I say what precise effect the accusation of a grand jury had in the very earliest times. It is also very difficult to ascertain what was the line between the functions of the grand and petty jury, and how far the justices took part in their deliberations or inquired into the reasons they had for their verdicts.

There is, however, abundant evidence to show that, however their powers may have been exercised, jurors, both grand and petty, originally were, as grand jurors still are in theory, official witnesses, upon whose sworn reports the justices acted in trying crimes. It is probable that from the very first they were aided by actual witnesses of the facts on which their reports were based, and it is certain that as time went on they ceased to be expected to testify to matters within their own knowledge only, and came to be the judges of matters of fact deposed to in their presence, and, in the case of the petty jury, in the presence and under the supervision of the justice. The question, however, occurs, How, while the grand jury acted as accusers, was the guilt of the accused person decided upon? The answer is that at first, as appears from the Assize of Clarendon (A.D. 1164) and the Assize of Northampton (A.D. 1176), and the *Rotuli Curiæ Regis* in the reigns of Richard I. and John, the trial was, in cases in which the grand jury accused, by ordeal, and in cases in which a private appellor accused, by battle. If the prisoner was condemned by the ordeal, he lost first one foot, and after the Assize of Northampton his right hand as well, and had to abjure the

realm. If he was acquitted by the ordeal, he nevertheless, CHAP. II. if accused "of murder or other base felony," had to abjure the realm. Ordeals fell into disuse (probably on account of the decrees of the Lateran Council of 1216) in the course of the thirteenth century; and when this happened accusation by a grand jury became equivalent to condemnation, and no means of trial remained except in cases of private accusations or appeals, in which the trial was by combat. It is probable that in these circumstances the petty jury came into use. The first step towards it was the Great Assize, which was an inquest of persons acquainted with the facts, who returned a verdict upon oath and of their own knowledge. Even before the disuse of ordeals, the privilege of going before a petty jury instead of being tried by ordeal might be purchased from the king, and after this the petty jury came to be the regular stated means of disposing of accusations made by the grand jury.

There is abundant evidence to show first that all juries held in the thirteenth century the position of official witnesses; secondly, that they were closely examined by the justices who took the inquests as to their reasons for their accusations or verdicts; and thirdly, that they were assisted in the discharge of their functions by witnesses, in the modern sense of the word, to particular facts.[1]

The change from this antique form of trial by jury to that which still exists amongst us, in which the grand jury accuses on the evidence of witnesses heard in private, and the petty jury decides upon the accusation also on the evidence of witnesses, but under the direction of the judge, was no doubt gradual, and there would be little interest in tracing out the steps by which it came to pass; but I may

[1] For details and authorities see *History of the Criminal Law*, i. 251–265. The old character of juries is illustrated by the Halifax Gibbet Law, see *ibid.* 265–269, and by the Liberty of the Savoy, 270–272.

CHAP. II. shortly mention a few characteristic circumstances connected with it.

The change was substantially complete in the sixteenth century, when the first report of an important trial by jury—that of Sir Nicholas Throckmorton—is given in a form presumably more or less authentic. The account given in the reign of Elizabeth by [1] Sir Thomas Smith, Secretary of State and Ambassador to France, of criminal trials, shows that the ordinary course of criminal justice in his time was, so far as the functions of the jury were concerned, substantially what it is now.

The following matters, which it is difficult to refer to definite dates, illustrate the gradual progress of the change.

The character of the jury as witnesses is illustrated by the fact that during the early stages of the system a remedy for a corrupt verdict in criminal cases existed at the suit of the king, though not at the suit of the party, in a proceeding called an attaint. It existed in civil cases at the suit of either party. The nature of it was that a second jury of twenty-four might convict the first jury, if they thought proper, of a false verdict, the result of which was that the first jury were subjected to extremely severe penalties.

Down to the reign of Queen Elizabeth no such crime as perjury by a witness, in our sense of the word, was known to the law. The attaint obviously assumed that the jurors were witnesses, and punished them as for perjury. As they came to be recognized as judges of the fact informed by witnesses, attaints fell into disuse. Smith says that in his time they were very seldom put in use. The attaint was spoken of by Lord Mansfield as "a mere sound," and was formally abolished in 1825 (6 Geo. IV., c. 50, s. 60).

Another remarkable circumstance which illustrates the

[1] *Commonwealth of England*, ch. xxv. 183–201; *History of the Criminal Law*, i. 347–349.

same thing is that in ancient times the prisoner had no right to call witnesses, and though this practice was gradually relaxed, the prisoners' witnesses were not allowed to be sworn till 1st Anne, st. 2, c. 9. The explanation of this rule, which to our minds appears so monstrous as to be unintelligible, is probably that the jury were originally regarded as witnesses, who, coming from the neighbourhood where the offence was committed, were supposed to know the circumstances. Other motives, no doubt, came in to enforce this application of the principle. It saved much trouble. It prevented doubtful questions from arising, and immensely increased the powers of the prosecutor, but it was probably originally suggested by the ancient constitution of inquests, and the ancient sentiment that accusation by the grand inquest was originally almost equivalent to conviction, as its consequences could originally be averted only by ordeal or compurgation. CHAP. II.

The last circumstance to be mentioned is that the practice of fining the jury for not finding the verdict which the king's advisers wished for or regarded as true becomes intelligible when we remember the original character of inquests. The jurors were not, as used to be assumed, constitutional judges of matters of fact. They were persons brought together to give the king information upon oath through the justices whom he sent to make inquiry into matters of fact. If they gave false or perverse information, it would be natural for the justice to fine them as for a contempt of Court. In proportion as they came to be recognized as judges of the fact, such a proceeding would be seen to be tyrannical and subversive of their position.

Sir Thomas Smith, in the sixteenth century, obviously referring to the treatment of Sir Nicholas Throckmorton's jury, who were heavily fined for acquitting him, speaks of such measures as "even then of many accounted very violent, "tyrannical, and contrary to the liberty and custom of the

CHAP. II. "realm of England." In 1670 such measures were held to be positively illegal in Bushell's case.[1] No one can question the propriety of this decision, but there was an historical explanation and foundation for the practice which it declared to be illegal.

Side by side with the development of trial by jury there existed another mode of trial, to which I have alluded in passing, which also exercised a remarkable influence over English law. This was trial by battle, which, as well as the inquest, was introduced by William the Conqueror, and was neither more nor less than private war organized and reduced to a system. The system was known by the name of appeals or private accusations, and applied to all cases in which a private person, for the sake of revenge or for any other object, wished to prosecute another for a crime. The nature of appeals differed according to the nature of the crime prosecuted. Appeals of treason were brought in Parliament, and, after having a remarkable history,[2] were abolished in 1399 by the statute 1 Hen. IV. c. 14. They were the predecessors of Parliamentary impeachments. Appeals of theft, rape, mayhem, &c., seem to have been soon disused, but appeals of murder were abolished only in the year 1819. The appeal of murder was a strange proceeding. It was originally made before the coroner, and had to be made in a highly technical, minute, and elaborate form of words, which could not be amended. The appellee was proclaimed at five County Courts, and, if he failed to appear, was outlawed, and might, by an equally elaborate process, be inlawed, and admitted to defend himself. The appeal was heard before the justices, and all manner of legal subtleties, known as "exceptiones" or pleas, might be urged by the accused. If the appellor could prove the appellee's guilt, the appellee was not allowed to wage his body—that is, to have trial by battle;

[1] See *History of the Criminal Law*, i. 306. [2] *Ibid.* i. 151–155.

but if all these difficulties were successfully avoided, the trial was by combat; and if the appellee was defeated, he was hanged, unless the appellor chose to pardon him. CHAP. II.

A more barbarous practice it is difficult to imagine, or one more liable to the grossest abuses, as it made the trial and punishment of the worst of private crimes dependent upon personal caprice, malice, or avarice. It was tolerable only because elaborate technicalities inconsistent with its principles prevented it from doing much harm. Monstrous as it was, it was for some reason favoured by the judges, who in 1482 made a rule of their own authority that persons indicted for murder should not be tried for a year, "so that the suit of the party may be saved," *i.e.* that an appeal may be brought in the interval. This worked injustice, and caused an increase of murders till 1487, when it was enacted (3 Hen. VII. c. 1) that people indicted of murder should be tried as soon as possible; that if acquitted they should be either imprisoned or bailed for a year; that the acquittal at the suit of the king should be no bar to an appeal by the party; and that appellors should for the future be freed from some of the restrictions formerly imposed upon them. The effect of this statute must have been to diminish greatly the number of appeals for murder, and to substitute for them trial on an indictment as the common course. Appeals, however, were occasionally brought when for any reason an acquittal excited dissatisfaction. Horne Tooke opposed their abolition when it was proposed in 1768 or 1769, and himself promoted an appeal.[1] They continued, though with increasing rarity, to the year 1819, when the case of Ashford *v.* Thornton caused their abolition.

In the course of this sketch I have not been able to confine myself strictly to any definite period, as it is highly characteristic of English law in all its departments that laws

[1] Horne Tooke's Life, by Stephens, i. 184.

CHAP. II. continue to exist in a more or less disused condition for long periods of time, often for many centuries, after they were in actual vigour. Appeals, for instance, having been instituted by William the Conqueror, and having been nearly put an end to by Henry VII., continued to the very end of the reign of George III., more than three hundred years afterwards. Speaking generally, however, so far I have been occupied with the system of criminal law which was in the course of development down to the beginning of the reign of Edward I. It may be recapitulated in a few sentences as follows:—

Accusation was originally made by some kind of judicial committee of the County Court, or by the reeve and four men, or by private persons.

At a later period it was made by the grand jury, or what was afterwards called the grand jury, before the County Court or the justices, or after the Conquest by private persons before the coroners, when it was called an appeal.

An accusation might be answered at first either by compurgation or by ordeal.

After the Conquest, and till the thirteenth century, the accusation involved ordeal, compurgation being abolished.

Ordeals being disused, the grand assize and the petty jury were substituted as means of proof.

The juries at first were half witnesses, half judges, but it was ultimately settled, both theoretically and practically, that they were to be judges of the fact.

While this process was going on, there was published one of the earliest and the best of English law-books: this is *Bracton de Legibus Angliæ*, the second part of the third book of which is headed "De Coronâ." It is much the nearest approach to a complete account of the law of England to be found till Blackstone, and it is almost the only English law-book which is founded in most parts on the civil law. The

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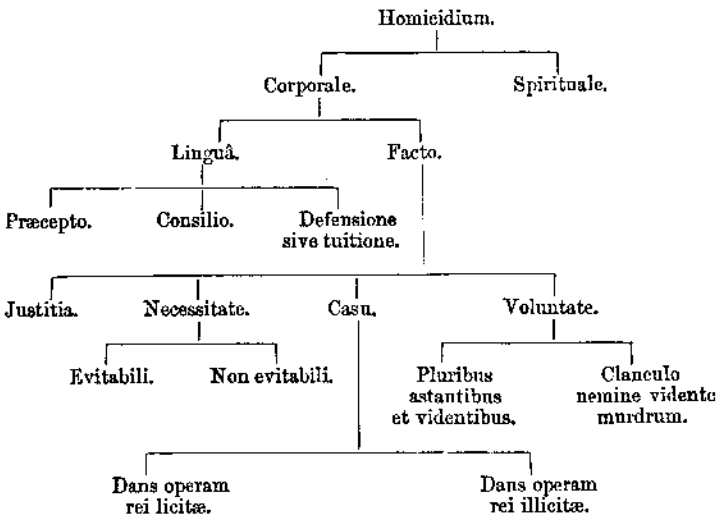
treatise "De Coronâ" forms the second treatise of the third book, "De Actionibus," and deals with each crime and with the procedure specially appropriate to it by itself. The result is that the impression created by the work is that it is wearisome, wandering, and indistinctly arranged. Under the head of "Homicide," for instance, accounts of the duties of coroners and of the processes of outlawry and inlawry are interposed between the general description of homicide and what is said of murder, Englishry, and homicide by misadventure. In the same way, accounts of the different kinds of appeals, and the incidents connected with them, are given in connection with the different offences in respect of which they may be brought. From this multifarious matter it is, however, possible to collect the definitions of the various crimes known in the author's time. They are eight in number:—

1. "Læsa majestas," or high treason.

This is of many kinds. One is attempting the king's death ("si quis ausu temerario *machinatus* sit in mortem domini "regis: vel aliquid egerit vel agi procuraverit ad seditionem "domini regis vel exercitus sui vel procurantibus auxilium et "consilium præbuerit vel consensum licet id quod in voluntate "habuerit non perduxerit ad effectum").

Some kinds of the *crimen falsi*—as, for instance, forging the king's seal and making bad money—are regarded as treason. This passage was, as will appear hereafter, the foundation of the most important part of the celebrated statute of 25 Edw. 3.

2. Homicide, which is "hominis occisio ab homine facta." Homicide is classified according to the following table:—



Murder is thus corporal homicide by act wilfully done in secret.

3. Wounding, which is mayhem if any part of the body is made useless for fighting, or if an eye or other member is destroyed or cut off.

4. Robbery.

5. Arson.

6. Rape.

7. Theft.

The definition of this crime is "furtum est secundum leges "contrectatio rei alienæ fraudulenta cum animo furandi "invito illo domino cujus res illa fuerit."

8. "Minora et leviora crimina," such as injuries of different kinds, are treated in the mass, and correspond partly to torts, partly to misdemeanours.

These definitions and classifications are the root, so to speak, of English criminal law, but they have had less importance in its history than this might be supposed to imply.

The definition of treason was replaced in Edward III.'s time by the well-known statute. The definition of homicide, if such it can be called, is a worthless classification of forms of killing which do not exclude each other. For instance, every killing "justitia" or "necessitate" is a killing "voluntate"; and it is absurd to distinguish killings "voluntate" according to the number of witnesses who may be present. The definition of "murdrum" as a secret homicide was no doubt given for the sake of the incident called "a presentment of Englishry." If the person killed was a Frenchman, the hundred where the body was found was liable to a fine called *murdrum*. The presentment that the dead man was an Englishman freed the hundred from this fine.[1] This practice was abolished in 1340 by 14 Ed. III. st. 1, c. 4. This swept away the old definition of murder.

The definitions of rape, robbery, and arson are mere names. Mayhem is defined, but the crime ceased to be regarded as distinguishable from other acts of violence. The definition of theft is like the one given in the Roman law,[2] but is distinguished from it by the omission of the words italicized in the note. Of the effect of these omissions I will speak further in describing the history of the law of theft. It is sufficient to say here that the distinction was very important, and it is also to be noticed that the "contrectatio" of Roman law and the "taking" of English law are by no means equivalent to each other. It is very remarkable that this slight resemblance (for it is no more) between the Roman and the English criminal law is the single trace of the former which is to be found in the latter. There is a considerable analogy between the way in which the two systems were developed, but each

[1] *History of the Criminal Law*, iii. 40.

[2] "Furtum est contrectatio fraudulosa *lucri faciendi gratia* vel ipsius rei *vel* "*etiam usus ejus possessionisve*." On all these see *History of the Criminal Law*, iii. 131, &c.

CHAP. II. was home-made, and they differ at every point. This is all the more remarkable because Bracton's whole work is to a great extent founded upon Roman law as it was understood in the Universities of the thirteenth century—that is to say, rather as a branch of science which proved itself than as a set of enactments depending for their validity upon their adoption by the sovereign power of the State. His work, however, is composed to an even greater extent of a statement of English customs than of a statement of Roman law, and indeed in the treatise "De Coronâ" there is hardly anything else except the definition of theft and the description or classification of homicide.

One other matter is mentioned in Bracton which must be shortly referred to now. It is the doctrine of privilege of clergy, which had perhaps the most singular history of any part of the English criminal law, as will appear hereafter. "A clerk taken for the death of a man," says Bracton,[1] "is "if claimed, to be delivered up to the ecclesiastical authori- "ties, to be kept in safe custody either in the king's or the "bishop's prison to make purgation." If he was degraded from his orders, he was to suffer no other punishment, as degradation was considered sufficient.[2] Ecclesiastical purgation was perhaps the most absurd institution ever devised by man. There was a jury of twelve clerks; the party swore to his innocence, he produced twelve compurgators who swore that they believed him to be innocent, and he might call witnesses on his behalf, but the accuser might not call witnesses against him.[3] This statement of the law

[1] *De Cor.*, c. ix.; Twiss, ii. 298.

[2] It is added, "nisi forte convictus fuerit de apostasia tunc primo degradetur "et postea per manum laicalem comburatur secundum quod accidit in Concilio "Oxon; . . . de quodam diacono qui apostatavit pro quadam Judæâ." On this remarkable case see Mr. Maitland's article in *The Law Quarterly Review*, vol. ii. p. 153. The last words suggest a strange forgotten romance. I shall have to refer to the case again.

[3] *History of the Criminal Law*, i. 460.

was made perhaps a hundred years after the death of Thomas Becket, and before the privilege of clergy had been modified by statute. It had a long and most singular history, to which I shall return. CHAP. II.

Such was the criminal law of England in the latter part of the thirteenth century.

As far as can be judged from such accounts of it as remain, it altered little during the reigns of Edward I. and Edward II. We have in Edward I.'s time a remarkable monument of its then condition in the Hundred Rolls, which contain the reports of Commissioners who made inquiry in all the hundreds of England into the various abuses, and especially usurpations of power, which had come into existence in the reign of Henry III. The only fact which I need notice here is that they show that, when these inquiries were taken, there were manor courts with powers of *infangthief*, summary execution, all over England. In Berkshire alone the entry "habet furcas" occurs in thirty-five places, and numerous instances occur of their use.[1]

It is not improbable that if the franchise courts had not been curbed by Edward I., and if he and his successors had been weak rulers, allowing encroachments to be made upon their power, and continuing to grant away petty local jurisdictions, the administration of justice might have been deeply and permanently degraded; but, happily, this was not the case. In the reign of Edward III. measures were taken which had deep effects, not only on the administration of criminal justice, but on many other subjects. One of these was the establishment of the officers at first called keepers and afterwards justices of the peace, who, in 1360, by the statute 34 Edw. III. c. 1, were first empowered to hold Courts of Quarter Sessions, and "hear and determine

[1] On the Hundred Rolls see *History of the Criminal Law*, i. 126–132, and also on the Statute of Quo Warranto which they occasioned.

CHAP. II. "at the king's suit all manner of felonies and trespasses "done in the same county."[1] This is the origin of the Courts of Quarter Sessions, which, to the present day, try all minor offences. Till the end of the seventeenth century they tried capital cases as well.

The Courts of Quarter Sessions in the boroughs had a different, though analogous, origin. Charters were granted to places of all degrees of importance by all or most of our kings from Henry I., who granted the first charter now in existence to the City of London. These charters almost always made some provision or other for the local administration of justice, and from the fourteenth century the provision made consisted usually in the appointment of magistrates, who were to hold Quarter Sessions.

The jurisdiction of the town magistrates was in some cases exclusive of the county magistrates; in others, the two had concurrent powers. In some cases it extended to capital crimes, in others it was limited. In some cases there was a recorder, who was nominated in different ways; in others there was none. Most of these towns received a definite constitution under the Municipal Corporations Act of 1835 (5 and 6 Will. IV. c. 76, repealed and re-enacted with amendments in 1882, by 45 and 46 Vic. c. 50).[2] The exact extent and operation of this Act would require a long explanation, but the effect of it is that in all important towns in England there is a Court of Quarter Sessions, of which a Recorder appointed by the Crown is the judge.

The Courts of London stand on a special footing.[3] The most important of them is the Central Criminal Court, which was established in 1834 by 4 and 5 Will. IV. c. 36, and replaced the more ancient Courts of the City of London and County of Middlesex.

[1] *History of the Criminal Law*, i. 111–116. [2] *Ibid.* i. 117–121.
[3] *Ibid.* i. 118.

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The result of all this is that institutions, of which the most important dates from the reign of Edward III., gradually came into existence, which, with the help of the Courts held under the King's Commission and before his justices, made up the system still existing amongst us for the ordinary regular administration of criminal justice.

Another process of great interest and importance was, however, in progress during the fourteenth and fifteenth centuries, which has been memorable in two different periods of the history of England divided from each other by nearly two hundred years. This was the process of Parliamentary impeachment. In a few words, its first stage was as follows:—The old Curia Regis had a threefold character. It was the Parliament, the head of administrative business in every department, and the Supreme Court of Justice all in one. In its character of Parliament it occasionally exercised judicial functions. One of the earliest instances of such a function was the trial in 1285 at Shrewsbury, of David, the brother of Llewellyn, Prince of Wales, for high treason against Edward I. Other trials occurred in the fourteenth century, one of the most remarkable of which was that of the alleged murderers of Edward II., the record[1] of which throws great light on the functions of juries as witnesses, and on other points of the highest interest. More remarkable still are the records of appeals of treason, connected with the deposition of Richard II. In 1387 the Duke of Gloucester and others appealed or accused the Archbishop of York and others of treason on account of their bad advice, by which King Richard had been led into misgovernment, and the appellees were convicted and punished in various ways. In 1397 the appellants of 1387 were themselves appealed, convicted, and punished for "accroaching" Royal power. In 1399, Richard having been deposed, the appellants of 1397 were in their turn convicted and punished,

[1] *History of the Criminal Law*, i. 147; 2 *Rot. Par.*, 57.

CHAP. II. and the Parliament passed an Act, 1 Hen. IV. c. 14, which abolished appeals of treason. It was also solemnly declared[1] by the Commons that "judgments in Parliament belong only "to the King and the Lords, and not to the Commons." The reply to which was "that the Commons are petitioners and "demanders, and that the King and the Lords from all time "have had and still have by right judgment in Parliament." This put the law as to impeachments substantially on the ground on which it has rested ever since. A few impeachments took place in the fifteenth century, the last being that of Lord Stanley for not sending his troops to the battle of Bloreheath. This took place in 1459. After this, impeachments were disused till 1621, when a new and more memorable series of them began.

During the time of the Plantagenets a certain number of alterations in the definitions of crimes were made by statute. In a legal point of view, the most important of these by far was the celebrated Statute of Treasons, 25 Edw. III. st. 5, c. 3. It is still in force, and has had the singular fortune of being regarded with a sort of superstitious reverence on account of the contrast which it presented on many occasions to temporary laws punishing as treason attempts to attain certain political and religious objects, and in some cases the expression of particular religious and political opinions, but the subject is one which I cannot pursue here.[2]

Important steps were also made in the development of the law of murder and theft. These are noticed in connection with the history of the definitions of those particular crimes.

A matter of infinitely greater importance, being as it was a leading event in the history of England, happened at the beginning of the reign of Henry IV. This was the passing of the Act 2 Hen. IV. c. 15 (1400), which was followed in

[1] 3 *Rot. Par.*, 449.

[2] It is treated at large in my *History of the Criminal Law*, ii. 241–293.

1414 by 2 Hen. V. c. 7, which reinforced it. These Acts made heresy a capital crime, punishable by burning alive and confiscation of property. Something must be said in connection with these Acts upon the system of religious persecution which formed a leading feature in the history of England through the whole of the fifteenth and the greater part of the sixteenth centuries, and which continued to exist to a certain extent till late in the seventeenth century. CHAP. II.

Before the Conquest the bishops took a prominent part in the ordinary administration of criminal justice as leading members of the Hundred and County Courts. At the Conquest, as I have already observed, they became the heads of separate ecclesiastical courts, which, with very various fortunes, have continued from that day to this to exercise a criminal jurisdiction over sins as distinguished from crimes. This jurisdiction was for centuries a matter of considerable importance. Persons were convened for intemperance, unchastity, all kinds of irregularity of life, and were compelled, under pain of spiritual censures, excommunication, and minor penalties, to do penance and pay fines, and if they refused obedience they might be imprisoned under writs *De Excommunicato Capiendo*. There were, however, all but no prosecutions for heresy or the like, because before the rise of the Lollards there were no heretics. A few instances of people who were whipped in the early part of the thirteenth century, and the single case of apostasy already referred to as mentioned by Bracton, are the only instances approaching to persecution for heresy which occurred down to the fifteenth century. In the course of the fourteenth century the first motion towards the great changes of modern times was made. Wycliffe's career, in particular, excited the fiercest hostility on the part of the clergy. He was denounced and his opinions were condemned as heretical by the highest ecclesiastical authorities, but he was subjected to no temporal penalties, and died in

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peace in 1385. Immediately before the passing of the Act of 2 Hen. IV. c. 15, the practice of punishing heresy with death by burning was introduced by one of the most shameful acts of fraud and oppression which have ever occurred in English history.[1] This was the execution of William Sawtre without any legal warrant, and by means which bear upon their face every mark of fraud, falsehood, and lawless violence. This most wicked action was so far successful as to induce a belief, used on several subsequent occasions for wicked and cruel purposes, in the existence of a common law writ *De Hæretico Comburendo*, independent of the statutes of Henry IV. and Henry V. The most characteristic and oppressive part of the statutes referred to was that they gave the bishops the power of defining heresy. Some slight restraint over them was exercised by the Court of King's Bench, but it was very slight; and from 1400 to 1533 the bishops had and exercised from time to time the power of burning alive all of whose religious opinions they disapproved.

This was fundamentally altered by Henry VIII. He passed an Act in 1533 (25 Hen. VIII. c. 14), which, though in appearance extremely severe, nearly put an end to prosecutions for heresy, partly by giving a negative definition of heresy ("speaking against the authority of the Pope, &c., "shall not be heresy"), and partly by providing that the proceedings must begin by indictment, and not by arrest and imprisonment on suspicion, as was the law under 2 Hen. IV. c. 15. This state of things lasted for about six years, when the Act of the Six Articles (31 Hen. VIII. c. 14) was passed, which provided that everyone should be burnt who denied transubstantiation, and that the profession of certain other opinions should be felony without benefit of clergy. The grotesque and cruel side of the Act is obvious enough, but it ought to be observed that it was infinitely less cruel

[1] See the whole story of Sawtre, *History of the Criminal Law*, ii. 443–449.

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than the Acts which it superseded. The laws of the fifteenth century enabled the bishops to burn whom they pleased for whatever they chose to call heresy. The Act of the Six Articles confined burning to those who denied transubstantiation.

Under Edward VI. all the statute law on the subject was repealed, but, thanks to the fraudulent practice which had made a precedent in Sawtre's case, Joan Bocher and a man named Van Paar were burned in 1550 and 1551 under a Commission issued by the Protector Somerset to the Archbishop of Canterbury. I think these executions were illegal, though probably they were not known to be so.

Queen Mary revived the statutes of the fifteenth century, and under them carried on her celebrated persecutions.

In 1558, Elizabeth repealed all these statutes for the last time, but she left untouched the supposed writ *De Hæretico Comburendo*, under which some Anabaptists (the names of two are known, but it is uncertain whether others were burnt or not) were burnt in 1575. The last executions under this fictitious writ took place in James I.'s reign, in the cases of Legate and Wightman, in circumstances of peculiar infamy. It was abolished in 1677 by 29 Chas. II. c. 9.

The penal laws directed against the Roman Catholics and the Protestant Dissenters belong to a different order of ideas. The punishment of holding or expressing particular theological opinions as a sin began in 1400. It was greatly diminished under Henry VIII., and, after a violent recrudescence in Mary Tudor's time, almost entirely ceased, though it was wrongly supposed to be theoretically possible till 1677, and though a few, not more than six known cases, and possibly eleven others, occurred in the reigns of Elizabeth and James I.

The third important period in the history of the criminal

CHAP. II. law begins with the reign of Henry VII., and ends with he Civil Wars of Charles I.

Trial by jury under the Plantagenets had, as I have already said, passed from the rude system of inquests, which, under the guidance and control of justices, collected and, to some extent, sifted village gossip, to a form of trial more or less similar to that to which we are accustomed; but there is great reason to believe that it was on many occasions corrupt and oppressive. Local influence was all-powerful over the jurors, and there was no effective check over them by public opinion or otherwise. Their corruption and intimidation was the most important branch of the offence of maintenance, which was the characteristic offence of the fifteenth century. The Wars of the Roses had no doubt done much to bring these evils to a head. The result is described in an emphatic manner in the preamble to 3 Hen. VII. c. 1 :—"The King remembereth how, by unlawful "maintenance, giving of liveries, signs and tokens, and "retainders, by indentures, promises, oaths, writings, or "otherwise embraceries of his subjects, untrue demeanings "of sheriffs in making of panels and other untrue returns, "by taking of money by juries, by great riots and unlawful "assemblies, the policy and good rule of this realm is "almost subdued." The Act then empowers certain high officers and Privy Councillors to call such misdoers before them and to punish them. The statute also contains regulations about appeals of murder, to which I have already referred, and requires coroners to do their duty strictly.

It is probably a mistake to suppose that this Act was the origin of the Court of Star Chamber, for there are traces of a criminal jurisdiction in the Privy Council at an earlier period; but, be this as it may, there is no doubt that from this time the jurisdiction of the Privy Council played a prominent part in the preservation of the peace throughout the whole

country, or that it was highly beneficial as a supplement to the defects of the common system for the administration of criminal justice, and especially as providing means for the control of the local influences which grievously interfered with its efficiency. How long the Privy Council played with advantage to the public a part analogous in the administration of criminal justice to that which the Lord Chancellor played in the administration of civil justice would be an instructive inquiry; but, however this may be, in the process of time it became a partisan court trying with much harshness, and even cruelty, to put down the popular party, and it was abolished, together with some other local courts of a similar nature, in the year 1641. CHAP. II.

In the course of the sixteenth century a great increase was made in the severity of the criminal law by restrictions placed upon the law as to benefit of clergy. I have already quoted a passage from Bracton which shows how this benefit stood in the thirteenth century. It was extended in the fourteenth century to all manner of clerks, as well secular as religious; that is, to all men who could read. On the other hand, it was settled in the fifteenth century that privilege of clergy could not be claimed till after conviction. The result was that benefit of clergy was extended to a great mass of people indiscriminately,[1] and that even clerks in orders could not avoid a trial by lay judges. Benefit of clergy thus ceased in the fifteenth century to be the privilege of a profession, and became a promiscuous but absurd and capricious mitigation of the cruel severity of the common law. Two truly astonishing exceptions were made to the

[1] The reading required extended only to reading the words, "Miserere mei "Deus" (Foster, p. 306), which, it is to be hoped, was generally known to the criminal classes. In earlier times I think it likely that the test was seriously applied. Anyone could learn "Miserere mei Deus" by heart, and repeat it on being shown the book.

CHAP. II. general rule. Women (unless they were nuns) were excluded from benefit of clergy, as being incapable of ordination; and so were "bigami," or men who had "married two wives or one widow." It applied, however, to all cases whatever except treason "interdictio viarum et depopulatio agrorum." It is hardly credible, but it is true, that till 1487 a man who could read and had not married two wives or one widow,[1] might commit murder, rape, and theft as often as he pleased without any punishment at all except the chance of being committed "absque purgatione" to the bishop's prison, which, indeed, might mean imprisonment for life.

Restrictions at length were placed upon this strange rule. In 1487 (4 Hen. VII. c. 13) it was enacted that all persons who had their clergy should be branded on the brawn of the thumb, and that no one but a clerk in orders should have clergy more than once, which the branding would prevent. Some other very special crimes were excluded from clergy in Henry VIII.'s time.

Under Edward VI. (1 Edw. VI. c. 12, s. 13) clergy was taken from murder, burglary, house-breaking, and putting the inhabitants in fear, highway robbery, horse-stealing, and robbing churches.

Under Elizabeth (8 Eliz. c. 4, 1565) stealing from the person, amounting to grand larceny, and rape and burglary in 1576 (18 Eliz. c. 7), were excluded from clergy.

These were the main points in the history of the criminal law from the earliest times to the end of the sixteenth century. From the beginning of the seventeenth century date three books: Staundford's *Plees del Corone*, Lambard's *Eirenarchia*, and Coke's *Third Institute*. They are the first detailed and systematic accounts of the criminal law since Bracton. Coke's reputation has thrown into the shade the works of Staundford and Lambard, and the fact that Staundford is written in law French is no doubt

an additional reason why his book has been forgotten. It CHAP. II. appears to me in some particulars better than the *Third Institute;* and the merits of the *Eirenarchia* are very considerable. Coke's great reputation, however, has given an importance to his work which no other can rival, unless Blackstone's *Commentaries* forms an exception. It is not by any means the best of his writings, and it appears to me to be in many ways defective. His references to Bracton and the *Year-books* are often inaccurate and sometimes unintelligent, and nothing can exceed his pedantry or his failure to reason correctly upon any sort of general grounds. His very defects, however, gave him a hold upon his contemporaries, who had been powerfully impressed by his energetic personal character and by the assurance and self-sufficiency with which he claimed exhaustive and final professional knowledge. However, whatever may be its faults, the *Third Institute* deserves to be taken as the next great literary landmark to Bracton in the history of the criminal law. It gives a full account of it as it stood at the beginning of the reign of James I.

In order to complete the sketch which I have been giving of this period, it will be necessary to say something of the principal features in the actual administration of criminal justice down to the year 1640.

I have given in my *History of the Criminal Law* an account of the most characteristic trials of which I have been able to discover reports from 1477 to 1640.[1] Of course, nearly all of them are political cases. The trials of which I have given an account are those of Nicholas Throckmorton (1537), the Duke of Norfolk (1571), Raleigh (1603), Hollis (1615), Sherfield (1632), Prynne, Bastwick, and Burton (1637), and Lilburn (1637), the last four being cases in the Star Chamber. Many other cases are referred to which illustrate the obser-

[1] *History of the Criminal Law*, i. 320–357.

CHAP. II. vations made. I will here confine myself to a few remarks on the general characteristics of the procedure.

The outline of the trials was, in its most general features, the same as in our own days. The jury were the judges of the fact, and they derived their information from sworn witnesses. There were counsel for the Crown, who managed the evidence for the prosecution, and the judge summed up. Unanimous verdicts were required, and an acquittal was final, even though the juries were occasionally fined for acquitting, but here the resemblance ended. The preliminary procedure was entirely in the hands of the Crown. The first step taken in a case in which the Government was interested was to put the accused into close confinement, by which he was deprived of the power of providing evidence in his own defence. He was kept in ignorance of the evidence given against him. He was himself examined as severely as a modern prisoner is examined in France and some other Continental countries by the *juge d'instruction*, and for a certain time, and in particular cases, he was liable to be tortured, though this was recognized as an abuse of power for which there never at any time was any legal excuse.

The essence of the trial lay in the examination of the prisoner upon every point of the case. If by any extraordinary chance he had witnesses, it is by no means clear that he could examine them at all. It is certain that he could not examine them upon oath. He was, in a word, placed under such circumstances that the whole course of every part of the proceedings was hostile to him, and that the jury had little more than a veto upon his conviction, and one which it required unusual courage and firmness to interpose in his favour. The rules of evidence, which gave and still give a great, though it was at one time a somewhat capricious, protection to prisoners, were unknown at the period in question. Written depositions taken in secret were often produced as evidence,

although the deponents were living; and cross-examination was almost if not altogether unknown. In a word, the regular procedure was to the last degree rough, imperfect, and harsh, though it contained the essential principle of trial by jury in a rudimentary and imperfect form. CHAP. II.

But besides this regular system a new one was introduced into the Star Chamber, which prevailed also in the ecclesiastical courts, and particularly in the great Court of High Commission, and which, during the whole of the period which I am considering, and especially during the last part of it, was a most formidable rival to trial by jury. This was a procedure closely analogous to that which prevailed in the Court of Chancery. A bill was filed against the defendant, and he put in his answer as in the Court of Chancery. He might be examined upon interrogatories, and required to take what was called the *ex-officio* oath. This was an oath used in the ecclesiastical courts, also known as an oath on the *voir* (*vrai*) *dire*—that is, an oath "true answer to make to such questions "as shall be demanded of you." [1] The evidence was given on affidavit.

At common law a prisoner was not allowed to have counsel. In the Star Chamber he was not allowed to put in an answer which was not signed by counsel. If he did not do so, he was held to confess the indictment. On the other hand, the counsel incurred such serious responsibility that they were sure not to state any defence which was likely to be in any respect unwelcome.

If this jurisdiction had been extended, it would either have established a despotism or caused a rebellion. The way in which it was used led to its abolition in 1640, and left behind it a passionate hatred of the *ex-officio* oath, and everything

[1] The form is still in constant use for harmless purposes, *e.g.* if when a prisoner has pleaded guilty the judge wishes to take evidence as to his character.

CHAP. II

which even remotely resembled it, which still influences our law after the lapse of nearly two hundred and fifty years.

I do not think that either the early State trials or the Star Chamber deserve the wholly unqualified censure which they have often received. For a considerable time the Star Chamber deserved some part of the applause which it received, though at last it undoubtedly became not only a partisan but a cruel tribunal. The early State trials only show of what very slow growth the sentiment of fair play is in regard of criminal law,[1] and how completely the control of the preliminary procedure puts the result of the case in the hands of the prosecutor.

One other matter must be mentioned before concluding this chapter. It is the revival of the practice of impeachments after their disuse for 161 years. All through the reigns of the Tudors the political offences of the enemies of the Tudor monarchy were punished either by the ordinary courts, which, if the offenders were peers, were the House of Lords, or, if Parliament was not sitting, the Court of the Lord High Steward with Lords Triers. These were in all essential respects like the trials of commoners, though verdicts were not required to be unanimous. All trials properly so called, however, were dispensed with in the case of bills of attainder, bills for putting to death, or otherwise punishing particular persons. They were substituted for Parliamentary impeachments during the reign of Henry VIII., and were afterwards resorted to in the case of Lord Strafford and a few other persons. In 1621, Sir Giles Mompesson, Lord Bacon, and others were impeached, and impeachment was the great weapon with which the long Parliament, and the short Parliament which preceded it, fought their early battles against

[1] It would be easy to show that in the present day it is slight and superficial. Who, *e.g.*, is shocked at the treatment received by Shylock in the *Merchant of Venice*?

CHAP. II

Charles I. It was used throughout the whole of the seventeenth century by the different parties which rose in turn into power; it was also used at intervals in the eighteenth century, especially in the memorable case of Warren Hastings, when its inherent weakness and unfitness for modern times were strikingly displayed. One impeachment only, that of Lord Melville in 1805, has taken place in the present century, and it is to be hoped that it will be disused for the future, for the House of Lords is in no degree fitted for the functions of a criminal court of first instance charged with a decision on matters of fact.

CHAPTER III.

HISTORICAL INTRODUCTION—THE CRIMINAL LAW FROM THE CIVIL WARS TO THE PRESENT DAY.

CHAP. III. THE principal effects of the Civil Wars of the time of Charles I. upon the criminal law were exhibited in its procedure.

During the Commonwealth a scheme for a deep and searching reform of the whole body of the criminal law was proposed, and might have been carried into effect with the greatest benefit but for the Restoration; but it was laid aside, together with other alterations then introduced. In so cursory a sketch as this, I can only refer to them in passing, but the subject is one of much general interest and curiosity. I have given in my *History* some account of it, and of the great revolutionary change made by the introduction of the High Court of Justice, which during the crisis of the establishment of the new Government, tried capital cases without a jury, but the tribunal lasted for only a short time, and left no traces behind it.

One great and essential change in the spirit of English criminal procedure was made by the Civil War. It put an end down to the present day to the system of trial upon the methods made so unpopular by the Star Chamber, and by the ecclesiastical courts of all grades. The Star Chamber and the Court of High Commission were abolished, and no one

has ever thought of reviving them. The *ex-officio* oath, which CHAP. III.
was the great weapon in the way of procedure of the ecclesiastical courts, was also abolished, and the courts were thus made nearly innocuous, though they still exist in a crippled and comparatively harmless state.

The effect on the common law courts was even more striking, though it was not caused by any definite change in the law. The old form of trial, in which the rigid examination of the prisoner formed the leading feature, was absolutely laid aside after the Civil War. There is no instance after that time of anything approaching to the disgraceful trial of Raleigh, or the harsh if not unjust State trials of the sixteenth century. In the seventeenth century, the accepted maxim, which was sometimes called the law of God, and sometimes the common law of England or common right, was "Nemo tenetur accusare seipsum," a phrase not the less influential because it rested on no definite authority.

This, no doubt, was a change for the better as far as it went. But it did not go far. The trials of the latter part of the seventeenth century, which were by jury, were perhaps even more unjust than those of the Star Chamber, under the system which prevailed in the sixteenth century.

The injustice was not confined to any one political party. The trials of the persons charged with the Popish Plot were neither more nor less scandalous than the trial of College, the joiner. The great leading defects in the state of things which then existed did not depend at all upon legal institutions. They were two: first, the prevalence of a general ignorance of or indifference to the principles on which questions of fact ought to be investigated; and secondly, the practical secrecy of the early stages of the procedure, which gave prisoners no notice of the case against them till they were put up to be tried. The remedies devised by the Legislature at the end of the seventeenth and the beginning

CHAP. III. of the eighteenth centuries for the scandals of the trials under the later Stuarts show how superficial a view was then taken of the true cause of these scandals. It was provided that in cases of treason and misprision of treason prisoners should be allowed to be defended by counsel, that their witnesses should be examined upon oath, that they should have copies of the indictment and lists of the witnesses to be called ten days before trial, and that an overt act charged in the indictment should be proved by two witnesses, or two overt acts by one witness each. These enactments, except only the one as to swearing the prisoner's witnesses, applied only to charges of treason and misprision of treason, and seemed to admit that a fair trial in cases of felony was a matter of little importance. In the second place, they left untouched the preliminary procedure, according to which the prisoner was practically kept, till his trial, to a considerable extent in the dark as to the evidence against him, and might theoretically (as indeed he still may) be put on his trial for his life upon the finding of a bill by a grand jury on evidence of which he has no notice.

A great change in the spirit of criminal procedure came about early in the eighteenth century by the combination of a variety of causes and by very gradual steps. The Revolution gave a decisive victory to one of the two great parties in the State, and the result was that they no longer fought out their differences in the law courts. The independence secured to the judges by the alteration in their tenure of their offices no doubt operated in the same direction; but, whatever was the cause, there can be no doubt of the fact that the standard of impartiality rose greatly from the year 1688 until it reached its present height. The special effects of this general change were very various. I will notice the most important of them. From this period may be dated the full though gradual acknowledgment of what I regard

as the principal characteristic of modern English criminal jurisprudence, the adoption and full carrying out of the doctrine that a criminal trial is to be regarded not so much in the light of a public inquiry into the truth of the matter alleged against the prisoner as in that of a private litigation between the prisoner and the prosecutor. In earlier times, as I have already shown, the two principles—which may be called the litigious and the inquisitorial—both prevailed to a certain extent. An appeal, in the old sense of the word, was the strongest possible illustration of the litigious principle. It was regulated private war, and it left to the appellant the opportunity of compromising his proceeding for money, and in fact of ransoming his enemy down to the last moment. On the other hand, trial by jury as originally conceived was emphatically a public inquiry conducted by the king's agent for the king's purposes. By the beginning of the eighteenth century a criminal trial came to be regarded practically as a litigation in which the king was always plaintiff, but in which the prisoner was entitled to the advantages of a defendant in a civil case; and though he was prejudiced to a certain extent by the accusation of the grand jury, the presumption of innocence was held to be in his favour, and that to such an extent that the king, the plaintiff, must prove his case beyond all reasonable doubt. CHAP. III.

This showed itself in various ways. In the first place, the rules of evidence which were gradually developed in the civil courts, and which are not, as a rule, older than the eighteenth century, were, as they were developed, applied to the criminal courts also; some, indeed, are peculiar to the criminal courts. Of these rules probably the most general was that which rendered a party an incompetent witness; and it appears that very soon after the beginning of the eighteenth century the practice of questioning the prisoner on his trial, which had for a considerable time prevailed till then, was finally laid

CHAP. III. aside. I doubt whether this was an advantage either for the prisoner or for the public, but no doubt it was intended to be favourable to the prisoner.

An obvious step in the same direction would have been to allow the prisoner in felony the advantage of counsel; but the very fact that this was permitted by statute in cases of treason was enough to prevent the courts from making so great a change.[1] A long step in that direction was, however, made by the practice which grew up in the course of the eighteenth century to allow counsel to cross-examine witnesses in cases of felony—an indulgence which was certainly inconsistent with the general principle, and was not allowed by the House of Lords to Lord Ferrers[2] (in 1760), though his defence was insanity.

Only one alteration of importance was made in the eighteenth century in the law relating to indictments. In 1725 it was enacted that indictments should thenceforth be in English, but a great number of cases, reported capriciously, were decided on various points, and made its administration capricious and technical in a very high degree. These technicalities were tolerated probably because to some extent they mitigated a system which was so harsh that it never was intended to be strictly executed, and never, in fact, was so; but much more because the notion of giving anything

[1] The rule against allowing counsel in cases of felony is as old as 1302. About that year a person accused of rape was thus addressed by the judge:—"Vos debetis scire quod rex est pars in casu isto, et sequitur ex officio, unde "in hoc casu jura non patiuntur quod habeatis consilium contra regem [qui] "vos sequitur ex officio. Si autem mulier ageret contra vos, haberetis adversus "eam consilium, sed contra regem non."—*Year-books*, 30 and 31 Edw. I., p. 530.

[2] 19 *State Trials*, 885–979. No application for counsel was made, but in his defence Lord Ferrers said: "I have been driven to the miserable necessity of "proving my own want of understanding, and am told the law will not allow "me the assistance of counsel in this case, in which, of all others, I should "think it most wanted," p. 944.

like system and simplicity to the criminal law, or indeed to any other part of it, did not arise till much later. CHAP. III.

The great mass of the actual working criminal law of the present day was first enacted as law in the course of the eighteenth century; and in particular nearly all the enactments contained in the Criminal Law Consolidation Acts, passed in 1861, and drafted by the late Mr. Graves.

The general history of this legislation is as follows. One of the most striking features of the old criminal law as it stood in the seventeenth century was its extreme vagueness. For instance, the law of theft, in Hale's time, was broadly this: Theft, which was so defined as to involve a number of subtle and useless distinctions, was divided into grand and petty larceny. Grand larceny was any larceny of a thing worth more than a shilling. Its punishment was death; but this was largely qualified by the law as to benefit of clergy. Petty larceny was theft of anything worth less than a shilling, and was punishable with imprisonment and whipping. Four particular kinds of theft—namely, horse-stealing (1 Edw. VI. c. 12, s. 10), stealing from the person above the value of a shilling (8 Eliz. c. 4), and stealing the king's stores or clothes off the racks (22 Ch. II. c. 5)—were excluded from benefit of clergy. In the course of the eighteenth century this exclusion from the benefit of clergy was extended to all manner of thefts which it would be tedious to enumerate here. The most notorious instances are: 10 and 11 Will. III. c. 23 (1699), which excluded from benefit of clergy stealing to the value of five shillings in a shop; 12 Anne, c. 7 (1713), which enacted the same with regard to stealing to the value of forty shillings in a dwelling-house; and the Acts 14 Geo. II. c. 6 (1741) and 15 Geo. II. c. 34, which applied the same measure to thefts of sheep and other cattle.

Much similar legislation took place in regard to other

CHAP. III. branches of the criminal law. For instance, I may mention what was called the Black Act (9 Geo. I. c. 22, 1722), which was directed against a set of deerstealers called the Waltham Blacks. It first provided punishments for shooting at people; sending letters "demanding money, venison, or other valuable thing"; and for many other offences of different degrees of importance all of which were made felony without benefit of clergy. A series of Acts against the forgery of particular documents, the first of which was 2 Geo. II. c. 25, were of a similar nature. Other provisions of the same kind were exceedingly numerous. These Acts resemble each other in several respects. Nearly all of them were occasioned by some particular case which attracted special attention, and most of them were restricted with almost absurd minuteness, as if the common law were proximately perfect, requiring small supplementary additions only in particular instances, instead of being, as it was, vague, imperfect, antiquated, and fragmentary to a monstrous degree. Cruel and fragmentary as this legislation was, most of the Acts which were passed did apply to real defects in the law, though it punished them with cruel severity. One instance of this will be sufficient. Till Lord Ellenborough's Act, 43 Geo. III. c. 58, passed in 1803, no special punishment at all was provided for wounding with intent to murder, or to do grievous bodily harm, or for unlawful wounding. Such acts were mere misdemeanours, punishable by fine and imprisonment. An attempt to commit murder not committed in any one of a few specified ways was a mere common law misdemeanour till 1861.

The working criminal law of England is at the present moment contained almost entirely in the Consolidation Acts of 1861, 24 and 25 Vict. cc. 95, 96, 97, 98, 99, and 100. These are composed principally, though not entirely, by consolidating the strangely narrow and imperfect legislation spread over

the eighteenth century to which I have been referring. I shall say something hereafter of the way in which the alteration was made; but I must in the meanwhile make some further remarks on that legislation. CHAP. III.

It is impossible to defend its principal characteristic, its lavish and cruel employment of the punishment of death; but it is right to say that the law was not, and was not intended to be, strictly executed. This certainly greatly modified its cruelty, but it did so at the expense of making its administration arbitrary and capricious to the last degree. A small proportion of the persons capitally convicted were executed. Most of them were pardoned conditionally on transportation, a practice recognized by the Habeas Corpus Act (31 Ch. II. c. 12, ss. 13 and 14, 1679). In 1768 (8 Geo. III. c. 15) the judges of assizes were empowered to order the transportation of persons convicted at the assizes of crimes not within the benefit of clergy. In London a list of prisoners capitally convicted was submitted after every Old Bailey sessions to the King in Council, and their fate was discussed and decided upon individually in the presence of the King upon the report of the Recorder. Much was said of the uncertainty which this practice introduced into the administration of the law; and it is perfectly true that it did make the infliction of the punishment of death so uncertain as to diminish its effect very much indeed; but a man who was capitally convicted under this system was reasonably sure that if he was not hanged he would be transported. At present he may either be sent to penal servitude or imprisoned with or without hard labour, but he cannot say which; although I have reason to believe that prisoners form an estimate of the sentences which they will receive, which, all things considered, is not very far from the truth.[1]

[1] I once sentenced a man at Bristol to penal servitude for an offence to which he had pleaded guilty. He was being removed from the dock, but he struggled

CHAP. III. Making allowance for all this, the system was a horrible one, and many dreadful instances of its nature might be given; but it prevailed throughout the whole of the eighteenth century, and was not altered till the reign of George IV., although it had long been condemned by the opinions of almost all reasonable men. The following remark from a letter of Sir James Mackintosh[1] not only shows this, but is an acute observation on the character of a remarkable man. Speaking of Windham, he says:—"Singular as it may appear, he often "opposed novelties from a love of paradox. These novelties "had long been almost established opinions among men of "speculation; and this sort of establishment had roused his "mind to resist them before they were proposed to be reduced "to practice. The mitigation of penal law had, for example, "been the system of every philosopher in Europe for the last "half-century but Paley. The principles generally received "by enlightened men on that subject had long almost "disgusted him as common-places; and he was opposing "the established creed of minds of his own class when he "appeared to be supporting an established code of law."

Besides the laws which excluded so many felonies from benefit of clergy, many others were passed which created felonies and misdemeanours not punishable with death at all, but with various terms of transportation and imprisonment. There were many of these enactments, and the punishments

violently, and kept crying out, "You cannot do that; you cannot do it." I asked him why not, for my legal power was unquestionable. He said, "I'm sure your lordship cannot know" this or that—I forget what. I said, "As you pleaded guilty and it is not in the depositions I did not know it, but "can you prove it?" He said he could, and called a witness who proved it at once. I said this made a great difference, and altered his sentence to a term of imprisonment and hard labour, on which he said with a tone of satisfaction, "Oh, yes, that's right enough." I have always regretted that I made no note of the particulars, and I have entirely forgotten them. I have frequently observed the accuracy with which prisoners estimate the probable duration of their sentences.

[1] Quoted in Romilly's Life, vol. iv. p. 143

which they imposed varied capriciously in many ways. Sometimes they imposed and sometimes they did not impose special terms of transportation, as seven, fourteen, or twenty-one years. Sometimes there were and sometimes there were not alternative terms of imprisonment; and these in some cases imposed minimum terms of imprisonment, and in others left the judge at liberty to imprison for as short a time as he pleased. Whipping, fines, and in later times solitary imprisonment, were sometimes added, either as alternative or cumulative punishments, and sometimes omitted. CHAP. III.

The general result of all this was that at about 1820 the state of the criminal law was unsatisfactory to the last degree. It was admitted to be much too severe, especially in regard of the punishment of death. It was immensely cumbrous. It was utterly unsystematic. Its punishments were to the last degree capricious, and it stood in the greatest need of compression, definition, and rearrangement, in nearly every part. On the other hand, it had the great merits of approximate completeness, and a solid basis of wide and long experience —in a word it contained the materials necessary for the construction of an excellent system. In the course of the next forty years this system was to a great extent constructed by the following steps.

Between 1826 and 1832 there were passed a series of Acts, known as Sir Robert Peel's Acts, which abolished nearly all the antiquated parts of the law, of which benefit of clergy was practically by far the most mischievous. They also consolidated the law relating to larceny, to offences against the person, to forgery, and to offences against the coinage. These Acts extended only to England, and did not touch any of the common law definitions or principles. They greatly diminished the number of capital offences, but still left a considerable number of offences punishable with death.

In 1837 the punishment of death was abolished in almost

CHAP. III. all the cases in which it had been retained; and after many Reports of Commissions the six Consolidation Acts were passed in 1861, which are known as Greaves's Acts, and which form a sort of imperfect Penal Code in respect of all the common offences. They contain about half of the existing working criminal law. In 1878 and 1879 Bills were introduced for establishing a complete Code both of crimes and of criminal procedure. I drew the first of these Bills, and the second consisted of the first as settled by a Commission of which I was a member.

Such has been the history of the criminal law of England. I will shortly sum it up in general terms, taking first that of the procedure, and then that of the crimes and punishments.

Before the Conquest the system of criminal procedure was essentially local. It consisted of courts in which it seems that the suitors were the judges, and which were convened by and presided over by the earl, the sheriff, or in particular places by other persons. The mode of accusation was by common report, or a sort of judicial committee of the court. The mode of trial was by compurgation or by ordeal.

At, and for a considerable time after, the Conquest, this system remained, but it was greatly invigorated by the action of the Curia Regia and the king's justices, whose authority gradually superseded that of the old County Courts.

The Courts of the Justices of Assize were first established, very nearly in their present form, by Henry II.; and the Queen's Bench Division of the High Court of Justice is of the same or nearly the same antiquity, representing as it does the Court of Queen's Bench, which represented the principal division of the original Curia Regia.

The procedure of these Courts was by means of the inquest, which was also a Norman invention.

A new mode of trial was also introduced by the Conqueror —namely, trial by battle, which was regulated private war.

CHAP. III. Under this system accusations were made by inquests, and for about one hundred and fifty years or more the mode of trial continued to be by ordeal, or if the accuser was a private person by battle. When ordeals were disused, which was before the middle of the thirteenth century, petty juries were introduced, and they gradually became judges of the facts deposed to by witnesses, instead of official witnesses of the fact.

Trial by jury has, ever since its full development was reached, continued to be the established mode of trying criminals. The attempt to supersede it by the Star Chamber failed, and has never been renewed; but it has been to a small extent superseded in reference to the punishment of matters of comparatively trifling importance by the summary powers given to magistrates.

The preliminary proceedings by which prisoners are committed for trial have had the following history. In very early times the sheriffs, the coroners, the bailiffs of hundreds, the mayors of towns, and the constables of villes, arrested persons suspected of crimes.

In the fourteenth century justices of the peace were appointed for these and other purposes. Four times a year, they sat, and still sit, as Judges of the Courts of Quarter Sessions, but their regular duty has always been to arrest persons suspected of crime, and to confine or bail them till their trial can take place. Since the reign of Philip and Mary it has been their duty to take depositions; and this duty is now regulated principally by the Act 11 and 12 Vict. c. 43 (1848), commonly known as Jervis's Act.

Passing from procedure to the definition of crimes, the following are the principal points in their history.

Definitions of crimes can hardly be said to have existed at all before the Conquest. What answered as such were no more than names. The first approaches to definitions are

[1] *History of the Criminal Law*, ii. 219.

CHAP. III. those which are found in Bracton, and the most careful and elaborate of them are no more than classifications, which do not deal with the real difficulties of the subject, or show that the person who framed the definition knew where the difficulties lay. Bracton, however, imperfect as his writings were, was the only writer of importance on the subject for three hundred years.

Little was added to the substantive criminal law by Parliament for a great length of time, with the exception of the statute which defined treason in 1352. Some additions and explanations are to be found in the Yearbooks; and heresy, which the bishops were allowed to define as they pleased, became a capital crime at the beginning of the fifteenth century, and continued to be dealt with criminally till late in the seventeenth century.

From Henry VII. to the Civil Wars, the decisions of the Privy Council in the Court of Star Chamber exercised considerable influence over that part of the criminal law which punished as misdemeanours offences which, falling short of high treason, consisted in disturbances of the peace, or in conduct having a tendency to produce such disturbances; such as libels, unlawful assemblies, conspiracies, and maintenance in all its forms. The theory and practice of the Privy Council jurisdiction is to be found in the Statute 3 Hen. VII., which founded, as Mr. Hallam thinks, a statutory Court of Star Chamber, often confounded with, but in his view essentially distinct from, the common law jurisdiction of the Privy Council. When the Privy Council ceased to be a regular court of justice, a considerable number of the crimes which it used to punish fell under the jurisdiction of the Court of Queen's Bench. The extreme importance of the whole of this matter has not, I think, been duly recognized by English historians. The great services of the Court of Star Chamber have been forgotten in the abuses and oppressions of the later stage of its history. There is, however, great reason to think that it did much towards the establishment of the general supremacy of the law over the efforts which were at one time made by the aristocracy to prevent it.

CHAP. III.

Another remarkable point in the history of the criminal law is found in the increase of its severity by the legislation which excluded so large a number of crimes from benefit of clergy. This is first to be remarked in the sixteenth century, from which date it continued till the end of the eighteenth, indeed till early in the nineteenth.

It is, however, perfectly true that surprisingly little change took place in the actual substance of the criminal law for a great length of time, temporary passing legislation only being omitted. In the course of the eighteenth century it was enormously increased, and became at last so intricate and unwieldy that the greater part of it has been codified and that attempts have been made to codify the whole.

CHAPTER IV.

THE EXTENT AND CLASSIFICATION OF THE CRIMINAL LAW—EXTENT IN PLACE, TIME, AND PERSON; COMMON OR STATUTE LAW, FELONIES AND MISDEMEANOURS.

CHAP. IV. IN the preceding chapters I have given an account of the history of the criminal law by way of introduction to the detailed consideration of its different parts, which is the subject of the present and the following chapters.

The first matter to be considered is the extent of the criminal law. Like everything else, it is limited in respect of place, time, and person.

The extent of the criminal law of England in respect of place is as follows. It includes the whole of England and Wales. Some parts of the statute law and the law relating to high treason extend to Scotland. The common law of England prevails in Ireland, but the statute law of England and of Great Britain does not, with certain exceptions, extend to Ireland, nor does the statute law of Ireland—the Acts of the Irish Parliament before the Union—extend to England. The statute law of the United Kingdom extends to both Ireland and Scotland, unless a contrary intention appears from the language of the different Acts.

The criminal law of England also extends to all land-locked waters forming part of the body of any English county, such as Plymouth Sound, Milford Haven, and probably the

whole of the Bristol Channel to an uncertain distance west; also to the open sea adjacent to the United Kingdom, and to all other parts of Her Majesty's dominions to the distance of a marine league from low water mark, and to such further distance, if any, as is deemed by international law to be within Her Majesty's territorial dominions; but no prosecution for an offence on board a foreign ship at sea can be instituted without express previous sanction by a Secretary of State.

It also extends to all British ships on the high seas or in foreign harbours or rivers below bridges, whether a person committing a crime is Her Majesty's subject or not.

It applies to piracy by the law of nations, committed by any person whatever in any part of the world on any person whatever.

It applies to high treason, misprision of treason, murder and manslaughter, and slave-trading, and to some other offences committed by any subject of Her Majesty in any part of the world.

It extends to all persons whatever, except Her Majesty, who is absolutely exempt from it, and foreign Ambassadors, who are exempted from it to an unascertained extent. There is some doubt as to the extent of its application to prisoners of war, and to the officers and crews of ships of war of a friendly power in British waters. It probably does not apply to them so as to interfere with acts done for the maintenance on board of naval discipline.

With respect to time, by the law of England no such thing is known as a general term of prescription in criminal cases, but there are a few particular crimes which must by statute be prosecuted within a certain time after they are committed. I have myself held a brief for the prosecution of a theft alleged to have taken place sixty years before the charge was made.

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Many inquiries of great interest and curiosity are connected with these matters. I have given a full account of them in my *History of the Criminal Law*, vol. ii. pp. 1–71, in which will also be found some account of the law relating to the little-known subject of the Foreign Jurisdiction Act, which enables Her Majesty to enact bodies of criminal law and to give British courts jurisdiction over crimes in uncivilized countries, or countries which permit her in fact or by treaty to exercise such powers. In the same chapter I have discussed the relation between acts of State (by which I mean acts done by the military and naval forces of the Crown, by which the lives and the properties of foreigners are affected) and the criminal law, and I have given an account of the operation of the Extradition Acts. But these are matters of which the whole interest would be lost by any attempt at the compression which would be necessary in referring to them in the present work.

Such being the limits of the criminal law of England, I will now proceed to notice two important distinctions which pervade every part of it, and furnish the only approach to a general classification of the whole subject which the law itself provides.

These are the distinction between common and statute law, and the distinction between treason, felony, and misdemeanour.

The distinctions in themselves are perfectly plain. Common law is that part of the law which has never been reduced to the form of an Act of Parliament. Statute law is composed, as its name implies, of Acts of Parliament. A felony was the name of all crimes which, whether at common law or by statute, were punished with death and forfeiture of property, or were denominated as felonies whatever might be the punishment. Treason is felony, and more. All other crimes are misdemeanours. This definition is substantially,

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but not absolutely, accurate; as mayhem and petty larceny, being felonies, were not punishable by death, and misprision of treason was punished by forfeiture, though a misdemeanour. These distinctions do not now rest upon any assignable principle. The limits between statute and common law can be pointed out only by an enumeration of the subjects which fall under each head, and the distinction between felony and misdemeanour only by enumerating the crimes which belong to each category.

Some important consequences are, however, still attached to these distinctions. The common law is much less definite than the statute law, and its provisions are interpreted more freely, that is, with a more direct reference to expediency and other general considerations than the words of a statute. There is more to say for the counsel, and more discretion is vested in the judges, upon a question of common law than upon a question of the meaning of a statute. As to felony and misdemeanour, the fact that a crime is a felony involves these consequences: (1) a person suspected is liable to arrest without warrant; (2) he is not entitled to be bailed as a matter of right; and (3) he is entitled to twenty peremptory challenges on his trial—a right so seldom exercised as to be of little practical importance.

I ought perhaps to notice here that, besides common law and statute law, a third kind of law may be distinguished—namely, that which is contained in cases decided upon statutes, which forms a kind of secondary common law. For instance, a statute punishes everyone who "by any false "pretence obtains money," &c. So many cases have been decided on the question what is and what is not a false pretence that it takes nearly a page to give even an abstract of the result of them.[1]

I will now proceed to give some account of the relation in

[1] See *Digest of the Criminal Law*, p. 276, Art. 330, and its ten illustrations.

CHAP. IV. which common law and statute law stand to each other, and I will in passing make a few observations upon case law.

The general principles which pervade and limit the application of the whole body of the criminal law are all, with hardly an exception, part of the common law. Those which define its extent, and which I have just stated, are, however, considerably limited by statute. It is by statute that the English courts can try cases of murder and manslaughter committed by the Queen's subjects in any part of the world, whereas by common law they cannot try them for theft or wounding committed abroad. It is by statute (the Territorial Waters Jurisdiction Act) that a crime committed on board a foreign ship within a marine league of the English coast can be tried in an English court. At the common law it was not so.

That body of law which I describe as the conditions of criminality, and which may also be regarded as constituting a set of general exceptions to every definition of crime—the law relating to the effect upon criminality of age, madness, drunkenness, marriage, compulsion, necessity, and ignorance of law and of fact—is entirely common law. The practice in the case of an acquittal on the ground of insanity, and the form of the verdict in such cases, is provided for by statute. There are also some statutory limitations upon some of the common law doctrines as to the effect of marriage upon the law relating to theft.

The law relating to principal and accessory in crimes is, as far as principle goes, entirely common law, but the common law rules as to the trial and punishment of accessories, which were extremely intricate and irrational, have been abolished by statute, and the punishment of accessories after the fact has also been regulated by statute.

Steps preparatory to crime—incitement, conspiracy, and attempts—are defined, and in most cases punished by com-

mon law, but many conspiracies and attempts, *e.g.* conspiracy CHAP. IV.
to murder, certain conspiracies in restraint of trade, attempts to murder, attempts to burn houses, are the subject of statutory enactments, and are in some cases made felonies, punishable with the highest secondary punishment.

Passing from these introductory matters to substantive crimes, the first class of offences to be noticed are those which affect public order. Of these, high treason, treasonable felonies, inciting to mutiny, and assaulting the Queen, are statutory crimes, but the words of the statute 25 Edw. III. st. 5, c. 2, have been made the subject of many decisions, so that a great amount of case law has been embodied in the statute. Its effect, however, is for the most part given in what is commonly called the Treason-Felony Act, 11 Vict. c. 12, and as prosecutions under this Act have in most cases superseded prosecutions under 25 Edw. III., these decisions have lost much of their importance.

Disturbances of the public peace by riots are punishable partly at common law and partly by statute. The most important common law offences of this class are affrays, unlawful assemblies, routs, and riots, all which are minutely defined by common law. Some particular kinds of riots are dealt with by statute, such as a riot continuing for an hour after proclamation is made for its dispersal, the riotous demolition or damage of houses, riotous smuggling, and armed poaching at night by three or more persons together.

Forcible entry is a statutory offence, a good deal explained by cases.

Offences against public order by illegal combinations and confederacies are most commonly dealt with under the common law relating to seditious words, libels, or conspiracies. Sedition itself is not, according to the law of England, the name of a crime, as it is by the law of Scotland; but every kind of conduct which would be included under that name in

CHAP. IV. Scotland, would, in England, be included under one or other of these heads. There are some statutes on unlawful clubs and societies, which, however, are seldom, if ever, acted upon.

Offences in which foreign countries are interested are mostly statutory, and are punishable either under the Foreign Enlistment or the Slave-Trading Acts, but piracy, by the law of nations, is an offence defined (if at all) by common law, but punished under a combination of four separate statutes.

Abuses and obstructions of public authority are generally punishable at common law, but there are elaborate statutes against bribery and the sale of offices.

Perjury was first punished by the Privy Council. It has been recognized as a crime, and its punishment is fixed by statute. Its definition is deducible from a great number of decided cases. False swearing not amounting to perjury is a misdemeanour at common law.

Maintenance and champerty are offences defined very vaguely by common law, and punished by statute.

The offences of escape, rescue, prison breach, misprision of treason, misprision and compounding of felony, are a singular jumble of common and statute law. This is perhaps the most confused part of the English criminal law.

Offences against religion consist partly of the offence of blasphemy at common law, which has been the subject of much controversy, and partly of statutes, which are practically obsolete.

Offences against morality are in several instances statutory, as in the case of unnatural offences, and offences under the Criminal Law Amendment Act of 1885. In other cases, as in the case of obscene libels and acts of public indecency, they are offences at common law, or I should perhaps say by case law, the Court of Queen's Bench having, in the seventeenth

century, taken upon itself part of the powers formerly exercised by the Court of Star Chamber. CHAP. IV.

The definition of a common nuisance is part of the common law, but by many statutes particular things have been declared to be such, especially the keeping of disorderly houses of different kinds, and lotteries.

Libel is an offence at common law, though several matters connected with it are regulated by statute. The greater part of the law relating to it is very modern, consisting as it does almost entirely of decisions given in the course of the present century.

Before passing to the consideration of the part of the law codified by the Consolidation Acts of 1861, I will observe that a power has sometimes been assumed of holding acts to be misdemeanours which were considered to be injurious to the public, though there was no precedent for it. This was and is described as the elasticity of the common law. I think that it has been used practically to the utmost extent, and that it is undesirable that it should ever be used again. The fate of the attempts made to adapt to modern trade disputes certain doctrines of the common law as to conspiracy in restraint of trade is a standing warning against such an exercise of judicial power.

I come now to the part of the criminal law which has partially been codified by the Acts of 1861 and one or two others. Of these, the Malicious Mischief Act, the Act relating to offences against the coinage, and the Acts relating to fraudulent debtors and bankruptcy, have hardly any relation to the common law, except so far as it is required to interpret the word "malicious" in the Act on malicious mischief.

The Acts relating to the law of master and servant cannot be understood without reference to the common law as to conspiracies in restraint of trade.

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The Act relating to offences against the person, the Larceny Act, and the Forgery Act, presuppose a considerable acquaintance with the common law, on which, indeed, each is founded.

The Act relating to offences against the person cannot be understood without reference to the law which justifies the application of force to the body of others in certain cases and to various extents. It also assumes an acquaintance with the definition of the crimes of murder, manslaughter, accidental homicide, and homicide by negligence, which, again, presupposes an acquaintance with the law relating to duties tending to the preservation of life. It also presupposes knowledge of the definitions of assault and rape, which last has to be deduced from a number of decisions, some of them not easily reconcilable. The offence of bigamy has also given rise to several difficult questions, as its statutory definition is very incomplete.

The Larceny Act is wholly unintelligible without reference to the common law definition of theft, and its rules as to things which are and things which are not capable of being stolen. Lastly, the Forgery Act depends upon the common law definition of forgery, and especially upon the common law meaning of an intent to defraud.

It thus appears that the common and statute law are mixed up in nearly equal proportions in our criminal law, and that nearly every part of it, though not to the same degree, is affected by each. It is also true that it is practically impossible to study the two apart. The statutes are unintelligible and a mere burden to the memory without the common law. The common law can be understood by itself, but unless it is studied in connection with the statutes it is, so to speak, disembodied and almost exclusively theoretical.

Of the distinction between felony and misdemeanour it

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is unnecessary to say more than that the following is an imperfect list of them :—

High treason has all the characteristics of felony and others of its own.

Felonies.	Misdemeanours.
Offences under 11 Vict. c. 12.	Assaults on the Queen.
Inciting to mutiny.	Unlawful assemblies.
Felonious riots.	Routs.
Unlawful oaths.	Riots.
Piratical slave-trading.	Forcible entries.
Felonious escapes.	Seditious offences.
Unnatural crimes.	Offences against Foreign Enlistment Act.
Murder.	Extortion.
Manslaughter.	Oppression.
Attempts to murder.	Bribery.
	Perjury.
	Maintenance.
	Escapes.
	Blasphemy.
	Offences against the Criminal Law Amendment Act.
	Common nuisances.
Greater bodily injuries.	Minor bodily injuries.
Rape.	Assaults.
Connection with children under thirteen.	Assaults on girls from thirteen to sixteen, and intercourse with them by consent.
Bigamy.	
Some irregular marriages.	

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Felonies.	Misdemeanours.
Abduction with intent to marry.	Abduction.
Stealing children under fourteen.	Neglect of children and not providing food for them.
Theft.	Libel.
Embezzlement.	Obtaining by false pretences.
Robbery and extortion by threats.	Cheating.
Burglary and housebreaking.	Conspiracy to defraud.
Receiving stolen goods.	Misappropriations by bankers, merchants, &c.
	Frauds by directors and trustees.
	Fraudulent false accounting.
Forgery of documents specified in Forgery Act.	Forging trade-marks, also forgery at common law.
Some personations.	Other personations.
Some coinage offences.	Other coinage offences.
Burning ships-of-war.	
Use of explosives for certain purposes.	
Arson, and some other injuries to property.	Minor injuries to property.
A bankrupt absconding.	Some other offences against the bankruptcy law, and the Fraudulent Debtors Act.
	Criminal breaches of contracts of service.
	Offences against Merchant Shipping Acts.

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In the Draft Code of 1879 the distinction between felony and misdemeanour was laid aside, but the distinction between crimes which do and do not render the offender liable to summary arrest, and in respect of which he has a right to be bailed absolutely or only at discretion, is inherent in the nature of things, and must in some form be preserved. The confused state of the present law upon this subject is set forth in my *Digest of the Law of Criminal Procedure*, chap. xii. Articles 96–98, pp. 59–62; as to bail, see pp. 88–92.

CHAPTER V.

CONDITIONS OF CRIMINALITY.

CHAP. V. ACCORDING to the law of England, in order to be a crime an act—

(1) Must be done by a person of competent age.

(2) It must be voluntary, and the person who does it must also be free from certain forms of compulsion.

(3) It must be intentional.

(4) It must be accompanied by knowledge, the nature and amount of which differs according to the nature of the crime.

(5) In many cases, malice, fraud, or negligence, enter into the definition of offences.

(6) Each of these general conditions (except the condition of age) may be affected by the madness of the offender.

AGE.—A child under seven years of age is not criminally responsible for its actions. From seven to fourteen a child is presumed to be irresponsible, but may be proved to have sufficient knowledge of right and wrong to make him responsible. In practice this rule is tacitly passed over. A child of ten or twelve would be unusually dull if it did not know that it might be punished for stealing.

VOLUNTARY ACTS.—A voluntary action is a group of bodily motions accompanied or preceded by volition, and directed to some object. Every such action involves, the

following elements: knowledge, motive, choice, volition, intention, and thoughts, feelings, and motions adapted to the execution of the intention.

These states of mind occur in the order in which I have named them.

The intention is the direction of conduct towards the object chosen upon considering the motives which suggest the choice. The word properly means aim, and involves a metaphor taken from shooting with a bow. In the absence of any one of these elements, action ceases to be voluntary.

Involuntary action is action in which there is no choice or no intention. A man in a convulsion fit, a person walking in his sleep, a person whose face changes its expression and whose heart beats violently under the influence of passion supply cases of involuntary action. No involuntary action is a crime.

Voluntary and involuntary actions are contradictory, but voluntary action may be either compulsory or free. To walk to the gallows is a voluntary act done under the strongest compulsion. When a thirsty man drinks, he acts freely. It will thus be seen that in the case of voluntary actions freedom is the general rule, and compulsion the rare exception, for no one would be said to be compelled unless he was under the influence of motives at once terrible and powerful, which is rarely the case. On the other hand, freedom means only the absence of such motives. It is a word, indeed, which has no definite meaning, unless we are told who is free from what, and from what restraints which might apply to him he is free.

The effect of compulsion thus understood is, according to the law of England, as I understand it, narrowly limited and somewhat capricious. Two cases of it only need be mentioned. The first is the rule that a married woman who

CHAP. V. commits a crime in her husband's presence is deemed, unless the contrary appears, to act under his compulsion, and to be thereby entitled to an acquittal. It is not certain how far this rule applies, for it certainly does not apply to high treason or murder. An historical explanation of it may, I think, be given, but this is a subject which I need not discuss here.[1]

The second case is when a body of rebels or rioters have, by fear of death or instant bodily harm, compelled unwilling persons to take a subordinate part in an insurrection or other disturbance.

There would be a strong objection to carrying the law further on this point, as it would afford a ready excuse for systematic crime. Criminals might commit offences with impunity by threatening others. Criminal law itself is a system of compulsion, and ought not to withdraw its threats on account of counter-threats. It would be foolish to say, "I "will hang you if you commit murder, unless you can show "that some one else threatened to shoot you if you did not." Besides this, the fact of compulsion may always be taken into account in reduction of punishment.

INTENTION.—I have said that an act to be a crime must be intentional. I have already explained what I mean by intention, but several explanations are required to avoid natural misconceptions.

First, I do not mean that the accused person must intend to commit the crime which he actually does commit, but that he must intend to do the act which constitutes the crime. A man, for instance, may not intend to kill by some act of intentional violence, and may yet be guilty of murder or manslaughter by reason of it; but if he did not intend to do the act which caused the death, he would be guilty of no crime at all unless the act was accompanied by negligence.

[1] See *Digest of the Criminal Law*, Art. 30 and note.

Secondly, it is important to distinguish between motives and intentions. An intention to do anything is consistent with any number of different motives, and may remain unchanged while the motives vary. In the crime of publishing a libel the intention must always be to give more or less publicity to a certain libel. The motives for this may be infinite, and may vary from time to time. So an intention to kill may be the result of all sorts of motives. It may be the act of an executioner, of a soldier in time of war, of a man defending his own life, of a murderer. The intent to kill is the same in all these and many other cases. Intention is a much more definite thing than motive, and is usually of much greater importance in criminal cases. CHAP. V.

Thirdly, it is important to observe that one intention does not exclude another. A man intending to escape from custody intentionally disables an officer who has him in custody. He intends both to escape and to disable.

Fourthly, I may observe that in many cases the existence of a particular definite intention forms part of the definition of a crime. Wounding with intent to murder or do grievous bodily harm, abduction with intent to marry, are instances. In these cases the presence of that particular intention is, of course, essential to the crime.

Fifthly, I may point out that the rule is so worded as not to include the case of crimes by omission. Where an omission is criminal, it may in some cases be unintentional, as, for instance, if a drunken engine-driver were to forget to notice the signals for the train, and so to cause death, he would be guilty of manslaughter. The state of mind, which in such a case would be criminal, would be a default of due attention in the discharge of legal duties. Crimes by omission are exceptional.

These remarks are of use because they display the falsehood of certain popular common-places about intention. Of

CHAP. V. the nature of these common-places I will say only that the most conspicuous example of them is to be found in Lord Erskine's celebrated arguments about the law of libel. I have examined this matter minutely in my *History of the Criminal Law*.[1]

I may remark in conclusion, on the maxim that a man is presumed to intend the natural consequences of his acts, that the rule is quite as much a rule of common-sense as of law, and that it is a rule of which the application has, after all, to be left to juries with reference to the particular circumstances of particular cases.

KNOWLEDGE.—Knowledge is always an element of criminality of more or less importance. Whatever controversies have arisen about the effects of madness, it has never been doubted by anyone that it destroys all responsibility if it is of such a nature as to prevent the person affected by it from knowing the nature and quality of his acts. But the question remains, What is the degree of knowledge which is essential to criminality in different cases?

The answer is that knowledge of the law is never required at all. This is a blunt and possibly ungracious equivalent for the well-known statement that everyone is conclusively presumed to know the law, a presumption opposed to notorious facts, and closely resembling a forged release to a forged bond. The degree of knowledge of fact which is necessary to criminality varies according to the different crimes which may be committed.

Generally, everyone is presumed, and the presumption is usually correct, to have a capacity of knowing the nature and consequences of his conduct, and the common opinions of his own time and country about morality and crime; to know that knives cut or stab, that gunpowder explodes, that

[1] Vol. ii. c. xxiv.; and see particularly my account of Shipley's case and Fox's Libel Act, pp. 330–356, and in particular p. 351, &c.

murder, theft, robbery, &c., are the names of wicked and punishable acts; nor is any excuse for the want of such knowledge accepted, speaking generally, except madness, the effects of which I shall consider separately. If, however, such ignorance should really exist, *e.g.* if a person did not know that a loaded gun would go off if the trigger were pulled, such ignorance, if proved, would be a good defence to a charge of shooting with intent to murder. CHAP. V.

The question how far ignorance or mistake as to a particular matter of fact connected with a crime is important or not depends upon the definition of the crime. For instance, the definition of theft includes as its mental element an intention to deprive the owner of his property permanently, fraudulently, and without claim of right. Hence it is not theft to take the property of another under a real belief that it belongs to the taker. Burglary is breaking and entering a house between 9 P.M. and 6 A.M. with intent to commit a felony. A.'s watch is wrong, and he breaks into a house at 9.5 P.M honestly believing that it is 8.35. Does A. commit burglary or not? Would it make any difference if he committed the crime by railway time instead of local mean time—a little before 6 by local mean time, and a little after by railway time? These questions may be decided when they arise, but others of more importance may and actually do occur. A woman marries a second husband believing in good faith and on reasonable grounds that her first husband is dead. He is in fact alive. Has she committed bigamy?[1] This depends on the construction of the section of the Act relating to offences against the person which punishes the offence of bigamy. Similar questions have arisen on other statutes, and they are in some instances expressly provided for, particularly in the Criminal Law Amendment Act of 1885. Many questions

[1] It has been very recently decided that she has not (see R. *v.* Jobson, *Law Reports* 23, Queen's Bench Division, p. 163).

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may be raised as to the effect of mistakes of fact upon the lawfulness of summary arrests, and acts intended as acts of resistance to crimes of violence. Their nature may be understood by reference to a variety of clauses drawn by Lord Blackburn in the Draft Criminal Code of 1879.

The consideration of these conditions of criminality may properly end with a reference to the saying, "*Non est reus nisi mens sit rea*," which is said by some to be the fundamental maxim of the criminal law. It appears to me to be neither more nor less valuable than the other scraps of Latin which have found their way into it, and which are generally used when counsel do not clearly know their own meaning. It would be just ast rue and just as important to say, "*Non est reus nisi corpus sit reum.*" I have never been able to discover anything like the expression about *mens rea* in the *Pandects*, though something of the kind is to be found in the *Leges Henrici Primi*. It is a mischievous phrase, because it is usually understood to mean that legal guilt cannot exist in the absence of moral guilt, and that a man may break the law if he is actuated by virtuous motives. The only true meaning which can be attached to it is that every definition of a crime involves some mental element. This is true, and now that all crimes have been more or less carefully defined it is easy to say what that mental element is in any particular case. In murder, for instance, the mental element is malice aforethought, a phrase which has itself been reduced to certainty. In theft, it is an intent to take away property permanently, and without claim of right, and so on. The only doubtful cases are those in which there is a question how much knowledge and what knowledge is required to constitute a given offence; or, in other words, whether the word knowingly or the like is to be understood in an Act of Parliament. On this the maxim, as it is called, throws no light; for the question commonly is whether or not the Legislature meant to compel peeple to act at their peril in taking certain

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steps. Did it mean that a person who abducts a girl is to take his chance of her being under sixteen? that a person who does, in fact, keep a house in which people are treated as lunatics is to take his chance of their actually being lunatics? that a woman who marries within seven years of the disappearance of her first husband is to take her chance of his being dead? These questions must all be decided according to circumstances, which differ from case to case.

There are three words which form the mental element of a number of crimes, on which it will be well to say something here. They are "malice," "fraud," and "negligence," and the corresponding adjectives and adverbs.

MALICE.—This word is objectionable, partly because it has to do with motives rather than intentions, and so is at once vague and an appeal to popular feeling. It was on these accounts omitted entirely from the Draft Code of 1879, and from the Indian Penal Code. It has, however, been rendered sufficiently definite for practical purposes in the principal cases in which it is used in the criminal law. These are three. In each the meaning of the word is different; nor would it in any case be safe to give to it the meaning which it bears in common popular use.

(1) The definition of murder is "killing with malice afore-"thought." The word malice here means a variety of totally different states of mind. I shall comment on them in connection with the history and the definition of the crime of murder.

(2) "Malice" is an element of the crime of libel. By a number of subtle fictions it has at last come to mean that written blame is always criminal unless it is justified or excused on one or another of some six or seven different grounds which are said to rebut the presumption of malice.

(3) The word "malice" is introduced into nearly every section of the Act which punishes malicious mischief.

CHAP. V. Throughout this Act it means intentional, and without justification or excuse or claim of right.

FRAUD is very nearly equivalent to deceiving a man so as to injure him or expose him to the risk of injury. This definition supplies an answer to the common saying, "I did not "mean to defraud him, because I meant to pay the money "back." To which the answer is, "You did mean to expose "him to the risk of your not paying it back." "Falsehood "profitable to the author" is perhaps as good a definition of fraud as could be given in a word, for such falsehood must, in order to be profitable to A., involve an equivalent loss to B.

NEGLIGENCE means the omission to perform a duty imposed by law. The word is used in criminal law principally in reference to the infliction of bodily injury by neglecting to perform one of the duties which are by law imposed on various persons for the preservation of human life. Questions of some nicety may occur in reference to this.

NECESSITY.—I may add a few words on the defence of necessity, which is the strongest possible form of compulsion. It is a question which, in fact, is hardly ever raised, and which, when it is raised, is always, as it ought to be, dealt with exceptionally. The only case of the kind of which I am aware was the case of R. *v.* Dudley and Stephens,[1] in which certain sailors in danger of death by starvation killed one of their number and ate him. This was held to be murder on grounds which appear from the judgment, and on which I have made some remarks in the last edition of my *Digest* (pp. 24–25, note). I think, on the whole, the judgment was right, but I disagree with part of it, which appears to me to "base a legal conclusion upon a questionable moral and "theological foundation, and to be rhetorically expressed." There is not, and I think there cannot be, any principle

[1] *Law Reports*, 14 Queen's Bench Division, p. 273.

involved in cases of this kind. It is, in my judgment, one of the very few cases in which a pardon might properly have been granted before trial. I can imagine somewhat similar cases, in which, notwithstanding R. *v.* Dudley, necessity might be an excuse. Suppose a man is so situated that he must either leave two persons to die, or kill one. You must either run over a boat, or have a fatal collision with a ship. You must leave both mother and child to die, or effect the delivery in such a way as to sacrifice at least one life. The subject is one on which it is useless to argue. CHAP. V.

CHAPTER VI.

THE RELATION OF MADNESS TO CRIMINAL RESPONSIBILITY.

CHAP. VI. I HAVE considered this subject in the fullest possible manner in my *History of the Criminal Law*,[1] and I refer to that chapter for a full statement of all my views on the subject. I will content myself here with a very short statement of my understanding of the law. It is, as I believe, correctly expressed in the 27th Article of my *Digest*, which is as follows.[2]

No act is a crime if the person who does it is at the time when it is done prevented, either by defective mental power, or by any disease affecting his mind—

(*a*) From knowing the nature and quality of his act;

(*b*) From knowing that either the act is illegal or that it is morally wrong; or

(*c*) From controlling his own conduct, unless the absence of the power of control has been produced by his own default.

But an act may be a crime although the mind of the person who does it is affected by disease, if such disease does

[1] Vol. ii. chap. xix. pp. 124–186.

[2] I have in the *Digest* inclosed in brackets certain parts of this statement, because some persons have regarded them as doubtful on the authority of the opinions of the judges in MacNaghten's case. I print in the text what, in my opinion, is the law as it exists. In my *History* I have minutely examined both the authority and the meaning of MacNaghten's case.

not in fact produce upon the mind one or other of the effects above mentioned, in reference to that act. CHAP. VI.

By "knowing either that an act is illegal or that it is morally wrong" I understand being able to judge calmly and reasonably of the moral or legal character of a proposed action; and "by controlling his own conduct" I mean ability to refer calmly and reasonably to those motives which would lead men in general to resist temptations to crime and to allow proper weight to them. A man may be aware as a general proposition that murder is a crime, but if his mind is haunted by delusions, which, even if they are not immediately connected with the killing of any particular person, vitiate the sufferer's mental operations, and are inconsistent with such an appreciation of the facts as a sane man has, this is strong evidence to show that he does not know the moral character of the act of killing any particular person. It is equally strong evidence to show that he has not the ordinary power of control over his actions; for how does anyone ever control his actions except by attending to the various considerations, moral, legal, and religious, which make him resist temptation? There may be no definite connection between the delusion, say, that a man's finger is made of glass and the murder of his wife; but if it was shown of anyone that he was under the delusion that his finger was made of glass when he murdered his wife, a long step would be taken towards showing that he was not in a position to know that to murder his wife was wrong, or to appreciate correctly the moral nature of any action whatever, or to perform that process of deliberation or comparison of conflicting considerations which is necessary to the control of conduct in any circumstances of temptation.

The law thus stated and explained is not, I think, open to objection, nor is it difficult to understand or to administer; but the subject has been made the occasion of great controversy between the legal and medical professions. Of this

CHAP. VI. I have in my *History* said all that I think it necessary to say. I will, however, indicate the principal points on which it has turned.

It has been thought that the law of England is that the fact that a man is disabled from controlling his conduct by madness is not, if proved, a good defence to a charge of crime in respect of an act so done.

This appears to me to be a mistake traceable in part to a misunderstanding of the meaning, and in part to an exaggeration of the authority, of the answers of the judges in Mac-Naghten's case. I have considered this matter at large in the chapter already referred to, and shall not return to it here. I think that the answers in question are unfortunately expressed, and imperfect. They do not explain that the knowledge that an act is wrong, which is the test not of insanity but of responsibility—that is, liability to punishment—means, not knowledge of the truth of the general proposition that a particular class of actions are wrong, but a power of appreciating the moral quality of a particular action. This power may be disturbed by delusions or impulses of various kinds not immediately connected with crime by any link apparent to a sane mind unacquainted with the way in which madness works, and in spite of the retention by the madman of a power of appreciating the difference between moral good and evil in cases with which he is not personally concerned.

I have tried many cases of murder in which the defence was insanity, and I do not think that I ever found the least difficulty in disposing of them in a way which was not complained of by medical men. I do not think I have ever had occasion to check a medical man in giving any evidence which he wished to give, nor have I found any difficulty in pointing out to the jury the way in which it bore on the issue to be tried by them according to my understanding of the law of England; and for these reasons I think that the

controversy supposed to exist between the medical and legal professions on this subject is merely a misunderstanding arising partly from the circumstance that the two professions look at the matter from different points of view, and partly from the fact that the nature of the disease was till lately very imperfectly understood. CHAP. VI.

Practically, there is no doubt that as a general rule madness in any of its forms is inconsistent with liability to legal punishment or responsibility, but this is not strictly true. It is the usual but not the invariable or necessary result of madness to destroy responsibility; and it is important to bear this in mind, for cases might occur in which a man might be both mad and responsible. Suppose, for instance, a very wicked man were to be slightly affected with a curable form of madness, so much so that it was thought desirable not at once to restore him to complete liberty, and suppose that, presuming on his supposed irresponsibility, he were with every circumstance of premeditation and contrivance to poison some person on whose death he would inherit a fortune. Surely such a person ought, as by law he would be, to be guilty of murder, and responsible for his act.

In connection with the subject of madness, the effects of drunkenness and anger may be noticed, each of which has something in common with madness. Neither drunkenness nor anger can in any case be an excuse for crime, but each may have, under certain circumstances, the effect in certain cases of affecting the degree of a criminal's guilt. Certain forms of provocation have the effect of reducing murder to manslaughter, and when any particular intention is essential to the commission of a crime, the fact that a person charged with the crime was drunk when he committed it is to be taken into account in considering whether he had the intention or not.

CHAPTER VII.

PRINCIPAL AND ACCESSORY. STEPS TOWARDS CRIME—INCITEMENT; CONSPIRACIES; ATTEMPT.

CHAP. VII. In former times the law relating to principal and accessory was one of the most intricate parts of the law. It was attended with one very singular circumstance: the law applied only to cases of felony. In cases of treason, the object was to include as many as possible in guilt, and all were accordingly held to be principals. In cases of misdemeanour, all were regarded as principals, because it was not thought worth while to make the distinction. In cases of felony, there were anciently four degrees in crime. Principals in the first degree—those who actually committed the offence; principals in the second degree—those who were present aiding or abetting at the actual commission of the offence; accessories before the fact—being all who directly or indirectly counselled, procured, or commanded the crime; and accessories after the fact—those who received or comforted a criminal knowingly, and in order to procure his escape. Consequences, all of which have since ceased to follow, depended upon the conviction or liability to justice of the principal at the time when it was sought to make the accessory also liable. It is now sufficient to remark that every person who would have been a principal in the second degree, or an accessory before the fact, is now a principal

felon, and is liable to be tried and convicted as a principal felon, whatever may become of the principal felon himself.

An accessory after the fact is one who receives, comforts, or assists a felon in his attempt to escape punishment. Such a person is, in all cases whatever, punishable by the law as it stands with a maximum punishment of two years' imprisonment and hard labour. In the case of murder alone, the maximum punishment is ten years' penal servitude.

There is little interest or curiosity in the law as it stands, except in one respect. It affords a strong instance of the injury formerly done to the law by its extreme severity. When all the parties to a crime were nominally felons, and as such were liable to death, it was natural to resort to all sorts of quibbles in order to avoid so terrible a consequence. The nature of the old subtleties, so far as I regarded the matter as likely to be interesting, is set forth in my *History*.[1] It is a curious instance of the reasons which made our old criminal law intricate and complicated. Every alteration in it was made for some unavowed reason, and had some effect other than that which was its professed object. Essentially the subject has no special interest.

I pass now towards those imperfect crimes which constitute the first steps, so to speak, in criminality. These are—incitement to a crime, conspiracy to commit a crime, and attempts to commit crimes which are not in fact committed. All such preliminary steps towards crime are, according to the law of England, themselves criminal. The exact point at which they become criminal cannot, in the nature of things, be precisely ascertained, nor is it desirable that such a matter should be made the subject of great precision. There is more harm than good in telling people precisely how far they may go without risking punishment in the pursuit of an unlawful object.

[1] Vol. ii. pp. 231–240.

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The bare formation of a criminal intention is not in itself criminal, but this is the last step towards crime of which this can be affirmed.

To incite another to commit a crime is a misdemeanour. To agree with another to commit it is a conspiracy. To attempt to commit a crime is to do an act intended to form part of a series of acts which, if actually done, would complete the crime, but it may be difficult to say precisely what is the first step in such a series. A conspiracy is often, perhaps generally inferred from a course of conduct which shows concerted action on the part of a variety of persons who unite in the pursuance of some common object.

In regard to conspiracy, it must be observed that in these days all objects of importance are obtained by combination. Every trading association, every club, every literary or artistic society, is in many respects a conspiracy, and would be criminal if the persons concerned in it had in view any common illegal object, either as an end in itself, or as a means of gaining other ends, themselves legal or illegal. The case of trade unions and the different laws relating to them is a standing illustration of the weight and interest attaching to this class of offences. I know of no more remarkable instance of many of the most interesting features of English common and statute law, and of the way in which they are called upon to complete each other in different states of opinion and under different circumstances.[1]

[1] *History of the Criminal Law*, iii. 209-227, but see the whole chapter.

CHAPTER VIII.

POLITICAL OFFENCES BY VIOLENCE.

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POLITICAL offences may be divided into two classes—namely, first, political offences by open force; secondly, political offences not committed by open force.

Of political offences committed by open force the principal is high treason, an offence which if it is fully successful constitutes to a greater or less extent a new departure in politics, according to the nature of the objects which the traitors have in view. These may of course vary as widely as those of the authors of the English Revolution of 1688 and those of the authors of the various French Revolutions which took place at the end of the last century and in the course of the present one. In all these, however, and in a vast number of more or less analogous cases, new systems of government have been erected or attempted to be erected by open force in a variety of different ways.

The history and the present condition of the law relating to treason and analogous offences can hardly be understood without reference to nearly the whole of the political history of England.

The law can be traced back to the Norman Conquest, or at least to the reign of Henry II. Glanville, who lived in that reign, uses language upon the subject repeated with some expansions by Bracton in the reign of Henry III. This,

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again, is no doubt closely connected with the language of the statute of 25 Edw. III., st. 5, c. 3, which has ever since it was passed been the standard authority upon the law of treason.

The statute of 25 Edw. III. appears to have been passed at a time when Edward III. was at the very height of his power, when his title was undisputed, and when no question likely to produce excitement of any sort was in agitation. It distinguishes only three kinds of treason: (1) compassing and imagining the king's death; (2) levying war against the king; (3) adhering to the king's enemies. Some minor offences of rare occurrence, such as compassing and imagining the death of the Prince of Wales, were also declared to be treason, but they are now mere historical curiosities.

Treasonable offences falling short of attempts on the king's life are not within the statute, whatever may be their gravity. An attempt to depose the king, to imprison him, or even to blind or mutilate him, or compel him by threats of such treatment to submit to deposition or minor restraints upon his power, are not within the statute, and the same may be said of attempts to obtain political objects by attacks upon his advisers, counsellors, and ministers. In a word, if the statute of Edward III. were construed as extending to the plain natural meaning of the words only, it would afford no protection to the sovereign in his political capacity unless his life was exposed to manifest danger, or unless an army were actually brought into the field against him. It is hardly too much, indeed, to say that such assistance as the statute would give must, if it were strictly construed, be useful only for the purpose of punishing either an assassination plot or an unsuccessful rebellion after it was over. Preparations for civil war in every shape are unmentioned in the statute, and this is all the more remarkable as great parts of the reigns of Henry III. and Edward II. had been occupied by civil wars.

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It may be that the statute was mild because the Government was unusually strong. The Statute of Treasons was nearly (A.D. 1352) contemporary with the Statutes of Labourers and Præmunire (1351—1353), and the establishment of Justices of the Quarter Sessions, the most important legislative measures of the time.

The subsequent history of the law on this subject must here be very concisely referred to. A full account of it is to be found in my *History of the Criminal Law*. It may be summed up in a few words as follows.

At every important crisis in our history, at the Reformation, in the time of Elizabeth, in the time of James I., at the Restoration, at the Revolution of 1688, at all periods of political excitement—in 1780, in 1794, in 1848, for instance—in a word, whenever there was any cause to apprehend a revolution, the definition of treason given in the 25th Edw. III., has either been enlarged by construction or has been reinforced by statutes intended to meet temporary purposes. The enlarged constructions given to the statute must still be regarded as theoretically law, but they have been practically superseded by the statute 11 Vict. c. 12 (1848), which makes them statutory felonies punishable with penal servitude for life as a maximum punishment; and it is by this statute that of late years such offences have been usually punished. The result is that the law has fallen into this shape, speaking roughly:—High treason is divided into three heads—

First, compassing and imagining the Queen's death, taking the words in a wide but not unnatural sense—that is, as including every conspiracy, the natural effect of which may probably be to cause personal danger to the Queen.

Second, actual levying of war against the Queen for the attainment by open force of public objects.

Third, political plots and conspiracies intended to bring

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about the deposition of the Queen, or levying of war against her, or the invasion of her territories. These last offences are usually punished not as treason but as felony under 11 Vict. c. 12.

I pass over with a bare mention, such an unusual form of treason as adhering to the Queen's enemies; I may observe, however, that its vagueness is a curious proof of the small experience which we have had of war. The French and German Codes are on this subject much fuller.

The provisions as to imagining the death of the Prince of Wales, the violation of a queen-consort or the wife of the heir-apparent, and the killing of the Chancellor and the judges in the actual exercise of their duties, are worth bare mention only.

The next most important acts of disturbance of the public peace are riots, which are of different degrees of importance. If they are committed by a number of persons riotously assembled to the number of twelve at least, who continue so assembled for an hour after being commanded by proclamation to disperse; or if the rioters demolish or begin to demolish any building, they are liable to the most severe secondary punishment. If these aggravating circumstances do not exist, the offence is a misdemeanour, punishable, as a rule, with a maximum punishment of two years' imprisonment and hard labour.

These laws are sufficient for the suppression of attacks by main force upon the public peace, especially when it is borne in mind that the law not only sanctions, but requires the use of any necessary degree of force, involving, if required, military power in its most terrible form for the restoration of the peace. Partly from a misunderstanding of the Riot Act, partly from the repugnance which for a great part of the last century was felt to a standing army, a notion prevailed at that time that it was illegal to use military

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force for the dispersion of a mob till after a proclamation made and the lapse of an hour, but this has been declared on the highest authority and on several memorable occasions to be a mistake.

Minor attacks on the public peace are dealt with as constituting the common law crimes of unlawful assembly, rout, and riot. I have given the definition of these offences in my *Digest*. The crime of unlawful assembly is not difficult to define, but it is by no means easy to apply the definition to particular facts, for it is not always easy to decide whether the conduct of a public meeting is such as to give firm-minded observers reasonable grounds to believe that it will lead to a breach of the peace.

Of political offences not committed by open force, the only ones of much interest are those which are comprehended in Scotland under the single name of sedition. In England they are distinguished as seditious words, seditious conspiracies, and seditious libel. In each case the words spoken or written, or the agreement entered into, must be with a seditious intent. The definition given of a seditious intent in my *Digest* is taken principally from a statute still in force (60 Geo. III. and 1 Geo. IV. c. 8), and partly from other standard authorities, and was accepted by the Criminal Code Commissioners of 1878–79 as a sound statement of the law as it stands. Perhaps the most interesting chapter in the whole history of the criminal law is that which relates to the steps by which the doctrine that a seditious intent is essential to seditious libel was introduced into the law; and not the least interesting part of the subject is that which relates to the difference between seditious motives and seditious intentions. A mere abstract of it would convey little instruction. I have gone into the whole matter at length in my *History of the Criminal Law*.[1] I hope that what is

[1] Vol. ii. c. xxiv. pp. 298–395.

CHAP. VIII. there said exhibits in full detail the development of a striking part of the law of England. It is certainly a curious instance (if I am right in my view of the subject) of the way in which either a legal fiction, or at least a misconception of the principles of the law, may be of service in first disguising and ultimately removing its harshness.

CHAPTER IX.

OF OFFENCES IN WHICH THE NATIVES OF FOREIGN COUNTRIES ARE INTERESTED.

CHAP. IX. NEXT to offences in which internal domestic tranquillity is principally concerned are offences in which the natives of foreign countries are principally interested.

Of these, the principal are the violation of the privileges of ambassadors, interference in foreign hostilities by the equipment of expeditions against a friendly Power, equipping ships for such purposes, and in other ways taking part in them. To these must be added piracy, slave-trading, and the kidnapping of the Pacific Islanders. Most of these offences are created by statute, and to all of them a history of more or less interest attaches. I have given in my *History* some account of the circumstances which led to each of them. Piracy at common law, or by the law of nations, is the only one of the offences mentioned which is not created by statute. There are singularities connected with the offence which I do not think it necessary to go into. The most authoritative definition of piracy in English law is "robbery at sea," but I think it is easy to show that this is too wide in one direction and too narrow in another. If a foreign sailor on a foreign ship were to rob another sailor of the same nation on the same ship, it would be absurd to call him a pirate, yet such an act would be a robbery at sea; and

CHAP. IX. if a piratical vessel were to attempt to capture a lawful ship and to be captured herself, it would be strange to describe her crew as anything but pirates, yet they would have committed, not what on shore would have been a robbery, but what would have been an assault with intent to rob.

Many of the statutes relating to piracy are curious relics of a past time, especially of the early part of the eighteenth century, when the cessation of a war, by throwing privateers out of employment, naturally led to piracy; a consequence which followed, it is to be hoped for the last time, at the end of the great war in 1815, when there was an outburst of piracy in the West Indies.

These are the principal offences which can be committed against public and private tranquillity by open force, or without open force, at home and abroad.

CHAPTER X.

ABUSES AND OBSTRUCTIONS OF PUBLIC AUTHORITY.

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DIRECT attacks upon public authority must, from their nature, be exceptional crimes, and can hardly be committed without raising exciting questions arising out of passionate controversies—political, social, and religious. This is not the case with abuses and obstructions of public authority. Such offences have definite degrees of importance, and may be viewed as the irregularities naturally to be expected in the working of all human institutions. They arise in one or the other of the following ways.

A person invested with public authority may abuse it by oppression, by extortion, or by fraud. He may also neglect his duty, or refuse to use his authority when he is required to do so. On the other hand, his lawful orders may be disobeyed. A public officer may be corrupted by bribery. He may be misled by falsehood, the most aggravated form of which is perjury. The execution of lawful orders, especially of sentences of courts of justice, may be frustrated by various means, such as escapes or rescues, and may be anticipated by illegal agreements for compounding offences.

No very minute detail is required in describing these various offences. They are fully defined in my *Digest*, Arts. 118–159. I will make a few remarks on them.

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Extortion and oppression by public servants is a crime which in our days is difficult to commit and is unlikely to be committed, for public officers have no longer the individual influence necessary to its commission, and what they do is for the most part done under the fullest possible publicity. An unlawful association may, and such associations sometimes do, oppress individuals, but it is difficult to believe that the sort of acts of oppression recorded in old times could now occur, except under very exceptional circumstances.

Frauds by public officers may, of course, occur from time to time, but since the time when this was decided to be criminal the number of frauds punished in private persons has been so much increased that the special liability of public servants to such punishment has become comparatively unimportant. Thus in the case of Bembridge, which early in the century attracted great attention, it was held to be criminal in a public servant to make fraudulent entries in his accounts, whereby he was enabled to retain large sums of money in his own custody, and to appropriate the interest on them to his own purposes, after they ought to have been paid over to the Crown. This would now be a crime in a private person under 38 and 39 Vict. c. 24, s. 2, an enactment suggested by a somewhat similar fraud committed by one of the clerks of a well-known London bank

A neglect or refusal to discharge an official duty may be a misdemeanour, as, for example, a neglect to take proper steps to put a stop to a riot. These, and the rules that it is a misdemeanour to disobey a lawful order of a competent authority, or to disobey a statutory prohibition, or neglect a statutory command, are only the equivalents of the principle that the law must be obeyed expressed in terms of criminal law.

I may observe in passing that these offences often afford the only means of testing certain rights. A dispute,

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for instance, arose as to the liability of a particular sheriff to execute particular criminals. It was decided by an indictment against him for refusing to do so.

Passing from abuses by public officers and disobedience to them, the next class of offences are those which consist of corruption by bribery. It is an honourable feature of English public life that judicial or other official corruption has been in practice almost unknown in nearly every period of English history. The occasional character of English law gives it one remarkable peculiarity. When no statutes are passed for the punishment of a particular crime, it is always probable that the crime has never attracted sufficient attention to provoke special legislation; and this is certainly the case with every form of corruption except one—namely, the corruption of voters in Parliamentary, and more recently in municipal, elections. The sale of offices and the sale of interest for the procurement of offices it has been found necessary to condemn by statute, but no traces of habitual corruption amongst either political or executive officers are to be found in the statute-book. A certain number of instances of such offences have certainly occurred from a time long before the famous case of Lord Bacon.

The statutes against Parliamentary corruption in all its forms have, on the contrary, become so elaborate and minute that they afford a nearly perfect specimen of what can be done by careful legislation seriously directed against habits confessedly injurious to the public, and which the public has really decided to put down.

Justice may be misled as well as corrupted. The principal crime of this kind is in the present day perjury, which is closely connected with a curious though almost forgotten branch of the history of the criminal law.

One of the great leading heads of crime in the latter part of the Middle Ages was what was known by the

general name of "maintenance." It has now dwindled down to an offence of little importance, and seldom committed. I have defined it in my *Digest* as "the act of assisting the "plaintiff in any legal proceeding in which the person "giving the assistance has no valuable interest, or in which "he acts from any improper motive." The definition is necessarily vague, because the crime is hardly known, but it was of the first importance. I have given in my *History*[1] an account of maintenance in the fourteenth and fifteenth centuries. The general character of crimes of this class appears from one of the recitals in the celebrated statute 3 Hen. VII. c. i. It is quoted above. "The King re- "membereth how by unlawful maintenances, giving of liveries, "signs and tokens, and attainders, by indentures, pro- "mises, oaths, writings, or other embraceries of his subjects, "untrue demeanings of sheriffs in making of panels and "other untrue returns, by taking of moneys, by fines, by "great riots and unlawful assemblies, the policy and "good rule of this realm is almost subdued." The effect of this is declared to be "the increase of murders, robberies, "perjuries, and unsureties of all men living." The statute then proceeds to empower either the Star Chamber or a new body of the same nature to deal with these offences. The fact that the Star Chamber did deal with them vigorously, and put a powerful check on maintenance, is its title to respect and gratitude.

Maintenance was greatly facilitated and promoted by the fact that down to the passing of this Act there was by the law of England no such crime as perjury by a witness; though Hallam justly describes perjury as "more universal and more characteristic than others"[1] in the Middle Ages. The only form of perjury which was punishable at all was perjury by a juror, which was in some cases punishable

[1] Vol. iii. pp. 234–240. [2] *Middle Ages*, iii. 30, 1855.

by the process of attaint, as I have already said. The witness seems hardly to have been regarded by the theory of the law as before the court at all. For the satisfaction of the jurors no doubt he was sworn, but the jurors continued to a singular extent to be both judges and witnesses long after they had ceased, in fact, to be witnesses at all.

The Star Chamber, or the statutory court of Henry VII., by an usurpation founded upon an obvious misinterpretation of the statute of Henry VII., first assumed, though by slow degrees, the power of treating as a common law crime perjury by witnesses. The process is described in detail in Hudson's treatise of the Star Chamber, and the authorities are collected in my *History*.[1] This has long since been confirmed by statute, and the maximum punishment of the offence is now penal servitude, or imprisonment with hard labour for seven years. It is the only crime for which such a term of imprisonment can now be given.

The details of this useful and successful usurpation of legislative power by the Court of Star Chamber, which was afterwards supported by the Court of King's Bench, are very curious. They will be found in my *History*.[2] The offence as now understood is defined in my *Digest*, Art. 135. The doctrine of materiality in perjury deserves particular notice. It was, I have no doubt, a relic of the ancient law of attaint ignorantly parodied by Coke. Its intrinsic absurdity, the stupid way in which it was introduced into the law, and the skill with which it was rendered inoffensive by judicial construction, are all characteristic and instructive.

The offence of escape is, oddly enough, one of the most intricate branches of the law, which, as it stands, is a good illustration of its strangely occasional unsystematic

[1] Vol. i. pp. 244–248. [2] Vol. iii. pp. 230–250.

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character, by which the same thing is provided for many times over. I will give a single illustration of the result. A, by helping B, confined for murder, to break out of Millbank Prison, would be—

(1) An accessory after the fact to the murder, for which, by 24 and 25 Vict. c. 100–101, he would be liable to ten years' penal servitude.

(2) He would be a principal in the second degree in prison-breaking, and liable in respect thereof to seven years' penal servitude (see authorities, *Digest*, p. 153, and Art. 18).

(3) He would commit the offence of rescuing a person committed for murder, and would be liable to penal servitude for life, 25 Geo. II. c. 37, s. 9.

(4) He would be guilty of an offence against the Millbank Prison Act, 6 and 7 Vict. c, 26, s. 22.

(5) He would be guilty of an offence under 28 and 29 Vict. c. 126, s. 37, and liable therefor to two years' imprisonment and hard labour.

These are the principal offences against public officers and against the administration of justice.

CHAPTER XI.

OFFENCES AGAINST THE PUBLIC INTEREST.

CHAP. XI

IN a general sense, all offences may be said to be against the public interest, but most of them are directed against some particular person, who is injured in his person, reputation, or property in some direct manner; as, for instances by the infliction of a bodily injury, by robbery, or by arson. The crimes of which I am now about to speak do not, as a rule, affect anyone in particular, but are punished because of the harm they are considered to do to some of the great interests of life.

The first, and in some respects the most curious of all, are what I have classed under the head of undefined misdemeanours,[1] a name which I have employed to designate acts mischievous to the public, which are punishable by no known or express law, but which appear to be such violations of the public interest or the public sense of propriety, or such outrages upon the great principles on which society is founded, that impunity should not be permitted to them. Such acts are usually done by several persons acting in concert, and are indicted as conspiracies; and instances have occurred in which the *quasi*-legislative power, which is exercised in declaring such conduct for the first time to be criminal, has been well and

[1] *Digest*, Art. 160.

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wisely exercised. The creation of the offences of perjury and obscene libel are instances; but it appears to me that such a power ought to be exercised with the greatest reluctance and caution, and I have acted on this view on several occasions of some interest. For instance, I held in the case of a man who burnt his child's body in a manner not amounting to a public nuisance, that he was guilty of no legal offence, and I should fully have accepted the consequence, which was put by way of a *reductio ad absurdum* in a Parliamentary discussion on the subject, that cannibalism was not a crime. I also was of opinion that a man who wilfully infected his wife with a foul disease could not be convicted of unlawfully inflicting grievous bodily harm upon her, or of any other offence known to the law.

I will not dwell upon the subject, but will content myself with a reference to the authorities referred to in the note on Art. 160 of my *Digest*, and to some observations in my *History*[1] on the elasticity of the common law.

The first great interest which the criminal law protects or tries to protect is religion. The efforts which have been made to do so are of the deepest historical interest. A full account of them will be found in my *History of the Criminal Law*.[2] A statement of the existing law, which however, consists of a few obsolete statutes and a common law doctrine to the last degree doubtful, and which I think is capable of being used only for bad purposes, will be found in my *Digest*, Arts 161–167. The only offence against religion which can be described as a living part of the criminal law is the offence of disturbing public worship.

The history of these offences is, in a highly condensed form, as follows.

The ecclesiastical courts were at the Conquest separated from the temporal courts and made independ-

[1] Vol. iii. p. 351, &c.

[2] Vol. ii. pp. 396–497.

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ent in their own sphere, the most important part of which was dealing with sins as such by punishments intended for the good of the souls of the persons punished —the infliction, namely, of different forms of penance. This system was worked by putting suspected persons upon their oaths as to the matters to be inquired into, and sentencing them on conviction. It applied specially to all sexual immorality. This ordinary well-established ecclesiastical jurisdiction continued in full force down to the year 1640, and for reasons which can still be explained and illustrated, at length excited passionate hatred, which was much intensified by the proceedings of the different Courts of High Commission from the time of Queen Elizabeth till the reign of Charles I. The final result was the Act of 16 Chas. I. c. 11 (A.D. 1640), which put an end for twenty-one years to the ecclesiastical jurisdiction, though on the Restoration it was re-established in a much milder form, in which it still retains a shadowy existence.

To some small extent the old ecclesiastical courts were superseded by statute law, as in particular in dealing with witchcraft, which was the subject of punishment by Act of Parliament from 33 Hen. VIII. c. 8 (1541) till 9 Geo. II. c. 5 (1736). Witchcraft then ceased to be even an ecclesiastical offence.

The ordinary ecclesiastical courts were, however, far too weak to deal with the tremendous question of heresy, which fell *primâ facie* under their jurisdiction. One well-known case is mentioned by Bracton in the thirteenth century, of a deacon "qui se apostatavit pro quadam Judææ," and was burnt; but heresy was all but absolutely unknown in England till the latter part of the fourteenth century. At that time, in consequence of the preaching of Wicliffe's doctrines, passionate efforts were made to find legal means of burning persons adjudged by the clerical power to be heretics.

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These efforts were carried so far as to bring about the forgery of an Act of Parliament,[1] and to procure the burning of William Sawtre as for heresy by a writ called the writ *De Hæretico Comburendo*, which I believe to have been a wholly unauthorized exercise of a prerogative invented for the occasion.[2]

These disgraceful measures were followed by two statutes, 2 Hen. IV. c. 15 (1400) and 2 Hen. V. c. 7 (1414), the effect of which was that the bishops' courts obtained authority to declare anyone to be a heretic of whose doctrines they disapproved, and to call upon the sheriff to burn him. These Acts continued in force till 1533, when various changes (the Act of the Six Articles, 31 Hen. VIII. c. 14 (1539), for one) were introduced. In some ways the last-mentioned Act was severe, but it greatly narrowed the powers given by the Acts of 1400 and 1410, which allowed the ecclesiastical judges to define heresy as they pleased, whereas Henry VIII.'s statutes, strange and harsh as they are, do give a sort of definition of it as consisting in certain definite opinions. They also substituted a mode of procedure, of which Hale describes the effect as being to make heresy "in a great measure a secular offence."

Edward VI. restored what was understood after the burning of Sawtre to be the common law—that is to say, the common law with the addition of the supposed writ *De Hæretico Comburendo*, under which two executions at least, those of Jean Bocher and George Van Paar, took place in Edward's reign. Mary restored the Acts of 1400 and 1410, and it was under their provisions that the great persecution of 1555 and the following years took place; and Elizabeth repealed the whole of both her sister's and her father's legislation. When the High Commission was established,

[1] *History of the Criminal Law*, vol. ii. p. 443.
[2] *Ibid.*, vol. ii. pp. 447–448.

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its powers as to defining heresy were practically almost taken away,[1] but the writ *De Hæretico Comburendo* was still kept alive for the suppression of Anabaptists or Unitarians, a few of whom were burnt in the sixteenth century, and two as late as 1610—one, Legate, by an act of shameful illegality, and merely to please the fanatical or, rather, pedantic animosity of James I.; and another, Wightman, at about the same time, of whom little is known. These were the last executions for heresy in England. The writ *De Hæretico Comburendo* was expressly abolished in 1677 by 29 Chas. II. c. 9.

The old offences against religion thus became obsolete by the year 1677, but a new one of some importance was invented at about the same time. This was the offence of blasphemous libel, to which may be added that of blasphemous words. These offences were originally punishable either by the ecclesiastical courts or by the Star Chamber, or Court of High Commission, but the ecclesiastical courts were disabled by the abolition of the *ex-officio* oath. The Courts of High Commission and Star Chamber were abolished; the Court of King's Bench took up some of their principles and practices, and treated on several occasions blasphemous words and libels (as also obscene libels) as offences against good order and good manners, and also as attacks upon religion, which was to be protected as one of the safeguards of society. The extent to which the law as it stands does in fact condemn the denial of the fundamental doctrines of religion, and the extent to which it is confined to the prohibition of indecency of language, is a matter of dispute on which I have expressed my views elsewhere. It is not necessary here to give any minute account of the matter.[2]

[1] *History of the Criminal Law*, vol. ii. p. 461.
[2] *Ibid.*, vol. ii. pp. 469–476; see also note 2 in my *Digest*, Art. 161.

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The Acts which at different times were passed for the security and maintenance of the Established Church, and for the restriction by tests and disabilities of Dissenters and Roman Catholics, belong rather to the political history of the country than to the history of the criminal law. Some account of them, however, will be found in my *History*.[1]

OFFENCES AGAINST MORALITY.—Crimes are, as a general rule, immoral actions, but it is only in a few cases that they are punished because they are immoral. In the great majority of cases an immoral act is punished as a crime only when it involves an outrage on some particular person.

The subject is not a pleasant one, and it involves little curiosity or interest. The offences referred to in Arts. 169 and 169A were, I believe, originally of ecclesiastical cognizance, and were first legislated against in 1533 by 25 Hen. VIII. c. 6.[2] Public acts of indecency and obscene libel were formerly punished by the ecclesiastical courts, but more lately by the Court of King's Bench. By far the most important Act of this kind is the Criminal Law Amendment Act of 1885 (48 and 49 Vict. c. 49). To what extent it has effected any improvement in morality is a matter of great doubt, but it has been in operation for only five years, and opinions must naturally differ. That it has in some important respects amended the previous procedure in such matters does not admit of a doubt.

COMMON NUISANCES.—Nuisance *nocumentum* is etymologically a word of the widest possible meaning. It might be used so as to cover all manner of crimes, and might so have been nearly as useful to lawyers desirous of giving a wide sweep to the criminal law as the words libel or conspiracy. In fact, the word has been practically harmless, its ordinary meaning having been fairly maintained. It is an act not warranted by law, or an omission to discharge a legal duty, which inconveniences the public in the exercise of rights common to all Her Majesty's subjects. The following familiar instances set the matter in a clearer light. The public have a right to breathe the air in a natural and unpolluted state. A man who makes foul or unwholesome smells commits a nuisance unless he can justify or excuse himself. The public have a right to pass safely along public highways without danger or interruption. A person whose duty it is to repair the roads, and who fails to do so, whereby their safety or convenience is seriously diminished, commits a nuisance. The public have a right to be undisturbed by riotous or disorderly proceedings and collections of ill-conducted people. Those, therefore, who gather together collections of disorderly persons commit a nuisance. In accordance with this principle, brothels, gaming-houses, betting-houses, and disorderly places of entertainment are declared by statute to be common nuisances. Acts tending to spread infectious diseases and the like are common nuisances. On the other hand, an interference with a private right of way, or noises made by a man in his own house to the annoyance of his neighbour only, are not public nuisances, which are the subject of indictment, but only private wrongs, for which the remedy is by an action for a nuisance or by injunction.

It is highly characteristic of our law that the common method of deciding upon the existence of a considerable body of liabilities is by indictments for the offence of not discharging them. An indictment for not repairing a road, for instance, is the common way of deciding whether the liability to repair it exists. This is the point at which the criminal law and the law which protects civil rights practically

[1] Vol. ii. pp. 476–494.

[2] *History of the Criminal Law*, vol. ii. pp. 429–430.

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run into each other. It is also the appropriate manner of deciding upon questions which in some countries would depend upon the discretion of the police authorities. I have known of a case in which it was proposed to hold a great dog show, which, no doubt, would have pleased and interested a large number of persons; but the scheme was given up because a lawyer's clerk threatened an indictment for nuisance, because the dogs would disturb his night's rest. This, again, is very characteristic of the way in which English law protects on occasion the rights of poor and obscure people by decisive means.

Another remarkable matter in connection with the law of nuisances is the nature and extent of the limitations upon it. To a considerable extent the law upon the subject is made up of compromises. It is said in an old case in regard to candle-making in a town, "Le utility del "chose excusera le noisomeness del stink"; and a law which required in a large town the quietness and purity of air which may be fairly expected in the country would be absurd, and inconsistent with the common interest. This principle is unquestionable law, but it requires great care and consideration in its application, for it is limited by others which are not obviously and perhaps not really consistent with it on all occasions.

In considering whether a thing is or is not a public nuisance, the following principles must, amongst others, be borne in mind. A jury is not entitled to sum up the conveniences and inconveniences to the public of a given act or omission, and to pronounce it to be or not to be a nuisance according to the result. Striking illustrations of this are given in the two well-known cases of the telegraph-pole and a tramway not authorized by Parliament. A telegraph-pole which occupied a certain part of a public highway caused no perceptible inconvenience to anyone,

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and was a necessary part of an apparatus which was, no doubt, as a whole, highly convenient. In the absence of express Parliamentary sanction, it was, however, held to be a nuisance because it was inconsistent with an unqualified right possessed by every member of the public to pass and repass over the space which it occupied.[1] So of the tramway, which, though it may have been a convenience on the whole to passengers, interfered with the unqualified right of every person to use every part of the road for traffic at all times.[2]

The question whether the use of a road or river is interfered with, in fact, may have light thrown upon it by the effect of staiths, embankments, and the like; but if the interference is admitted, Parliamentary sanction for them is required.

It is also to be remembered that it is part of the definition of a nuisance that the act or omission by which it is constituted must be unlawful. Parliament frequently authorizes what, without its authority, would be unlawful acts. Such, however, as are authorized cease to be nuisances. A strong illustration is to be found in the case of a railway which was authorized by statute, and frightened horses and otherwise interfered with the ordinary traffic on a neighbouring road. This was held not to be a nuisance.

[1] R. v. United Kingdom Telegraph Company, 3 *F. and F.*, 73.
[2] R. v. Train, 2 *B. and S.*, 640.

CHAPTER XII.

OFFENCES AGAINST THE PERSON—CASES OF JUSTIFIABLE AND EXCUSABLE FORCE AGAINST THE PERSON; CASES OF NEGLIGENT OFFENCES AGAINST THE PERSON.

CHAP. XII. IN the previous chapters I have given an account of what appeared to me to require notice in regard to crimes against public tranquillity, by violence or without violence; crimes in which foreign countries are interested; crimes committed by and against public officers; crimes against religion and morals; and public nuisances,—all of which have the common character of being directed against the public, or some part of it, rather than against particular individuals.

I now come to consider common offences against individuals. Nearly all of these—I think I may say all of any importance or of ordinary occurrence—are punished by the 24 and 25 Vict. c. 100, c. 96, c. 97, c. 98, c. 99, or c. 100, the five Consolidation Acts which form the nearest approach contained in our law to a Criminal Code.[1] In general, these Acts speak for themselves, and need little explanation. This is particularly true of c. 97, relating to offences of which arson may be taken as the type; c. 98, relating to forgery; and c. 99, relating to offences against the coinage; but the

[1] 24 and 25 Vict. c. 96, theft; c. 97, malicious injuries to property; c. 98, forgery; c. 99, coinage; c. 100, the person.

law which deals with offences against the person (c. 100) assumes in the reader a previous knowledge of the doctrines of the common law relating to the employment of force against the person of another, and of the common law definitions of certain crimes which the Act punishes but does not define. I proceed to consider the principles by which these matters are regulated.

The first general principle which runs through the whole law on this subject is that any interference whatever with the person of another, or with his personal liberty, requires special justification. The general rule is that everyone is entitled to be free from all bodily harm voluntarily inflicted, and from all restraint, either by mechanical means or by threats or the show of force, from going to any place to which he has a lawful right to go, or being in any place in which he has a lawful right to be. The protection of the law extends to some cases in which negligence, and even to cases in which accident, causes bodily harm.

This general principle is accompanied by another equally general. It is that, even in cases in which the application of force to the person of another is on any ground justifiable, such force as is reasonably necessary for the purpose which justifies it is all that can be justified, and that any excess is unlawful.

These principles are assumed in all cases, but are nowhere explicitly stated in an authoritative shape; but it is necessary to state them explicitly, in order to state in a clear and systematic way the principles which apply to the subject.

There are two general heads under which all cases of the justifiable employment of force against the person of another may be classed. The first is force used either in the execution of legal process or in the prevention of crime in various forms. The second is the case of private

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defence in the large sense of the word—that is to say, in a sense which includes not merely the defence of the person from violence, but the assertion by force of any right which is allowed by law to be so asserted or protected. I include under the expression, for instance, not only the act of a man who forcibly resists a trespasser seeking to enter upon his land, but also the act of an owner who forcibly ejects a trespasser who has entered upon it.

For the sake of brevity, the two may be called force in aid of justice and force in private defence. These two forms of lawful force to a considerable extent run into each other, for an act may fall under both heads. Thus, summary arrest is for certain crimes a form of legal process. A man who arrests a burglar is at once preventing a crime, arresting a criminal, and, it may be, defending himself from violence; and of course the effect of the union of these different characters is to give the person in whom they are united all the rights which he would have in any one of them. In order to be understood, however, they must be considered separately.

FORCE JUSTIFIABLE IN AID OF JUSTICE.—This is of two kinds—namely, (1) force used in the execution of the law, and (2) force used for the suppression of violent crime.

(1) Force used in the execution of the law may be used for a great variety of purposes. Common illustrations are the execution on criminals of legal sentences, and the enforcement of legal decisions in civil cases, as, for instance, by giving possession of land to the successful party in a lawsuit, or by the removal of a structure decided to be a public nuisance. But all these cases depend upon one plain principle: whatever may be the object to be obtained, the right and duty of the proper executive officer is to obtain it

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by the use of any kind and amount of force which may be necessary for that purpose. The amount and kind of force to be used can be limited only by the resistance opposed to it. The plain duty of the executive power is to overcome that resistance at whatever risk.

(2) The use of force for the suppression of crimes of violence has given rise to many questions of interest connected principally with cases in which the crimes suppressed were regarded with sympathy, and in some cases with approval, by those who were opposed to their suppression. Unlawful assemblies and riots are judged of in a very different way by people of different political and social views. I have considered the most important of these questions as carefully as I could in different parts of my *History of the Criminal Law*,[1] where I have traced the history of the law on the subject and the legislation relating to it from the first institution of watchmen to the organization of the modern police force, and the gradual establishment of what is, in fact though not in form, a standing army.

The following pages are partly quoted and partly condensed from my *History*.

The common law right and duty, not only of the conservators of the peace, but of all private persons (according to their power), to keep the peace and to disperse and, if necessary, to arrest those who break it, is obvious and well settled, but it is also obvious that it can hardly be discharged to advantage without special statutory power. In the earlier stages of our history the power and turbulence of the nobility was so great that private war was all but continual, and the preservation of the peace by force of arms was the first duty of all rulers. Violence in all its forms was so common, and the suppression of force by force so simple a matter, that special legislation did not appear

[1] *History of the Criminal Law*, vol. i. pp. 184–200.

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necessary in very early times.[1] The earliest express recognition by statute of this state of things to which I can refer occurs in the Statute of Treasons. After defining treason positively, the statute proceeds to say what shall not be held to be treason. "And if percase any man of "this realm ride armed covertly" (it should be translated "openly," the French is "descovert") "or secretly with "men of arms against any other to slay him, or rob "him, or take him, or retain him till he hath made fine "or ransom for to have his deliverance, it is not the "mind of the king nor his council that in such case it "shall be judged treason, but shall be judged felony or "trespass according to the laws of the land of old time "used, and according as the case requireth." In other words, private war, whatever else it may be, is not treason.[2]

A history of the legislation of the fifteenth and sixteenth centuries, is followed by an account of the existing law on the subject.

At the beginning of the eighteenth century was passed the famous Act, 1 Geo. I. st. 2, c. 5, still in force, and commonly known as the Riot Act. It increases the severity of the Tudor Acts (which expired at the death of Elizabeth) by making it felony without benefit of clergy for twelve rioters to continue together for one hour after the making by a magistrate of a proclamation[3] to them to

[1] See, however, 7 Edw. I. st. 1 (1279), as to coming armed to Parliament, and 33 Edw. I. st. 2 (1304), a definition of conspirators.

[2] *History of the Criminal Law*, vol. i. p. 201.

[3] "Our Sovereign Lady the Queen chargeth and commandeth all persons "being assembled immediately to disperse themselves, and peaceably to de-"part to their habitations or to their lawful business, upon the pains con-"tained in the Act made in the first year of King George for preventing "tumults and riotous assemblies. God save the Queen." The making of this proclamation is commonly, but very incorrectly, called reading the Riot Act.

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disperse. It then requires the magistrates to seize and apprehend all persons so continuing together, and it provides that if the persons so assembled, or any of them, "happen to be killed, maimed, or hurt, in dispersing, "seizing, or apprehending, or endeavouring to disperse, "seize, or apprehend them," the magistrates and those who act under their orders shall be indemnified. As a standing army had come into existence before this Act passed, the effect of it was that after making the proclamation and waiting for an hour the magistrates might order the troops to fire upon the rioters or to charge them sword in hand. To say so in so many words would, no doubt, have given great offence, but the effect of the indirect hint at the employment of armed force given by the statute was singular. It seems to have been generally understood that the enactment was negative as well as positive; that troops not only might be ordered to act against a mob if the conditions of the Act were complied with, but that they might not be so employed without the fulfilment of such conditions. This view of the law has been on several occasions decided to be altogether erroneous. The true doctrine on the subject was much considered, both in the case of Lord George Gordon's Riots in 1780, and in the case of the Bristol Riots in 1831. It may be shortly stated as follows. The fact that soldiers are permanently embodied and subjected by the Mutiny Act to military discipline, and bound to obey the lawful orders of their superior officers, does not in any degree exempt them from the obligation incumbent on all Her Majesty's subjects to keep the peace and disperse unlawful assemblies. On the contrary, it gives them special and peculiar facilities for discharging that duty. In a case of extreme emergency they may lawfully do so without being required by the magistrates. In the words of Lord

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Chief Justice Tindal,[1] in his charge to the grand jury at Bristol, January 2nd, 1832:—"The law acknowledges "no distinction between the soldier and the private in- "dividual. The soldier is still a citizen, lying under the "same obligation and invested with the same autho- "rity to preserve the peace of the king as any other "subject. If the one is bound to attend the call of the "civil magistrate, so also is the other. If the one may "interfere for that purpose when the occasion demands "it, without the requisition of the magistrate, so may "the other too. If the one may employ arms for that "purpose when arms are necessary, the soldier may do the "same. Undoubtedly, the same exercise of discretion which "requires the private subject to act in subordination to "and in aid of, the magistrate rather than upon his own "authority before recourse is had to arms, ought to operate "in a still stronger degree with a military force. But "where the danger is pressing and immediate; where a "felony has actually been committed or cannot otherwise "be prevented, and from the circumstances of the case "no opportunity is offered of obtaining a requisition from "the proper authorities, the military subjects of the king, "like his civil subjects, not only may but are bound, "to do their utmost of their own authority to prevent "the perpetration of outrage, to put down riot and tumult, "and to preserve the lives and property of the people. "Still further, by the common law not only is each private "subject bound to exert himself to the utmost, but every "sheriff, constable, and other peace officer is called upon "to do all that in them lies for the suppression of riot, "and each has authority to command all other subjects "of the king to assist them in that under the king."

The result of this view of the subject is to put soldiers

[1] *5 C. and P.*, 261. &c.

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acting under the orders of their military superiors in an awkward position. By the ordinary principles of the common law they are, speaking generally, justified only in using such force as is reasonably necessary for the suppression of a riot. By the Mutiny Act and the Articles of War they are bound to execute any lawful order which they may receive from their military superior, and an order to fire upon a mob is lawful if such an act is reasonably necessary for the dispersion of rioters. If not reasonably necessary, it would not be a lawful order. The hardship upon soldiers is, that, if a soldier kills a man in obedience to his officer's orders, the question whether what was done was more than was reasonably necessary has to be decided by a jury, probably upon a trial for murder; whereas, if he disobeys his officer's orders to fire because he regards them as unlawful, the question whether they were unlawful as having commanded something not reasonably necessary would have to be decided by a court-martial upon the trial of the soldier for disobeying orders, and for obvious reasons the jury and the court-martial are likely to take different views as to the reasonable necessity, and therefore as to the lawfulness, of such an order.

I do not think, however, that the question how far superior orders would justify soldiers or sailors in making an attack upon civilians has ever been brought before the courts of law in such a manner as to be fully considered and determined. Probably upon such an argument it would be found that the order of a military superior would justify his inferiors in executing any orders for giving which they might fairly suppose their superior officer to have good reasons. Soldiers might reasonably think that their officer had good grounds for ordering them to fire into a disorderly crowd which to them might not appear to be at that moment engaged in acts of dangerous violence,

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but soldiers could hardly suppose that their officer could have any good grounds for ordering them to fire a volley down a crowded street when no disturbance of any kind was either in progress or apprehended. The doctrine that a soldier is bound under all circumstances whatever to obey his superior officer would be fatal to military discipline itself; for it would justify the private in shooting the colonel by the orders of the captain, or in deserting to the enemy on the field of battle on the order of his immediate superior. I think it is not less monstrous to suppose that superior orders would justify a soldier in the massacre of unoffending civilians in time of peace, or in the exercise of inhuman cruelties, such as the slaughter of women and children during a rebellion. The only line that presents itself to my mind is that a soldier should be protected by orders for which he might reasonably believe his officer to have good grounds. The inconvenience of being subject to two jurisdictions, the sympathies of which are not unlikely to be opposed to each other, is an inevitable consequence of the double necessity of preserving on the one hand the supremacy of the law and on the other the discipline of the army.[1]

Beyond the employment of the ordinary forces of the Crown for the suppression of a riot lies a proclamation of martial law. This has never occurred in England since the Civil Wars in Charles I.'s time; but the prerogative of proclaiming it has been asserted in Ireland on several occasions, for the last time, I think, in 1833 (3 and 4 Will. IV. c. 4), and it was used in the most vigorous way for the suppression of the Rebellion of 1798. It has also taken place on several occasions in the colonies and in India. Of the legal effects of a proclamation of martial law I have given a full account in my *History*.[2]

[1] *History of the Criminal Law*, vol. i. pp. 202–206. [2] Vol. i. pp. 207–216.

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The result of it is thus summed up on p. 215:—

(1) Martial law is the assumption by officers of the Crown of absolute power, exercised by military force, for the suppression of an insurrection, and the restoration of order and lawful authority.

(2) The officers of the Crown are justified in any exertion of physical force, extending to the destruction of life and property to any extent, and in any manner that may be required for the purpose. They are not justified in the use of cruel and excessive means, but are liable civilly or criminally for such excess. They are not justified in inflicting punishment after resistance is suppressed, and after the ordinary courts of justice can be reopened.

The principle by which their responsibility is measured is well expressed in the case of Wright *v.* Fitzgerald.[1] Wright was a French master of Clonmel, who, after the suppression of the Irish Rebellion in 1798, brought an action against Mr. Fitzgerald, the sheriff of Tipperary, for having cruelly flogged him without due inquiry. Martial law was in full force at that time, and an Act of Indemnity had afterwards been passed to excuse all breaches of the law committed in the suppression of the rebellion. In summing up, Mr. Justice Chamberlain, with whom Lord Yelverton agreed, said:—

"The jury were not to imagine that the Legisla-
"ture, by enabling magistrates to justify under the In-
"demnity Bill, had released them from the feelings
"of humanity, or permitted them wantonly to exercise
"power, even though it were to put down rebellion.
"They expected that in all cases there should be a
"grave and serious examination into the conduct of the
"supposed criminal, and every act should show a mind
"intent to discover guilt, not to inflict torture. By exami-

[1] 27 *St. Tr.* 765.

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"nation and trial he did not mean that sort of examina-
"tion and trial which they were now engaged in, but
"such examination and trial the best the nature of the
"case and existing circumstances should allow of. That
"this must have been the intention of the Legislature was
"manifest from the expression 'magistrates and all other
"'persons,' which provides that as every man, whether magis-
"trate or not, was authorized to suppress rebellion, and
"was to be justified by that law for his acts, it is required
"that he should not exceed the necessity which gave him that
"power, and that he should show in his justification that he
"had used every possible means to ascertain the guilt which
"he had punished, and, above all, no deviation from the com-
"mon principles of humanity should appearin his conduct."

Wright recovered £500 damages, and when Mr. Fitzgerald applied to the Irish Parliament for an indemnity he could not get one.

(3) The courts-martial, as they are called, by which martial law, in this sense of the word, is administered, are not, properly speaking, courts-martial or courts at all. They are merely committees formed for the purpose of carrying into execution the discretionary power assumed by the Government. On the one hand, they are not obliged to proceed in the manner pointed out by the Mutiny Act and Articles of War. On the other hand, if they do so proceed, they are not protected by them as the members of a real court-martial might be, except so far as such proceedings are evidence of good faith. They are justified in doing, with any forms and in any manner, whatever is necessary to suppress insurrection, and to restore peace and the authority of the law. They are personally liable for any acts which they may commit in excess of that power, even if they act in strict accordance with the Mutiny Act and Articles of War.

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As for the use of force for the purpose of preventing crimes of violence of the common kind, and for the purpose of apprehending persons who commit them, the law requires an historical as well as a systematic explanation. I have mentioned in my *History*[1] the steps by which the great prerogative of keeping the peace was at first exercised locally by the sheriffs and constables; how the coroners were added about the end of the twelfth century; and how the ancient system was completed by the appointment of justices of the peace under various statutes passed in the reign of Edward III. I have also referred to the ancient institutions of frankpledge, hue and cry, the Assizes of Northampton (A.D. 1166) and Clarendon (A.D. 1176), the Assize of Arms (A.D. 1181), and the eyres of the justices, as described by Bracton. All these laws and institutions are proofs that from the very earliest period of English history one of the first objects of the law was to secure the instant and summary arrest of criminals by the force of the neighbourhood, which was justified in using violence to any extent in arresting them or preventing their escape. The various institutions which I have mentioned became superannuated, and are now superseded by the police system established by numerous statutes, the first of which was passed in 1829, viz. 10 Geo. IV. c. 44, which constitutes the Metropolitan Police District.

Every one of these laws and institutions assumes and rests upon the principle that everyone may, and that all officers of justice must, arrest a felon in a summary way as soon as he has notice of his crime, using any required degree of force for that purpose, and for the purpose of preventing his escape, even if it extends to the use of deadly violence, and actually kills. Of course, in the present day, such extreme cases do not occur, but the language used by Hale

[1] Vol. i. pp. 184–290.

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and other authorities, and justified by a consideration of the institutions with reference to which it was used, would justify a person whose pocket was picked, or indeed anyone who tried to arrest the thief, in shooting or stabbing him if he could not otherwise be prevented from getting into a crowd in which he would escape.

I do not think it necessary to enter minutely upon the question what are the offences for which summary arrest is permitted. They are enumerated, and the authorities respecting them are given, in my *Digest of Procedure*, Arts. 96–98. They show in what respect a police-constable's position differs from that of an ordinary person. I do not think it has ever been decided that a summary arrest under the provisions of a statute for misdemeanour may be executed with the same unrestricted violence as an arrest for felony. Granting that it is lawful to fire a rifle at a boy who steals a handkerchief and runs away too quickly to be otherwise stopped, I am not sure that this would be held to be true of a boy found by the owner unlawfully and maliciously cutting a stick from his hedge or taking his gate off its hinges.[1] The law as to felonies might advantageously, I think, be limited in several ways, and it might possibly be held that some such limitations would be recognized if the case arose.

THE RIGHT OF PRIVATE DEFENCE.—Many cases of private defence are, as I have already pointed out, cases of violence in support of justice; and in cases where the two coincide, the justification of violence being in support of justice is the best to be relied upon, as it is the more emphatic and peremptory of the two. If a man attempts to rob another by violence, and the person assaulted shoots him, the fact that the shooting was for the prevention of a felony and for the arrest of the felon is a complete defence; though on a variety

[1] 24 and 25 Vict. c. 97. ss. 25 and 61.

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of possible grounds it might be difficult to prove that if the act were regarded as one of mere self-defence it was not excessive.

For this reason it will be unnecessary to deal in this place with those acts of private defence which may be justified on the ground that the person against whom violence is used is a criminal. It will be enough to say something of acts of private defence in cases which do not arise out of crime. They may be divided into three classes:—

(1) Defence against violence to the person of the man who defends himself.

(2) Defence against the invasion of his proprietary rights.

(3) Forcible assertion of his proprietary rights.

Private defence against personal violence can very rarely occur except in cases of crime, for it is difficult to put a case of personal violence which is neither justifiable nor criminal. The only one at all likely to happen which occurs to me are cases of mistake or madness. A man might, no doubt, attack another under the impression that he was a robber, or a madman might attack another in a frenzy. In each of these cases the right of the person assaulted would be the same—namely, to defend himself as circumstances might require, using such violence only as was reasonably necessary for effecting his purpose. Thus, if a man were assaulted by a madman in such a way as to endanger his life, he might kill him if necessary to save his own life. If he were similarly assaulted by a robber, he might not only kill him to prevent the robbery, but might kill him if he could not otherwise prevent his escape. He might justify such violence only to the madman as might be necessary to prevent him from harming others; but even for that purpose he might not do him any deadly injury, unless possibly as the only means of saving another from immediate death or deadly injury. The only remark on this subject which need be made is

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that in all cases, even in the case of a crime against a man's own person, it is his duty, if reasonably possible, to avoid a breach of the peace by appealing, if he can, to the protection of the law; to call in a constable, if it can be done, before defending yourself against threats of violence; to retreat as far as can be reasonably done before a blow is returned. This is stated more pointedly and harshly by Hale and others than would now, I think, be correct, because people in those times carried arms and fought with them upon trifling occasions. There is reason and wisdom in the doctrine that, if A draws his sword to provoke B to a duel, B must retreat, as was said, "to the wall" before he draws and defends himself; but I should not be prepared to hold without argument that a man is bound to run away from a drunken bully who strikes him, if the person attacked is fortunate enough to be able to knock down his assailant. I have, on several occasions, allowed, and even more or less invited, juries to acquit people of manslaughter who unintentionally and unexpectedly caused death by returning a blow in what the jury regarded as reasonable self-defence. The greatest caution ought, however, to be used in regard to this matter. A deliberate fight, even with fists, is in all cases unlawful; and self-defence against a slight assault must, if justifiable at all, be confined within the narrowest limits—that is, it must be confined to what is reasonably necessary to avoid personal injury or to stop, not to punish, the grossest personal insult.

(2) DEFENCE AGAINST THE INVASION OF PROPRIETARY RIGHTS AND IN THEIR ASSERTION.—The leading principle in cases of this kind is that in nearly all cases rights of all kinds should be protected, not by the person entitled to them, but by the law of the land and its executive officers. In some cases, however, private defence is, to a limited extent, permissible. Generally speaking, the principle is this:—The person injured may prevent the wrong-doer, by force not extending to blows or wounding, from pursuing or effecting his unlawful purpose, but may not strike or wound him, either in order to prevent his unlawful act or in order to punish him for having acted unlawfully. For instance, he may put a trespasser out of his house or out of his field by force, but he may not strike him, still less may he shoot or stab him. If the wrong-doer resists, the person who is on the defensive may overcome his resistance, and may proportion his efforts to the violence which the wrong-doer uses. If the wrong-doer assaults the person who is defending his property, that person is in the position of a man wrongfully assaulted, and may use whatever violence may become necessary for the protection of his person. It must be added that an attack upon a man's dwelling-house is always regarded as almost as strong a justification for violence in defence as an attack on his person. In the assertion of a proprietary right, force is less frequently justifiable, and to a smaller degree, than in its defence. This is not so much a matter of law as a wise and necessary rule of evidence in appreciating the nature and extent of the force used, for such forcible assertions of right usually border, at all events, on criminal offences, such as riot, unlawful assembly, forcible entry, and wilful damage. If a large number of persons pull down inclosures, or walk along a disputed road, or the like, there is great danger of their doing so in such numbers, or with the accompaniment of such speeches or other proceedings, as are likely to cause a breach of the peace; and there can be no doubt that all such proceedings are unlawful. For instance, if two parties of men set out, the one to exercise and the other to resist the exercise of an alleged right to abate a nuisance, or to pass along a disputed thoroughfare, the justices of the peace would be justified in preventing each party from taking such steps, and the meetings, if held, would be unlawful assemblies if shown

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to be likely to cause a breach of the peace, irrespectively of the merits of the question whether the alleged right existed or not.

There are some other cases in which the use of private force may be justified, as, for instance, the right of a schoolmaster to correct his scholars, the rights of the captain of a merchantman incidental to the maintenance of discipline, and some others; but I do not think these involve any principles of interest.

MISTAKES.—The employment of force against the person of another is the part of the law in which the question of the effect of mistakes most frequently arises. These mistakes may be mistakes of fact or of law, and they may be made either by a constable or other officer of justice, or by a private person; so that the question is divided into mistakes of law made by an officer, mistakes of law made by a private person, mistakes of fact made by an officer, and mistakes of fact made by a private person. Regard must also be had in all these cases to the distinction between the civil and criminal consequences of all these mistakes.

In all cases of mistake it must be assumed that the mistake is made in good faith and without culpable negligence, the meaning and effect of which will be explained further on. Speaking generally, the effect of such a mistake is, in reference to penal consequences at least, the same as if the facts supposed to exist had really existed. A man who kills a person breaking into his house because he mistakenly believes him to be a robber is justified as if he had been a robber, whether he is a constable or a private person; but there is in some cases an important distinction between them, especially in reference to civil consequences. A man who mistakenly supposes that the law imposes a duty upon him, and upon whom such a duty would be imposed by the facts which he believes to be true, is in a better position

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with regard to civil consequences than a man who merely supposes himself to have a right, but not to be under a duty, to act as he does. Thus it is a good plea on an action for false imprisonment that the defendant being a constable reasonably suspected that the prisoner committed felony; but if the defendant is a private person he must prove in addition that a felony was actually committed. If an action for false imprisonment is brought against two persons—namely, A, a policeman, and B, a private person; and it is proved that B gave the plaintiff in charge to A for picking a pocket, as B thought, in his sight, A is justified and entitled to a verdict if he proves that he acted on B's information, but B is not justified unless he proves that some one did pick a pocket, and that he was mistaken only in the identity of the man. I believe, though I cannot prove it by any definite authority, that if a policeman is ordered by his superior officer to disperse a crowd under such circumstances that he may, and does, naturally and reasonably believe that the order was lawful, he would be protected at all events from criminal consequences by the order, even if it were illegal as not being justified by the circumstances. The rule as to the particular case of false imprisonment is exceptionally favourable to a defendant who has mistakenly arrested a man without a warrant, for it certainly results in the consequence that one person may suffer for the mistake of another, although the sufferer is completely innocent. I do not quite understand why, because my pocket is picked, a private person who takes it into his head that A B, an honest man, who was miles off at the time, was the person who picked it, is with impunity to cause him to be arrested and imprisoned from Saturday till Monday. I suppose the answer is that it is desirable to protect *bonâ fide* prosecutors. For the purposes of civil consequences the general rule is that a volunteer acts at his peril.

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As to mistakes in law, the only cases in which they are likely to cause difficulty are cases in which constables and other executive officers act under irregular warrants.

NEGLIGENT OFFENCES AGAINST THE PERSON.—I have now gone through the principal cases of justifiable and excusable violence against the person, though I do not pretend, and it is not the object of this book, to treat completely of all the cases which may arise in connection with the subject. I now pass to the subject of negligence, which is the omission to discharge a legal duty of whatever kind, and such an omission may be either (1) intentional, (2) culpable, or (3) not culpable.

There are four cases in which the negligent infliction of bodily harm is criminal. The only statutory offences of the sort known to me are defined by 24 and 25 Vict. c. 100, s. 31.[1] They consist of negligence endangering a person conveyed on a railway, and the causing of bodily harm by misconduct or neglect in driving. These offences are not often prosecuted, and are of no special interest. The only cases of criminal negligence which are at once common and important are cases in which death is caused by it.

Upon intentional negligence I have only one remark to make. If it is the neglect of a legal duty, it does not differ, as far as criminal or civil consequences are concerned, from an act. A mother who, having the means to do so, wilfully omits to feed her infant child, and so starves it to death, is both legally and morally in the same position as if she put it to death by the means which caused its death; and the same might be said of a man who, in order to prevent the proper ventilation of a mine, wilfully omitted to open air-ways necessary for that purpose. Negligence of this kind may accordingly be regarded as being, for all purposes, on the same footing as an act, and must always be culpable when an act would be criminal. No further notice need be taken of

[1] *Digest*, Art. 240.

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it. Indeed, I use the words intentional negligence solely in order to mark the fact that in some cases acts and omissions stand on the same footing.

It is, however, to be remarked that the omission must be an omission to discharge a legal duty. An omission to do what it is not a legal duty to do is no crime at all, even if the omission causes, and is intended to cause, death. It is not a criminal offence to refuse to throw a rope to a drowning man, or to allow a man to walk over a cliff or into a quicksand when a word of advice would save him.[1]

The difficult matter to deal with is to define the nature of negligence which is culpable, though not intentional, and to distinguish it from that which is not culpable, though it may be actionable as a wrong. The best mode of understanding this subject is to begin by considering what are the duties which are imposed by law on persons whose conduct may preserve or destroy human life. I think these duties may all be reduced under three heads, which, stated in a summary way, are these. It is a legal duty, incumbent on every person, who, by law, or by contract, or by the act of taking charge, wrongfully or not, is in charge of any other person, to provide such last-mentioned person with the necessaries of life, if he cannot provide for himself or withdraw from the care of the person first mentioned. It is the duty of everyone who does any act which is or may be dangerous to life to employ proper precautions in doing it. It is the duty of every person who undertakes to administer surgical or medical treatment, or to do any other lawful act of a dangerous kind which requires special knowledge, skill, attention, or caution, to employ in doing it a common

[1] Lord Macaulay has some curious remarks on this in his notes on the Indian Penal Code. I lent the book to Mrs. Cross (George Eliot) for her novel of *Middlemarch*. It approaches the subject, but in *Daniel Deronda* a much more striking illustration of the principle is given.

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amount of such knowledge, skill, attention, and caution, or at all events, if he acts as a matter of necessity, to do his best. The omission to discharge these duties and others of the same kind, if any such there are, is criminal, unless it is so slight that the jury do not regard it as such. I do not think it is possible to be more precise than this, or that the attempt to be so would really be of any advantage. It is easy to give instances which fall on different sides of the line between culpable and not culpable negligence, but I do not think it possible to lay down any principle on which such cases can be decided. An engine-driver causes the death of passengers by omitting to notice signals because he went drunk on to his engine. No one would doubt this was culpable negligence. A signalman causes death by omitting to make proper signals. He proves that his hours of work were very long, and his duties were extremely arduous. This is evidence which may be worth more or less according to circumstances, to show that his negligence was not culpable so as to make him guilty of manslaughter, though both the company and he (if he were worth suing) might be liable in damages. Juries, in my experience, have no difficulty in dealing with this question. The only general observation I can make upon it is that in this, as in all cases in which the criminal law is brought into play, the connection between law and morals ought, as far as possible, to be maintained when it is possible; and it may often be a guide to a proper conclusion in this matter to consider whether the negligence of which the accused person was guilty was morally blamable or not, it being always borne in mind that it is a moral duty to appreciate the extreme importance of duties on the due discharge of which the safety of many persons depends, and to be alert, active, and attentive in their discharge. If a man is to be a surgeon, a station-master, or the captain of a ship, it

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is his duty to know his business fairly well, to have reasonably steady nerves, and not to lose his head in a difficulty. If he has a specially weak or foolish head, or specially sensitive nerves, he ought to know it, and not try to discharge duties for which he is not competent.

ACCIDENT.—I will conclude this chapter by a short account of accidental bodily harm. The history of the subject is exceedingly curious, and was much misunderstood even while the old law upon the subject was still in force. Upon this I must refer to my history of the law relating to murder and manslaughter,[1] which contains a full account of a number of matters which it would be uninteresting and uninstructive to abridge. What is said of accident is as follows[2]:—The cases in which homicide is excusable may all be reduced under the head of accident—that is to say, killing without any intention to kill or hurt—and upon this the law of England recognizes two distinctions. Death may be caused accidentally or, which is the same thing, unintentionally, in the doing of an act in itself lawful or in itself unlawful. It may also occur by reason of the omission to perform a legal duty tending to the preservation of life. The following are typical instances of these four classes of accidental death:—

1. A fires a gun at a mark. The gun bursts and kills B.

2. A fires a gun at a mark without giving proper warning or taking proper care in placing the mark, and kills B.

3. A fires a gun at C with intent to murder him. The gun bursts and kills B, A's accomplice.

4. A fires a gun at B, intending to murder him, and kills C, whom A did not warn to stand out of the way.

I may add that in the four cases referred to under the law as it stands, A would, in Case 1, be guilty of no crime at all. In Case 2 he would be guilty of manslaughter; but if B had been dangerously wounded instead of dying, A

[1] Vol. iii. pp. 1–107.

[2] *Hist.* vol. iii. pp. 15–16.

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This is a striking instance of the advantage of statute over common law, though I think the common law in this case is rational and well understood.

[1] See Regina *v.* Latimer, 17 Queen's Bench Division, 359; and my *Digest*, Art. 239 (2).

CHAPTER XIII.

OFFENCES AGAINST THE PERSON (*continued*)—DEFINITIONS ASSUMED IN 24 AND 25 VICT. C. 100.

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The greater part of it requires no explanation or remark whatever; but as the most important of the crimes which it punishes are defined by the common law, it presupposes an acquaintance with the common law definitions, and this presupposes some historical observations on their gradual development.

The first series of sections (1–10) deal with murder and manslaughter. After a judicial experience of ten years, in the course of which I must, I should think, have disposed of at least a hundred cases of murder or manslaughter, I am, I think, entitled to say that I have never found reason to doubt the accuracy and completeness either of the distribution of the subject of homicide, or of the definitions of the various crimes and common law doctrines stated in chapters xxiii. and xxiv. of my *Digest*. To this there is one exception. I doubt whether Art. 223 (*e*) is law. It is generally supposed to be so. But for reasons given in my *History*, vol. iii. pp. 57, 58, and 69, I have doubts about it. It is

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founded on the well-known dictum of Foster, that shooting at a fowl with intent to steal it and killing a man is murder, because of the felonious intent, whereas if the thing shot at were a wild bird the accidental killing of a man would be but barely manslaughter. In the passages already referred to, I suggest some reasons for thinking that this doctrine is as much mistaken in law as it is repugnant to common-sense and humanity.

For this reason I shall content myself with giving an account of the reasons why the subject of homicide is arranged and defined as it is in my *Digest*, with as much historical matter as is necessary to show how the distinction between murder and manslaughter came to be made, and what it means.

I will first explain the grounds on which my systematic exposition of the existing law is founded.

Having stated the propositions already explained or referred to as to the justifiable, excusable, negligent, and accidental application of force to the human body, I proceed to the consideration of homicide. This is not now a technical legal term, though the word is used and defined with perfect correctness and completeness by Bracton. "Homicidium est "hominis occisio ab homine facta." Though this definition is simplicity itself, it involves questions of principle not at all obvious. They are—At what period, for the purpose of the definition, does a person become a human being? What acts amount to killing? These questions are answered in full detail, and the authorities for the answers are given, in Art. 218–222 of my *Digest*. They require considerable detail. For common purposes, it is enough to say that a child becomes a human being as soon as it issues in a living state from its mother's body, and not before; and that killing is causing death by an act or omission without which the person killed would not have died when he did, and which is

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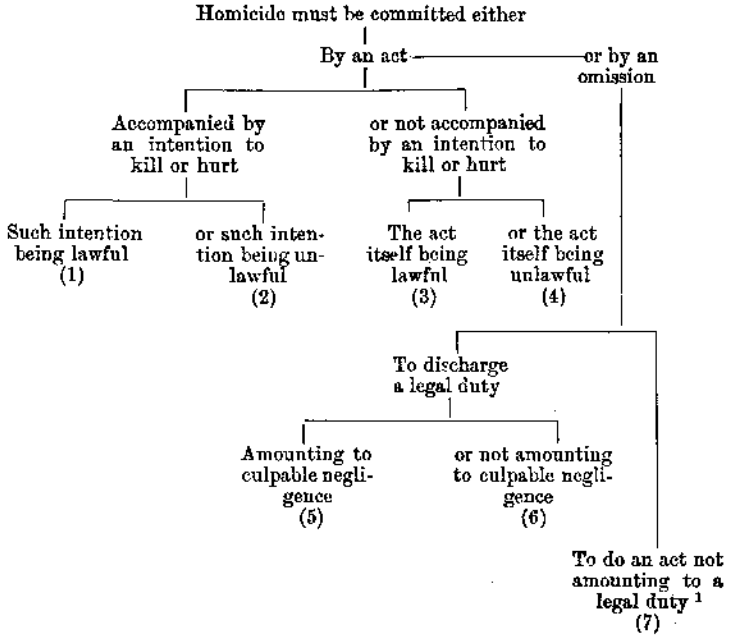
directly and immediately connected with his death. This may appear at first sight a merely pedantic substitution of many words for one, but it is necessary in order to show the necessity for something closer and more definite than the mere word "killing" would imply. The illustrations to Art. 219 show the necessity for the definition. Such a phrase as "He killed his wife; he broke her heart and killed her by his "infamous behaviour," might be a natural way of expressing the real belief of the speaker, but it would not necessarily mean that the person spoken of had killed his wife in the sense of Art. 219. I give my reasons in the illustrations for thinking that Iago and Fagin did not in this sense kill Desdemona and Charlotte.

I have also dealt with the cases of an act being the remote cause or one of several causes of death (Art. 220), and with some cases in which the causing of death is not regarded as homicide. These cases involve matters of a good deal of curiosity which I here pass over.

Passing from these preliminary matters, I come to the classification of homicide as being unlawful or not unlawful, in the sense of not being punishable by law. Upon considering the contents of the last chapter, it will be found that all cases of homicide may be classified according to the following table, the distinctions contained in which are inherent in the nature of things, and ought to be, and I believe are, in a clumsy way provided for by all bodies of criminal law:—



Of these seven kinds of homicide three involve the legal guilt of either murder or manslaughter as the case may be. Four involve no legal guilt at all, though one

[1] The construction of this table caused me greater labour than almost any part of the book. It is implied in s. 222 of my *Digest*, and the main difficulty of constructing it lay in perceiving that the unlawfulness of homicide by an act done depends upon the intention with which the act is accompanied and its lawful or unlawful character, whereas the lawfulness or unlawfulness of homicide by an omission depends on the question whether the act left undone is a legal duty or not. An act is almost always intentional, an omission as a rule is unintentional, and in this particular case the intention of the negligent person does not always measure his fault. Not to stretch out a stick to a drowning man, with the intention of causing his death, involves as much moral guilt as the intentional omission of a sick-nurse to administer medicine which she has contracted to administer; but the one is a legal duty and the other is not. The difficulty of forming distinct coherent schemes on this subject can be fairly appreciated by those only who know in full detail the history of it. See my *History*, vol. iii. pp. 23–107.

of them may involve the blackest kind of moral guilt. The four which involve no legal guilt are—

Homicide (1) committed by an act accompanied by a lawful intention to kill or hurt;

(2) Committed by an act not accompanied by an intention to kill or hurt, such act being lawful; or

(3) By an omission to discharge a legal duty, such omission not amounting to culpable negligence; or

(4) By an omission to do an act not amounting to a legal duty, however wicked may have been the intention with which such omission was made.

But homicide

(1) By an act accompanied by an unlawful intention to kill or hurt; or

(2) By an unlawful act unaccompanied by an intention to kill or hurt; or

(3) By an omission amounting to culpable negligence to perform a legal duty, must be either murder or manslaughter. It is to be understood that an intentional omission to perform a legal duty is always culpable negligence.

The distinction between murder and manslaughter is a different matter from this, depends upon different considerations, and has a different history.

The history of the law relating to homicide so far as it is necessary to be known for the purpose of taking a general view of the existing system of criminal law, consists of two parts—namely, first, the history of the formation of the general conception that all culpable homicide is either murder or manslaughter; and secondly, the history of the different meanings which gradually came to be attached to the words "malice aforethought," the presence or absence of which forms the test by which the two crimes are distinguished. I do not think a better

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illustration could be given of the slow and gradual way in which all general legal conceptions are formed. Mr. Pollock has shown the same thing in relation to both contract and tort, and I think the same may be said of the way in which fictions are at a certain stage of legal history not merely useful but practically indispensable aids to the reform of the law.

GENERAL CONCEPTION OF HOMICIDE AS CONSISTING OF MURDER AND MANSLAUGHTER.

Till the days of Bracton, nothing in the nature of legal theory upon this subject deserves notice, except the explanation given by Glanville (*temp.* Henry II.) of the word murder—*murdrum*. He contrasts it with *simplex homicidium*. "Duo sunt genera homicidii: murdrum quod nullo vidente "nullo sciente clam perpetratur præter solum interfectorem "et ejus complices, et aliud homicidium quod constat in "generali vocabulo et dicitur simplex homicidium."

Bracton gives a much more elaborate definition, dividing homicide into twelve different kinds, which produce an utterly confused, hardly intelligible, and almost wholly useless network of divisions which do not exclude each other, or depend upon any coherent principles.[1] He does, however, hit upon one principle of importance, viz. that in the case of homicide *casu* a distinction must be made between "dans operam rei "licitæ," and "dans operam rei illicitæ." He also explains murder as done "clanculo nemine vidente." As appears from other places in Bracton, and from the statute-book, the practical difference between homicide and murder was that in cases of murder a presentment of Englishry was required, in the absence of which the person found killed was presumed to be a Frenchman (Norman), and the township was

[1] See it *supra*.

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fined. The fine was called *murdrum* as well as the offence. Englishry was abolished in 1340 by the 14 Edw. III. st. 1, c. 4;[1] but there is evidence that in the course of the 274 years which had then elapsed since the Conquest its meaning and the meaning of the word "*murdrum*" in connection with it had become almost forgotten.[2] The abolition of Englishry took away all distinction between murder and other forms of homicide, but the name of murder was not discontinued, probably because it had become well known and popular. Assassinations usually are secret, and the words "morth" and "morth works" continually occur in the laws before the Conquest. The word "murder" was thus in all probability preserved by accident as a name of the worst kind of homicide, though it had no longer any distinctive meaning. Murder subjected the offender to the same punishment as other kinds of homicide, and persons guilty of it were entitled like others to the benefit of clergy.

There were from the days of Bracton some forms of homicide which were regarded in a different light from the rest. Some homicides were always regarded as strictly justifiable, as, for instance, the execution of a felon or the killing a felon who refused to be arrested. These involved

[1] *History of the Criminal Law*, vol. iii. p. 40.

[2] The evidence is this. In 1267 the Statute of Marlbridge (52 Hen. III. c. 25) enacted: "Murdrum de cetero non adjudicetur coram justiciariis ubi im-"fortunium tantummodo adjudicatum est sed locum habeat murdrum in inter-"fectis per feloniam et non aliter." The fine called *murdrum* is not to be adjudged before the justices henceforth in cases adjudged to be misadventure. *Murdrum* is to take place only in case of people killed by felony and not otherwise. In *Year-book*, 21 Edw. III. p. 17 B (A.D. 1348), the reporter says that a person found guilty of killing another in self-defence lost his chattels but was not hanged, "la cause fut parce qu'al comon ley home fut pendu in cet cas aux "avant si come il eut ce fait felonisement." The reporter no doubt construed "murdrum" murder, and not the fine for murder, with which Coke is quite satisfied, so utterly had lawyers even forgotten all about Englishry between 1267 and 1348. *History of the Criminal Law*, vol. iii. pp. 36 and 41.

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no penal consequences at all, but if a man killed another by accident or in self-defence or when mad ("si home tue autre "par misadventure ou soy defendant ou en deverie") the jury found a special verdict to that effect, and he was entitled to his pardon, apparently forfeiting his chattels and probably paying fees. The effect of this no doubt was to provide something in the nature of a punishment for manslaughter by negligence, and some small profit for the casual revenue of the Crown. Deodands had much the same effect. The thing which "moved to the death of a man" was forfeited, and at one time was in a sort of way punished by being burnt. Thus from the reign of Henry III. till nearly the end of the fourteenth century homicide consisted practically of—

(1) Strictly justifiable killing, as the execution of criminals.

(2) Homicides by misadventure, in self-defence, and by madmen, which were regarded as in some degree blamable, on the principle that in a deadly brawl both are more or less blamable, and that misadventure generally involves carelessness, and that a man who kills another ought at least to be pardoned and to pay for his pardon.

(3) Homicide by felony, which was punished by death, subject to the law of benefit of clergy, and which used, if it was secret, to be called murder. Murder ceased to be distinguishable from other criminal homicides when, under Edward III., Englishry was abolished, but it is probable that all punishable homicides came to be popularly known as murders.

This, I think, is the real meaning of Bracton's involved and elaborate account of the whole subject. I may add that the obscure learning about homicide in self-defence and by misadventure hung about the law in an obsolete and much misunderstood condition till 1828, when by 9 Geo. IV. c. 31, s. 10, it was enacted that no punishment or forfeiture shall

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be incurred by any person who shall kill another by misfortune, or in his own defence, or in any other manner without felony.

MALICE AFORETHOUGHT.

The next question is as to the history of the phrase "malice aforethought," and the way in which it came to be adopted as the test by which it was to be determined whether a given homicide was murder or manslaughter, understanding by each word the name of a distinct crime.

Very shortly the history is this. In 1389 (13 Rich. II.) it appears from entries in the Parliament Rolls[1] that the prerogative of pardoning was much abused, pardons for the most heinous crimes being frequently pleaded in bar of trials, the pardons being procured by the interest of great men. The king promised that if a general pardon for murder was granted and pleaded, a jury should be charged to try whether the murdered man "fuist mourdrez ou occis par agait assaut or malice purpense." If he was, the pardon was to be void.[2] This is a step towards a new definition of murder, though it is no more than a step. Murder might after 1389 have been defined as a kind of homicide in defence of which a pardon for murder in general terms could not be pleaded. That the pardon might be good it must state that the murder pardoned was by assault, waylaying, or malice prepense. Murder of all kinds was still clergyable.

This distinction was deepened and made the specific difference between murder and other forms of homicide or manslaughter by the statutes (there were four of them) which excluded murderers from the benefit of clergy. They were passed between 1496 (12 Hen. VII. c. 7) and 1547 (1 Edw. VI. c. 1, 2, 7, 10); the words used are—"wilfully prepensed

[1] See these, *History of the Criminal Law*, vol. iii. pp. 42–44.

[2] See 13 Rich. II. st. 2, c. 1.

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"murders," "prepensed by murder," "murder upon malice "prepensed," "wilful murder of malice prepensed," "murder of "malice prepensed."[1] The result of these Acts no doubt was to divide homicide thus:—

(1) Murder, killing with malice aforethought—a felony without benefit of clergy.

(2) Wilful killing without malice aforethought, then and since called manslaughter—a clergyable felony.

(3) Homicide in self-defence or by misadventure, which included many cases of what would now be called manslaughter by negligence—not a felony, but an act requiring pardon, and involving forfeiture of chattels.

(4) Justifiable homicide, which was not criminal at all.

Petty treason was an aggravated kind of murder, and murder by poison was for a short time punishable by boiling alive.

We may thus consider the present definitions of murder and manslaughter as settled by the year 1547, but though the words "malice aforethought" thus became part of the law, the questions, What amounted to "malice"? and What satisfied the word "aforethought"? were not decided till long afterwards.

The subsequent arrangements of the subject by Lambard Staundforde, Coke, and Hale, are all, I think, bad, for they are all based upon Bracton, which is radically vicious and confused. Coke's is very bad, much worse than those of Lambard and Staundforde; Hale's is, I think, the worst of all.[2] All these writers with more or less skill tried to explain the words "malice aforethought" by distinguishing between express or implied malice. Lambard and Staundforde showed most

[1] *History of the Criminal Law*, vol. iii. p. 44.

[2] Homicide he says is "purely voluntary," "purely involuntary," or "mixed." How can voluntary and involuntary be mixed? How can it be said that to kill a man "se defendendo" is partly purely voluntary and partly purely involuntary? There is a great deal of downright nonsense in Hale.

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skill in this, Coke is nearly as bad as bad can be, but Hale is worse. At a later date several of the judges of the eighteenth century, in particular Holt and Lord Raymond, and one eminent writer, Foster, appear to me to have succeeded much better; and an enormous number of decisions, to be seen in *Russell on Crimes*, Roscoe, Archbold, and other books of practice, have at last made the meaning of the phrase sufficiently plain for practical purposes. Omitting refinements and qualifications "malice aforethought" may now be described thus. It means killing with any one of the following intentions or states of mind:—

(*a*) An intent to kill or do grievous bodily injury.

(*b*) Knowledge that the act done will probably kill or do grievous bodily harm, although the offender hopes that the consequence will not follow.

(*c*) An intent to commit any felony.[1]

(*d*) An intent to oppose by force any officer of justice in discharging certain of his duties.

All other culpable homicide is manslaughter.

The law as to the effect of provocation is traceable as far back as Coke, but not much further. It anciently had much the same effect as it has now, but in another way. If malice aforethought is construed in a popular sense, killing on a sudden provocation is not killing on malice aforethought. When murder meant only secret killing, and when both murder and manslaughter were clergyable, the doctrine had little importance.

All these matters are set out with the fullest detail in my *History of the Criminal Law*, vol. iii. pp. 23–87.

After disposing of the subject of homicide, the Offences against the Person Act deals with attempts to murder (ss. 11–15). The sections on this subject are a remarkable

[1] As to this I have great doubts, unless the felony is in itself an act of such a kind as to fall within (*a*) or (*b*).

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instance of timidity in drafting, for, instead of providing for the punishment of all attempts to murder, they provide in four sections for different ways of attempting to commit murder, and in a fifth for attempts by any means other than those specified, which is as if, after providing in four sections for assaults by each arm and each leg, a fifth section were added to include all other assaults. The explanation is that till 1861 a certain number of ways of attempting murder were capital crimes, and that the rest were misdemeanours at common law. In 1861 all attempts at murder which were till then capital crimes ceased to be capital, and all attempts which used to be misdemeanours were made felonies punishable with the severest secondary punishment. The details of all this legislation have a good deal of historical curiosity, and illustrate the gradual and fragmentary character of English legislation, but it is not my purpose to say anything of them here. A full account of the matter will be found in my *History*, vol. iii., chap. xxvii., pp. 108–120. The strongest illustration known to me of what I have said is that till 1803 (43 Geo. III. c. 58) the administration of poison with intent to murder was only a misdemeanour at common law as an attempt to commit a felony. It was not even an assault.

The remainder of the Act needs only a few words.[1]

RAPE.—Trials for this offence have given rise to a few disputed points, which will be found in my *Digest;* and the Criminal Law Amendment Act of 1885 (48 and 49 Vict. c. 69) has made considerable additions to the law relating to this and other offences against women; but it is sufficient to mention this, and to refer for such details as are required in practice to my *Digest.*

BIGAMY.—This offence is punished by s. 57 of the Offences against the Person Act. It would be more appropriate to

[1] *Digest*, Arts. 253A; *ib.* Arts. 257, 258.

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call it an offence against conjugal rights, for no violence is used in committing it; but an offence against rights inseparably annexed to the person is closely connected with an attack on the person. Several most singular questions have been raised in connection with trials for bigamy. I may mention the great case of R. *v.* Millis (10 *C. and F.*, 534), when it was decided by the House of Lords in 1844—very strangely, as most people thought, and in virtue only of the maxim "præsumitur pro neganti," for the Court was equally divided—that at common law the presence of a priest in episcopal orders was necessary, at least in the British Islands[1] outside Scotland, to a valid marriage; for the decision was that a man who had been married in Ireland by a Presbyterian minister did not commit bigamy by a subsequent marriage otherwise unquestionably valid. Several other questions of great interest have arisen in the same way, but upon these I have said all that is necessary in my *Digest.*

LIBEL.—A libel on a private person may be referred to here, as it is an attack on a right inseparable from his person —his right to his reputation. I have already made such reference as I thought necessary to seditious libels under the head of political offences without violence. Of libels on private persons I will only say that I think it would be a great mistake to relax the criminal law in regard to them. When a man wishes to defend his character against a serious and plausible attack, it is usually best on all grounds that he should take the civil rather than the criminal remedy, and this most people are usually ready to do if a defendant can pay costs and damages; but I do not know of a meaner class of criminals than those who, either for money or to gratify personal spite, make a man's life a burden to him by constant

[1] It appears that the principle does not apply to India. I doubt whether it would apply to a British ship at sea, or a barbarous country.

CHAP. XIII. libelling, when they cannot pay a farthing of any damages awarded against them or of any costs which they compel their victim to incur. The crime is by no means an uncommon one, and appropriate punishments, such, *e.g.*, as taking a plea of guilty and allowing the defendant to go free on recognizances to come up and receive judgment if called upon, will generally stop the annoyance.

CHAPTER XIV.

OFFENCES AGAINST PROPERTY.

CHAP. XIV. In my *History of the Criminal Law*[1] will be found a full history of the law of theft from Glanville to the present day I do not propose here to do more than state such parts of it as must be known in order to understand the enactments of 24 and 25 Vict. c. 96. The law must in the nature of things deal with the following matters:—

(1) The question what is theft.

(2) The question what things can be stolen.

(3) The question how the crime may be committed, and by whom.

(1) What is theft? Omitting one or two matters of little interest, Bracton's definition of theft, which is the root of the whole law, is this: "Furtum est secundum leges con-" trectatio rei alienæ fraudulenta cum animo furandi." The definition of the Roman law was: "Furtum est contrectatio " fraudulenta *lucri faciendi causa vel ipsius rei vel etiam usus* " *ejus possessionisve*." The omission in English law of the words italicized is remarkable, and may throw some light on the source of most of the difficulties of the subject The omission of the "lucri faciendi causa" is of little importance. It expresses the principle that the motives of theft are by our law of no importance. The omission of

[1] Vol. iii. pp. 128–166.

CHAP. XIV. "usus ejus possessionisve" indicates that, from Bracton's time, a taking, to be felonious, must be an absolute misappropriation of the thing itself. The words in the definition "cum animo furandi" are awkward, as they include the word to be defined, but the meaning, no doubt is to exclude the case of taking under a claim of right. Theft in English law has always meant taking a thing with intent to deprive its owner of it permanently and without claim of right, and no change has been introduced into this principle from the earliest times.

(2) What things can be stolen? The answers given to this question will be regarded with continually increasing surprise and disapproval the more they are studied. I have given in my *History*[1] an account of the cases in the *Year-books* and other ancient authorities on this subject, and I add the following remarks:—[2]

In order that a thing might be the subject of larceny, it must fulfil three conditions: it must be the subject of property; it must be movable personal property; it must have a definite value of its own. These conditions were supposed to exclude several classes of things from the possibility of being stolen, but neither the classes of things nor the ground on which they were incapable of being stolen were at all definitely settled. Three classes of things were in one way or another decided to be incapable of being stolen—namely, things growing out of the earth, deeds, and certain animals. Things of the first and second classes were regarded as not being movable chattels, but as either realty or savouring of realty. Deeds were also regarded as having no definite independent value of their own; and the same was said of some animals. Animals were regarded as not being, in the proper sense of the word, property. Each of these three principles thus applied to more than one of three classes

[1] Vol. iii. pp. 134–142.

[2] Vol. iii. p. 142.

of things, and the extracts given from the *Year-books* show how very ill-defined the old law was down to the time of Henry VIII. The last case I have quoted, for instance, shows that in 1528 it was doubtful whether a peacock could be stolen. It was not quite clear whether it was tame, or whether it had real value. The meaning of "value" seems not to have been the same in earlier times as it is in our own days. We should describe anything which would command a price as valuable, but in earlier times it seems to have been thought that "valuable" implied serious practical importance as opposed to mere fancy or amusement. Thus it was argued in the case of the peacock that mastiffs, hounds, and spaniels, and tame goshawks, are not the subject of larceny, "Car ils sont "proprement choses de plaisir plus que de profit. Et aussi le "peacock est un oiseau plus pur plaisir que pour profit." This view was carried to an extreme length by Hales, J., who is said[1] "to have thought it no felony to take a dia- "mond, rubie, or other such stone (not set in gold or other- "wise), because they be not of price with all men, however "some do hold them dear and precious." The common law on this subject was thus extremely uncertain both in its principles and in their application. I may conclude my account of it by noticing its further application. The most irrational case which I have quoted from the *Year-books* is that of the deeds and the boxes in which they were contained. It depended on two principles: first, that the deeds savoured of the realty, and that the boxes were merely appurtenant to the deeds; and, secondly, that the deeds had no definite independent value. The *Year-books* do not refer to "choses in action" other than deeds. There is no decision that a bond, for instance, which did not affect land was incapable of being stolen. Coke, however, who accepted any sort of principle laid down in the *Year-books* as if it was a law of Nature,

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[1] Stanford, p. 275.

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accepted this principle, and applied it to all "choses in action" whatever. In Caly's case he gives an elaborate commentary on the writ in the register which defines the liability of innkeepers for the goods of their guests. Some of its words, he says, extend to all movable goods, although of them felony cannot be committed, as of charters, evidences, obligations, deeds, specialties, &c. The only authority quoted for this incidental remark is the case in the *Year-book*, 10 Edwd. IV. c. 14, already referred to, and references to it in Broke and FitzHerbert. Hence the doctrine that a "chose in action" cannot be stolen rests upon an unauthorized extension made by Coke, in treating of a different subject, of a case in the *Year-books* which depends on a wholly different principle.

A long series of statutes has been passed, by which these so-called common law principles—for they really did not deserve the name—have been repealed by the cumbrous method of denying in detail what they approved in general; with this strange result, that nearly everything which can physically be stolen and which is worth stealing—even water in a pipe, gas, and, what is still stranger, electricity—is the subject of larceny, except, perhaps, ferrets, pigeons flying at liberty, and the dead bodies of human beings.

It is necessary shortly to observe that the things which, according to what was supposed to be the common law, were not the objects of larceny, were—

(1) Land, because it was not physically movable, whence it was inferred that parts of it or of its fruits which were made movable could not be stolen.

(2) Rights, because it was physically impossible to steal them, as they had no physical existence; whence it was inferred that the evidence of their existence could not be stolen, though they might easily be moved, and do certainly exist.

(3) A number of animals, for various reasons, some good, as in the case of wild animals, some absurd, as in the case of dogs.

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(3) How can theft be committed? The full answer to this question is given in my *Digest*, Arts. 295–312. I may, however, point out that all the forms of theft there described depend upon one principle—namely, that in all cases of theft there must be a fraudulent taking. An innocent taking, followed by a fraudulent conversion, is not theft. The most striking instance of this is to be found in the case of finding (Art. 302). A man who picks up something which he sees dropped by another, intending to keep it for himself steals it. If he takes it with intent to return it, and afterwards changes his mind and determines to and does keep it, he does not commit theft.

This principle runs through all the cases. The commonest form of theft is by taking and carrying away. If this form of the offence is committed in the presence of the owner, and by actual violence or the threat of violence, the crime is robbery.

Theft may be committed by a servant or other person who has charge of a thing for a special limited purpose. Thus a groom may steal his master's horse while riding it on his master's service. A guest at an inn may steal plate which he is using at table. A clerk or servant who commits such an offence is guilty of embezzlement, which is a statutory form of theft.

Theft may also be committed by obtaining the possession of a thing by a trick; but if the property and not merely the possession is obtained, the offence is not theft, but obtaining goods by false pretences.

Theft may be committed by converting property received from the owner under a mistake which the offender knows to be such when it is made, but the distinctions here are fine, and not quite perfectly ascertained (see Art. 299).

The old common law rule that there must in all cases of theft be a felonious taking is still maintained to a con-

siderable extent; indeed, the bad results to which it led have been remedied to such a great extent by the creation of special statutory offences, which in themselves are so many recognitions of the principle, that it will no doubt be maintained unless the whole of the law upon the subject should ever be recast.

There were only two exceptions of much importance to the old common law rule. It was always held that if a bailee determined the bailment made to him by breaking bulk, and then misappropriated the goods, he was guilty of theft; and it was always the law that if a servant who had the custody of goods for his master, or a guest at an inn who had a cup or plate for use at a meal, misappropriated them, he was guilty of theft; but this was because it was considered that the servant or guest was not properly in possession of such things, but had a mere custody or charge, and that the possession still remained in the master or the host, and so the thing when stolen was feloniously taken. These exceptions were construed so strictly, that when, in Bazeley's case,[1] a banker's clerk was tried for theft for having put in his own pocket a note for £100 which a customer gave him to be carried to his credit, it was held that he could not be convicted; and a statute was passed which enacted that clerks and servants who embezzled money received on their masters' account should be deemed to have stolen it. This statute, though it considerably extended the law as to one particular class of offenders—namely, clerks and servants, made no fundamental alteration in it, and much increased its difficulty by raising a long series of questions as to the technical meaning of "clerk" and "servant." The Act which punished it introduced other technicalities, which I need not here point out.

By degrees, attention was called to the fact (the neglect

[1] Leach, 835; and see *History of the Criminal Law*, vol. iii. p. 152.

of which is pointed out and ridiculed by Swift in *Gulliver's Travels*) that a breach of trust deserves punishment as much as a felonious taking; and a variety of statutes were passed upon this subject, which constituted new offences, like theft, but differing from it in the circumstance that each of them treats as a crime a fraudulent dealing with property innocently received. The first of these statutes was suggested by the case of a stockbroker,[1] who stole £22,000, the proceeds of a cheque with which he was intrusted to buy securities for Sir T. Plumer. This occasioned an Act for the punishment of bankers, brokers, merchants, solicitors, and other agents who misappropriated securities, &c., with which they were intrusted. The first Act passed for this purpose was 52 Geo. III. c. 63.

A still further inroad was made upon the principle that a felonious taking was essential to larceny by the enactment that all bailees, whether they had or had not broken bulk, who stole anything bailed to them, should be guilty of theft. This was in 1857. These two enactments practically repealed the old common law doctrine that a person who stole property intrusted to him was liable to no punishment, though cases may be put in which it still applies; but it did not reach the case of trustees, in whom the whole legal interest in property is vested for the benefit of *cestui que trustent*, who are beneficial owners. If, *e.g.*, the trustee of a marriage settlement sold all the securities in which the settled funds were invested, and spent the proceeds, he was, till 1857, guilty only of a civil wrong.

These offences, however, have since been dealt with, though in an exceedingly clumsy and imperfect way,[2] but the result of the whole may thus be summarized:—

The fraudulent misappropriation of property is not a

[1] R. v. Walsh, January 4, 258.

[2] *History of the Criminal Law*, vol. iii. pp. 156–157.

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criminal offence, if the possession of it was originally honestly acquired, except in the case of—

(1) Servants embezzling their master's property, who were first excepted in 1799.

(2) Brokers, merchants, bankers, attorneys, and other agents misappropriating property intrusted to them, who were first excepted in 1812.

(3) Factors fraudulently pledging goods intrusted to them for sale, who were first excepted in 1857.

(4) Trustees under express trusts fraudulently disposing of trust funds, who were first excepted in 1857.

(5) Bailees stealing the goods bailed to them, who also were first excepted in 1857.

Before passing to the exposition of the Larceny Act, the following observation must be added. Many of its enactments differ from each other only in varying the maximum punishments for different kinds of theft; *e.g.* stealing a horse may be punished by fourteen years' penal servitude. Stealing an ass only by five years' penal servitude. Theft by a servant is punishable by penal servitude for fourteen years, whereas if the offender were not a servant he might not be liable to a sentence exceeding five years. These provisions appear, and indeed are, capricious. The historical explanation of their existence is this. The old division of larceny was into grand larceny (stealing over the value of a shilling), which was punishable with death, and petty larceny (stealing the value of less than a shilling), which involved minor punishments. Grand larceny, however, was clergyable. In the course of the eighteenth century many larcenies were excluded from clergy, sometimes in an arbitrary way. When the punishment of death was abolished in cases of larceny, those offences which had been excluded from clergy were punished with greater severity than the rest, and felonies which were not otherwise specially provided for were subjected to seven

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years' transportation as a maximum punishment. In the case of theft, five years' penal servitude is now the maximum punishment in cases not otherwise provided for.

I now proceed to the arrangement of the Larceny Act. It is wretchedly ill-arranged, though the Act is drawn with the most complete knowledge of the law which it consolidates, and shows a servile respect for the mass of intricate and irrational technicalities which I have tried to explain.

Section 1 gives the Act its title. Section 2 abolishes the distinction between grand and petty larceny, which had been abolished forty-six years before. Section 3 (which ought to come in before Section 67) re-enacts the Act which made larceny by a bailee a crime.

Some confused sections about punishments and indictments (4–9 inclusive) follow. Then come a series of exceptions to the common law rules as to things which are not the subject of larceny at common law, and as to the rule that a felonious taking is essential to theft.

Sections 10–26 are principally exceptions from and qualifications of the common law rules about stealing animals; Sections 27–30, exceptions to the common law rules as to stealing written instruments; Sections 31–39, exceptions to the common law rule that land or things growing out of or fixed to land cannot be stolen; Sections 67–87, exceptions to the common law rules that fraudulent breach of a common law trust is not a crime, and that a trustee possessed of the whole legal interest in property commits no offence when he defrauds his *cestui que trust*.

The Act would be rather less unintelligible if Section 3 and Sections 67–87 followed Section 39, as this would keep together all the exceptions made to the common law rule as to a felonious taking; but for some reason not apparent Sections 40–49 relate to robbery and extortion by threats; Sections 50–59 to burglary and housebreaking, which are

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defined in a very intricate way; and Sections 60–66 to some special forms of larceny are interposed. Sections 88–90 relate to obtaining goods, &c., by false pretences; and Sections 91–99 to the receiving of stolen goods, and to various matters connected with the procedure relating to it.

The rest of the Act relates to procedure.

I have arranged all this matter on a different principle in my *Digest*. I first (chap. xxxiii. Arts. 279–285*a*) deal with the definition of the terms and of the common law doctrines which pervade the subject, viz. property, possession, ownership general and special, taking and carrying away, or asportation, and bailment.

I next (chap. xxxiv. Arts. 286–294) state the law as to what is the subject of larceny, and what not, putting together the common law rules and the statutory exceptions.

In chap. xxxv. Arts. 295–308, I state the ways in which theft may be committed, the law as to finding, and the distinctions between theft and other fraudulent conversions, of which some are and others are not criminal.

In chap. xxxvi. Arts. 309–312, I state the law as to embezzlement.

I then proceed to define different kinds of theft, taking the most serious first, and stating the punishments. Chap. xxxvii. Arts. 313–314, defines robbery and extortion; chap. xxxviii. Arts. 315–320, burglary and similar offences; chap. xxxix. Arts. 321–328, deals with thefts for which no special punishment is provided, or after a previous conviction, and with thefts punishable with a maximum punishment of penal servitude for life, for fourteen years, for seven years, for five years, and with various terms of imprisonment; in chap. xl. Arts. 329–342, I deal with obtaining goods by false pretences and some other frauds like theft; I deal in chap. xli. Arts. 343–352, with frauds by bankers, brokers, agents, trustees, &c., and with the new offence of

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fraudulent false accounting; and finally, in chap. xlii. Arts. 353–354, with the receiving of property unlawfully obtained. In these chapters I have included several offences punished otherwise than under the Larceny Act, *e.g.* those which are defined by the Post Office Act.

Of the remaining Consolidation Acts, 24 and 25 Vict. c. 97, which relates to malicious injury; c. 98, which relates to forgery; and c. 99, which deals with offences relating to coin, I have nothing to say beyond what is said in the Acts themselves. The common law definition of forgery involves questions of some difficulty, but I need add nothing to what I have said on this subject in my *Digest*, Arts. 355 and 356.

The law as to offences against trade has a history of the greatest interest, which I have related to the best of my ability in vol. iii. of my *History* (chap. xxx. pp. 192–234); but as to the actually existing law, which consists principally of enactments relating to fraudulent debtors, criminal breaches of contract, and certain statutes as to navigation, I have nothing to add to what is said in chap. xlix. Arts. 387–398 of my *Digest*.

CHAPTER XV.

CRIMINAL PROCEDURE.

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IN the earlier chapters of this book I have given an historical account of the gradual development of the law of criminal procedure, which shows the steps by which the present most elaborate and complete system has been gradually formed. Referring to the statements there made, I propose in the present chapter to draw a sketch of the system as it stands, avoiding all the details which, though absolutely necessary for practical purposes, are too minute to be accurately remembered, unless they are learnt by long practice, and interfere with the unity of impression which it is the great object of a general view to communicate. The authorities for each statement contained in this chapter, and the details which for purposes of practice require to be known, will be found in my *Digest of Criminal Procedure*, at the articles referred to in the foot-notes. The first, the most general, and perhaps the most characteristic principle of the law of England on this subject is that everyone, without exception, has the right to use the Queen's name for the purpose of prosecuting any person for any crime. This is subject only to the condition that the Attorney-General has power on his own authority to stop any prosecution by entering a *nolle prosequi*.

Prosecutions are, in fact, usually instituted by the police,

and in cases of importance they are not unfrequently carried on by the Public Prosecutor, in which character the Solicitor to the Treasury acts. He has, however, no legal authority whatever as such. He cannot require any person to attend before him or to answer questions. He can, in a word, do nothing whatever which may not equally be done by any private person through his private solicitor.

This is one of the most marked distinctions between the criminal procedure of this and, I believe, almost all other countries.

I have already said what appeared to be necessary on the subject of the local extent of the criminal law of England in regard to place, time, and person.[1] I begin my sketch accordingly with the constitution of the criminal courts.[2] They consist of—

(1) The House of Lords and the Court of the Lord High Steward, for peers accused of treason or felony and for commoners impeached by the House of Commons. These courts have not been called upon to act since the trial of Lord Cardigan in 1841.

(2) The High Court of Justice (Queen's Bench Division), which usually sits only in cases of special magnitude or interest—principally misdemeanours removed into it by *certiorari*.

(3) The Courts of the Commissioners of Assize, Oyer and Terminer, and Gaol Delivery, which sit in every county in England for the trial of all crimes committed there.

(4) The Central Criminal Court, which sits in London for the trial of all cases occurring in London and the neighbourhood.

These are the superior criminal courts, in which all offences may be, and in which all serious offences usually are, tried.

[1] *Digest of Procedure*, Part I. [2] *Ibid.*, Part II.

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The judges are the judges of the High Court of Justice. Many other persons of eminence are honorary members of these Courts, and the Recorder of London, the Common Serjeant and the Judge of the Sheriff's Court try the less important cases at the Central Criminal Court, and the Queen's Counsel on the several circuits may try the less important cases on circuit if asked by the judge to do so. Criminal, like all other courts, have also ministerial officers, of whom it is not necessary to speak in detail, though in the Commissions of Assize and Gaol Delivery they hold a somewhat peculiar position under what is called a Commission of Association.[1]

The other criminal courts are courts of limited jurisdiction in respect of the crimes which they are competent to try. These are the Courts of Quarter Sessions. They are courts either for counties or parts of counties, or for boroughs. Each county or part of a county has a separate Commission of the Peace,[2] and the magistrates of each Commission are the judges of the Court of Quarter Sessions. They elect their own Chairman, who exercises most of the functions of a judge, though only as *primus inter pares*. In all boroughs having Courts of Quarter Sessions, and all such boroughs have a separate Commission of the Peace, there is a Recorder who is appointed by the Crown, and is sole judge.

The limits of the criminal jurisdiction of the Courts of Quarter Sessions are fixed by statute,[3] and in general may be

[1] See *Digest of Procedure*, Art. 24.

[2] There is one for each county except York and Lincoln 50
York, one for each Riding 3
Lincoln, one for each part 3
Liberties 9
Counties of towns 18
In all 83
Commissions for England and Wales.

—*History of the Criminal Law*, vol. i. p. 115.

[3] 5 and 6 Vict. c. 38, s. 1 *Digest of Procedure*, Art. 39.

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said to exclude all capital crimes, all crimes which may be punished on a first conviction by penal servitude for life, and all cases which are likely to give rise to important questions of law, or to cause local prejudice.

Various property qualifications[1] are required of county and borough magistrates. There are also in London (outside the City), and in many other populous places, stipendiary magistrates appointed by the Crown.

Such is the organization of the criminal courts. To complete the subject I may mention the coroners, though only in a few words. The coroners are the most ancient of English officers of justice, excepting only the judges.[2] They are at present in almost all cases elective, and their duties connected with criminal justice consist in holding inquiries by the aid of coroners' juries into the causes of all deaths by violence or accident or under suspicious circumstances. There is much in the discharge of their duties which is historically interesting, but nothing which, in such a statement of our system of criminal procedure as I am now giving, requires notice.

The next point to be mentioned is as to the place where a crime committed within the jurisdiction of the English criminal courts is to be tried.[3] As a general rule, they are tried where they are committed; but there are many exceptions, which can hardly be stated correctly in fewer words than are used in the articles of my *Digest* referred to below.[4] One principle may, I think, be suggested which is omitted in it. A crime, I think, may be said to be committed in any place in which anything essential to its commission is done. This is expressly enacted in the obvious case of a fatal wound given in one place and the death of the person

[1] *Digest of Procedure*, Art. 30.

[2] *History of the Criminal Law*, vol. i. pp. 216–245.

[3] *Digest of Procedure*, Arts. 67–87 [4] Arts. 79–87.

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wounded taking place in a different jurisdiction, and it is more or less implied in several decided cases. Thus, a man posts at Leicester a libellous letter to a newspaper which publishes it in London.[1] He commits the offence of publishing a libel both in Leicester and London. A writes at Nottingham a letter to B in France, making a false pretence, whereby B is persuaded to send to A at Nottingham a bill of exchange, which A receives and discounts at Nottingham. A commits an offence at Nottingham.[2] A man who steals goods is held to go on stealing them as long as he has them, and may be tried for the theft in any county where he has them. A variety of special provisions are made with regard to offences on journeys, to offences near the boundary of a county, to bigamy, forgery, offences connected with the coinage, &c.

In some few cases the High Court of Justice has power to vary the usual place of trial: as, for instance, if a fair trial cannot be otherwise conveniently had; if it is desired to try a criminal case on the civil side; and in a few special cases, as, for instance, when a soldier is accused of the murder of a soldier. This is commonly done by the issue of a writ of *certiorari* upon terms fixed by statute. The *certiorari* may in some cases be issued by the High Court, or any judge, including the Recorder of London, to the counties of Middlesex, Essex, Kent, and Surrey, for the trial of any prisoner therein at the Central Criminal Court.

Passing from the organization of the criminal courts, I now come to the course taken upon the commission of a crime to bring the criminal to justice. The first step is the arrest of the criminal. This may in many cases be done either in a summary way by any person, whether a police constable or not in many cases, and in some additional cases

[1] Regina *v.* Burdett, 4 *B. and A.*, p. 95.
[2] Regina *v.* Holmes, *Law Reports*, 12 Queen's Bench Division, p. 23.

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by a constable without a warrant. These are set out in my *Digest*.[1] An arrest may also be made for any offence on a summons or on a warrant on the first instance, and such a warrant must be issued on an information in writing and on oath, or on a warrant issued on a failure to appear to a summons. A warrant issued by any magistrate in England, Scotland, Ireland, or the Channel Islands, must be backed by a magistrate having local jurisdiction in the county where it is executed,[2] and the case of Indian and colonial warrants is similarly provided for, but with more elaboration.[3]

It is a peculiarity of English criminal procedure that till some person charged with an offence appears before a magistrate, either on arrest, summons, or warrant, no official inquiry into the crime can be held except in the single case of a coroner's inquest. This has always appeared to me one of the most irrational defects in the criminal law, and one of which the removal has by experience been shown most to increase its efficiency.

When a suspected person appears before the magistrates, the witnesses against him are heard in his presence, and he is allowed to call witnesses. If the magistrates are of opinion that the evidence is not sufficient to put the prisoner on his trial, it is their duty to discharge him. If it is in their opinion sufficient for that purpose, they must commit him. If the case cannot be finished at one hearing, the prisoner may be remanded for periods of not exceeding eight days till it is completed.

If the prisoner is committed, the clerk to the magistrates forwards the depositions as to the taking of which there are various enactments, to the clerk of assize, clerk of the peace or other principal ministerial officer of the court by which the prisoner is to be tried. In all cases, except murder

[1] *Digest of Procedure*, Arts. 96–98.
[2] *Ibid.*, Arts. 105–107.
[3] *Ibid.*, Arts. 164–166.

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and treason, the justices may bail a prisoner till he is tried. In the case of misdemeanours which border on felony they have a discretion.[1] A judge, or the Queen's Bench Division, may bail in all cases, but it admits of a doubt whether the Habeas Corpus Act does not enable a prisoner to claim to be bailed in all cases of misdemeanour.[2] As a general rule, it may be said that till sentence is passed prisoners may be bailed; as, for instance, during remands, during adjournments of the court at or after commitment for trial. The committing magistrate has power to compel the attendance of witnesses both at his own inquiry and at the assizes, to issue search warrants, and to do some other necessary things which I pass over.

There is one case in which a man may be committed for trial without going before a magistrate. This is the case in which a witness appears to the judge to perjure himself at a trial; the judge may thereupon direct him in a summary way to be prosecuted for perjury, and either commit or bail him till trial. This course is hardly ever taken, and is most unwise. If the judge were authorized to direct such a person to be taken in the usual way before a police magistrate, it would be much better. In the only two cases in which I have thought it desirable to interfere, I contented myself with saying in open court that I thought a particular witness ought to be prosecuted. In the case of crimes incidentally brought to notice in a different proceeding, it is generally sufficient for the presiding judge to write to the Public Prosecutor. In the case of bankruptcy misdemeanours, the county court judge can commit for trial.[4] A series of provisions to be found in several Acts of Parliament called the Extradition Acts, the important one being the Extradition Act of 1870, 33 and 34 Vict. c. 52, provide for the case of the extradition of criminals, for the verification of the evidence against them, and for some other matters, such as the return of criminals to distant parts of Her Majesty's dominions. Of all these things an account will be found in my *Digest*.[1] The history of the subject is related and its principles are stated in my *History*.[2]

[1] *Digest of Procedure*, Art. 137. The misdemeanours are enumerated in the note.

[2] *Ibid.*, Art. 136.

[3] *Ibid.*, Arts. 122–128.

[4] 46 and 47 Vict. c. 52, s. 165. The Act was passed since my *Digest of Procedure* was published.

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The next question to be considered is that of accusation. Substantially, a committal for trial is an accusation; but formally, a prisoner is regarded as being detained or bailed only for the purpose of being accused, and this may be done in various ways. An accusation may be, and generally is, made, (1) by a grand jury, (2) by a coroner's inquest in the case of murder or manslaughter; (3) by a criminal information. Other ways in which accusations may be made are said to exist, but are obsolete.

All criminal courts summon a grand jury for the purpose of receiving indictments preferred before them. They are charged by the judge. The indictments, which are usually drawn by the clerk of assize, or other officer, are laid before them in turn by the various prosecutors, and the witnesses in support of them are examined in private by the grand jury, who indorse upon each indictment "A true bill," if they think there is a case for inquiry, and "No true bill" if they think there is none.

It is a curious feature of the English law that any person may present a bill of indictment against any person whatever for any crime whatever, except a few,[3] without having given notice to the accused, or going before a magistrate.

[1] *Digest of Procedure*, Arts. 141–184.

[2] *History of the Criminal Law*, vol. ii. pp. 65–74.

[3] Perjury and subornation, conspiracy, false pretences, keeping a gaming-house, keeping a disorderly house, indecent assault, libel, and certain offences under the Newspaper Libel Act. *Digest of Procedure*, Art. 192.

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It would be perfectly lawful for any man to accuse the most distinguished person of treason, murder, rape, or any other crime except those mentioned, by false witnesses, without notice, without any previous authority or inquiry whatever; and to have the accused arrested and locked up in prison under circumstances in which he might find it difficult to get bail, and in which he would find it impossible to know what was the evidence given against him. It has often surprised me that this is not, in fact, done, and it is still more surprising that the remedy which is applied in the excepted cases is not applied in all cases. I think that all persons charged with crimes should be taken before a magistrate before committal,especially persons charged on a coroner's inquisition; and that if the magistrate refuses to commit, the accuser should not be allowed to send up a bill unless he causes himself to be bound over to prosecute, and makes himself liable to costs. I should like him to be liable to be made to find security for them. Prisoners are usually in custody or on bail when indictments are found against them. If not, they may be arrested on a certificate[1] or Bench warrant.[2]

CORONER'S INQUISITION.—A coroner's inquisition is equivalent to an indictment in cases of manslaughter and murder. Coroners' juries have very loose notions about manslaughter by negligence, and often return verdicts of manslaughter where there is no real ground for them.

CRIMINAL INFORMATIONS.—The Attorney or Solicitor General has a right to put a person on his trial for any misdemeanour without an indictment. This right was formerly used for purposes and in a way which made it a stock subject of denunciation. It is now of little importance.[3] The procedure is described in my *Digest*.[4]

[1] *Digest of Procedure*, Art. 196.
[2] *Ibid.*, Art. 195.
[3] *History of the Criminal Law*, vol. i. pp. 294-296.
[4] *Digest of Procedure*, Arts. 197-208.

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Criminal informations will in some particular cases be ordered, upon a motion made in court, to be issued by the Master of the Crown Office, on affidavits showing that certain offences have been committed, filed by persons aggrieved by such offences.[1] The power is, however, used very sparingly —chiefly in cases of misdemeanour by or against official persons, or libels on public men.

The most important topic connected with accusation is the contents of indictments and criminal pleading generally. The subject is one which I shall treat very concisely. The principles, when rightly understood, are extremely simple, but a full statement of the law is and must be intricate and qualified, especially because it must, so to speak, describe what may be called a forged release to a forged bond. By the forged bond I mean the intricate technical rules of the old common law. By the forged release I mean the many statutory enactments which have partially, but not entirely, blotted them out. A full exposition of the whole system will be found in my *Digest of Procedure*, Arts. 236-255. It will be found that the result of the whole is that the words of Art. 244 describe an indictment with substantial accuracy,[2] though some exceptions to part of it have been made by statute with a view to brevity, and though many irrational rules which formerly obtained in relation to it, and which were intended, to a greater or less extent, to provide means for evading the cruelty of the old criminal law by quibbles, are now removed, or at least neutralized by being allowed by statute to be amended.

An indictment may be quashed; demurred to, if the facts alleged, being admitted, are denied to amount to a crime; or may be pleaded to. The common pleas are guilty, not guilty, *autrefois* acquit, *autrefois* convict or pardon, and a

[1] *Digest of Procedure*, Arts. 206-207.
[2] "An indictment must be consistent with each."—*Ibid.*, Art. 244.

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special plea is allowed in the case of an indictment for libel.[1] There are several rules of practice connected with this which I need not notice; a full account of them is given in my *Digest*.

The next step is the trial, which used in early times to be called the arraignment, though the expression is now applied rather to taking the plea than to the actual trial. The effect of the Habeas Corpus Act is to give a person accused of treason or felony a right to be indicted on his trial at the first sessions after his committal, or if he is not tried to be bailed, unless the witnesses for the Crown cannot appear. If he is not tried after being bailed, he can at the second sessions insist on his release without bail. The arraignment usually occupies only a few minutes, as the prisoners are usually arraigned in groups, and plead at once either guilty or not guilty. There is, however, a legal possibility of a challenge to the array which alleges default or partiality on the part of the sheriff in returning the panel; or a challenge to the individuals or polls, who may be challenged either peremptorily or for cause. In cases of felony, twenty peremptory challenges and any number of challenges for cause are allowed; but there are no peremptory challenges in cases of misdemeanour.

It is remarkable that for centuries challenges have been uncommon in England. I cannot remember more than two cases in which any considerable number have been made in thirty-five years. There are, however, elaborate rules about them, and about the rare incident of standing mute, which, however, operates now only as a plea of not guilty.

In the common course of things this is followed by the trial.[3]

[1] *Digest of Procedure*, Arts. 256–268. [2] *Ibid.*, Arts. 270–275.

[3] The following is condensed from my *History*, vol. i. pp. 428–456.

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The first step in the trial, properly so called, is the opening speech of the counsel for the Crown. He is expected to confine himself—except under very special and unusual circumstances—to a quiet account of the different facts to be proved, and of their bearing upon each other, and on the guilt of the prisoner. This statement is often of decisive importance, for it produces the first impression made upon the minds of the judge and jury, the indictment being a neutral, formal document, wholly unlike a Continental *acte d'accusation*. It is pleasant to be able to say that, as a rule, subject only to rare exceptions, extreme calmness and impartiality in opening criminal cases is characteristic of the English Bar. It is very rare to hear arguments pressed against prisoners with any special warmth of feeling or of language: one reason for which no doubt is, that any counsel who did so would probably defeat his own object. Apart, however, from this, it is worthy of observation that eloquence either in prosecuting or defending prisoners is almost unknown and unattempted at the bar.

The opening speech for the prosecution is followed by the examination of the witnesses, who are first examined in chief by the counsel for the Crown, then cross-examined by the counsel for the prisoner, if he is defended by counsel, or by the prisoner himself if he is not, and then re-examined by the counsel for the Crown. The judge and the jury can also ask such questions as they may think necessary. The object of examination-in-chief is to make the witness tell what he knows relevant to the issue in a consecutive manner and without wandering from the point. The object of cross-examination is twofold—namely, to prove any facts favourable to the prisoner which may not have been stated by the witness when examined in chief, and to bring to light any matter calculated to shake the weight of his evidence by damaging his character, or by showing that he has

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made inconsistent statements on former occasions, or that his opportunities of observation, or his memory as to what passed were defective. The object of re-examination is to clear up any matter brought out in cross-examination which admits of explanation.

The main rule as to the manner in which the examination of a witness must be conducted is, that leading questions—that is, questions which suggest the desired answer—must not be asked by the side which calls the witness, and to which he is presumed to be favourable, but that they may be asked by the party against whom he is called, and to whom he is presumed to be unfavourable; in other words, leading questions may not be asked in an examination-in-chief or in a re-examination, but they may be asked in cross-examination.

This rule, however, is liable to be modified at the discretion of the judge, if the witness appears to be, in fact, unfavourable to the party by whom he is called, and to be keeping back matter with which he is acquainted. A common instance of this is when a witness refuses or hesitates to state at the trial what he stated in his depositions before the magistrate. The great care bestowed upon the examination of the witnesses, and the importance attached to such rules as these, are characteristic features in an English trial; and though they are sometimes carried to an apparently pedantic length, there can be no doubt of their substantial value.

Their proper application requires experience and skill. It is not easy to question a person in such a way as to draw from him the knowledge which he possesses on a given subject in the form of a continuous statement in the order of time, the questions being so contrived as to keep alive the attention and memory of the witness without being open to the objection that they suggest the answer which he is to give.

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The examination-in-chief is followed by the cross-examination. Cross-examination is a highly characteristic part of an English trial, whether criminal or civil; and hardly any of the contrasts between the English and Continental systems strikes an English lawyer as forcibly as its absence in the Continental systems. Its history may be collected from the particulars given in my *History*. So long as prisoners were really undefended by counsel in serious cases, their cross-examination of the witnesses against them was trifling and of little or no importance, though they did cross-examine to a greater or less extent. When they were allowed to have counsel to cross-examine, but not to speak for them, the cross-examination tended to become a speech thrown into the form of questions, and it has ever since retained this character to a greater or less extent. Cross-examination is, no doubt, an absolutely indispensable instrument for the discovery of truth, but it is the part of the whole system which is most liable to abuse, and which, in my opinion, ought to be kept most carefully under control by the judge; but I do not think that the unfavourable criticisms often made upon it by unprofessional persons are well founded.

Few stronger proofs are to be found of the simplicity of English taste in the matter of making speeches than the exceedingly prosaic character of speeches in defence of prisoners. Even when the circumstances of crimes are pathetic or terrible in the highest degree, the counsel on both sides are usually as quiet as if the case was an action on a bill of exchange. This way of doing business is greatly to be commended. It is impossible to be eloquent in the sense of appealing to the feelings without more or less falsehood; and an unsuccessful attempt at passionate eloquence is of all things the most contemptible and ludicrous, besides being usually vulgar. The critical temper of the age has exercised an excellent influence on speaking in the courts. Most

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barristers are justly afraid of being laughed at and looking silly if they aim at eloquence, and generally avoid it by keeping quiet.

The defence is followed by the examination of the prisoner's witnesses, if any, the summing up of his counsel, and the reply of the counsel for the Crown, if he is entitled to a reply. But upon these matters I need add nothing to what I have already said.

The trial concludes by the summing up of the judge.

This, again, is a highly characteristic part of the proceedings, but it is one on which I feel it difficult to write. I think, however, that a judge who merely states to the jury certain propositions of law, and then reads over his notes, does not discharge his duty. This course was commoner in former times[1] than it is now. I also think that a judge who forms a decided opinion before he has heard the whole case, or who allows himself to be in any degree actuated by an advocate's feelings in regulating the proceedings, altogether fails to discharge his duty; but I further think that he ought not to conceal his opinion from the jury, nor do I see how it is possible for him to do so if he arranges the evidence in the order in which it strikes his mind. The mere effort to see what is essential to a story, in what order the important events happened, and in what relation they stand to each other, must of necessity point to some conclusion. The act of stating for the jury the questions which they have to answer, and of stating the evidence bearing on those questions and showing in what respects it is important, generally goes a considerable way towards suggesting an answer to them; and if a judge does not do as much at least as this, he does almost nothing.

The judge's position is thus one of great delicacy, and

[1] It was followed, to take one instance in a thousand, by Lord Mansfield in Lord George Gordon's case.

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it is not, I think, too much to say that to discharge the duties which it involves as well as they are capable of being discharged, demands the strenuous use of uncommon faculties, both intellectual and moral. It is not easy to form and suggest to others an opinion founded upon the whole of the evidence without on the one hand shrinking from it, or on the other closing the mind to considerations which make against it. It is not easy to treat fairly arguments urged in an unwelcome or unskilful manner. It is not easy for a man to do his best, and yet to avoid the temptation to choose that view of a subject which enables him to show off his special gifts. In short, it is not easy to be true and just. That the problem is capable of an eminently satisfactory solution there can, I think, be no doubt. Speaking only of those who are long since dead, it may be truly said that, to hear in their happiest moments the summing up of such judges as Lord Campbell, Lord Chief Justice Erle, or Baron Parke, was like listening not only (to use Hobbes's famous expression), to "law living and armed," but to the voice of Justice itself.

A verdict of guilty or not guilty concludes the whole matter, and the prisoner is in the one case sentenced and in the other is at once discharged, unless there are other charges against him. But the jury may not agree. Various accidents (such as the death or illness of a judge or juryman) may occur. These are all enumerated, and the way of disposing of such occurrences are stated, in my *Digest*.[1]

There is no appeal in criminal cases, but there are three modes of procedure which are more or less analogous to it. In cases of error in the form of the proceedings, a writ of error may be brought if the Attorney-General consents. In cases of law arising upon the trial, a case may in the judge's discretion be reserved for the Court for the Consideration of Crown Cases Reserved; and in misdemeanours tried upon the civil

[1] *Digest of Procedure*, Arts. 296–302.

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side of the Queen's Bench Division, a new trial may be moved for. Many rather technical questions arise upon these points, of which I need not here speak in detail. Punishments of all kinds may be either wholly remitted or commuted in any case whatever. This is done, if at all, on the advice of the Home Secretary, who, I believe, invariably consults the judge who tried the case, if there is a question of the guilt of the prisoner or of over-severity in his sentence. In cases where a man is pardoned on account of his health, *e.g.*, the judge is not consulted.

On the question of costs and of rewards, compensation, and restitution of goods in criminal cases,[1] I can only refer to my *Digest*.

Upon the question whether there ought to be an appeal in criminal cases there has been much discussion. I was at one time in favour of such an appeal. The Report of the Criminal Code Commission, of which I was a member, contained a recommendation of a scheme for such a court, which I concurred in. Subsequent experience, however, has led me entirely to change my opinion, and to think that substantially the existing system cannot be improved, and that such defects as exist in it are inevitable consequences of the nature of trial by jury, or are easily removable.

Put very shortly, the principal argument in favour of admitting an appeal upon matters of fact is this:—

(1) Appeals are admitted in nearly all civil cases, sometimes absolutely, sometimes under restrictions. Why allow an appeal on a question of a small sum of money, which the parties may, if they please, carry up to the House of Lords, and yet allow no appeal on a question of life, liberty, and character?

(2) Why pardon a man admitted to be innocent, and on the ground of his innocence? Pardon implies guilt.

[1] *Digest of Procedure*, Arts. 318–329.

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The shortest and most general answer to the question is that to admit appeals in criminal cases upon matters of fact is to overlook the essential distinction between criminal and civil proceedings, and to carry out the principle of assimilating them beyond the point which reason or expediency warrant. A civil proceeding is meant to decide a question as to a right to property or a right to compensation for an injury between party and party. Appeals are admitted (I think too freely) not so much for the purpose of arriving at truth as for the purpose of satisfying the parties. A man appeals if he can afford it and thinks he will succeed, and his willingness to embark in an appeal and to carry it on depends, to a great extent, upon the importance to him of the interests at stake. In a criminal case the question is one in which the public is almost as much interested as the party, and in which an appeal is reasonable only in cases where granting it is desirable for the sake of truth.

It must in the first place be borne in mind that the diminution of the decisiveness of a criminal trial is in itself a great evil, which should be incurred only for the sake of avoiding injustice, and to such an extent as is required for that purpose only. The vigour of the criminal law depends to a great extent upon its deciding finally upon matters brought before it, and appeals from it have beyond all doubt the effect of breaking its point and blunting its edge. The possibility of evading it, and all unnecessary delay in carrying it into execution is so much taken away from its capacity of preventing crime. It is therefore essential, in considering the present question, to try to form something like a fair estimate of the extent of its failures, in the way of wrong convictions. I have one piece of evidence on this point to give, which I believe would be corroborated by most of my brethren. In the course of the last five years (January,

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1885, to September, 1889) 1,216 criminal cases came before me.

Of these, there ended in a plea of guilty . .	199
Bills were thrown out in	38
And there were tried	979
	1,216

Practically one case out of a thousand was proved to be a case of a false conviction. In twenty-eight of these, references have been made to me by the Home Office. In one case only was a convict pardoned on the ground of his innocence. He was convicted of a burglary, and the mistress of the house came out of her room, met the burglar, and swore to the prisoner as the man. It was afterwards discovered that she was mistaken in his identity, though there were some other suspicious circumstances in the case. One of the cases was that of Mrs. Maybrick, which attracted so much attention, in the summer circuit of 1889. I mention it not in order to say anything about it, but merely in order to remark that it was the only case in which there could be any doubt about the facts. In the remaining twenty-six cases there was more or less of a question as to the severity of the punishment inflicted, but little as to the facts. There was one famous case in which a certain number of newspapers made a great noise, but the prisoner made a full confession before his execution. He was a man called Lipski, a Polish Jew.

I have no knowledge of the experience of others, but from my own I feel entitled to say that the number of wrong convictions must be very small, and that it is not worth while to provide for such cases at the expense of establishing any institution at variance with the established principles of trial by jury and of diminishing the efficacy of the criminal law. The less need be said about this because, when a few years

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ago an attempt to frame a scheme for a Court of Appeal was made, these very difficulties caused it to be given up.

Taking for granted, then, that trial by jury is to retain its present position as the stated regular method of disposing of criminal cases, the following observations as regards a Court of Criminal Appeal as to matters of fact appear to me to follow.

First, such cases must be regarded as exceptional, and must be treated exceptionally. This, in itself, appears to me to be a conclusive objection to the proposal which was the basis of the last Bill introduced into Parliament.

The proposal was to permit motions for a new trial on any ground on which a new trial may be moved for in a civil case, and on several other grounds besides, of which the following were instances. There was to be no limit of time within which a new trial might be moved for. It was not to be an objection to such a motion that the new trial was moved for on the ground that witnesses had not been called at the trial who might have been called, or on the ground that a defence which had not been raised might have been raised. A defence might be kept back till the witnesses against it were dead.

It appears to me that all such proposals are in reality opposed to the principle of trial by jury, for reasons which may be put in various shapes, but which may be illustrated by two special remarks as well as by a finished essay. In the first place, it is an elementary and indisputable principle of trial by jury that a jury are bound to give a prisoner the benefit of every reasonable doubt. Therefore, before a new trial can be granted, it must be established, to the satisfaction of the Court which grants the new trial, that the jury which gave their verdict did not fulfil their duty in this respect, but such a decision would entitle the prisoner, not to a new trial, but to an acquittal. In every case in which the complaint was grounded on any cause other than the discovery subsequently to the first trial of new evidence,

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the result would be that the judges and not the jury would have the last word on the final result.

The same thing is perhaps even more strongly illustrated by a second remark. It is an undoubted principle as to trial by jury, approved by recent decisions of the highest authority, that to grant a new trial on the ground that the verdict is against the weight of evidence, the Court must be of opinion, not merely that the verdict is wrong, but that it is so wrong that the jury could not reasonably hold it. If this rule were observed by a Court of Appeal in criminal cases, the Court of Appeal would, by the act of granting a new trial, effectually prejudge the case at that trial. If the doctrine is given up in such cases, all steady administration of criminal law is at an end. If it is maintained, it will be found in practice that the supposed advantages of a Court of Criminal Appeal will not be gained. The true reason for wishing for such a Court is that exceptional cases occur to which the attention of the public is directed, it may be by some picturesque circumstance or person. The newspapers take a leading part in the matter, and a quantity of bitter, ill-informed, and often most ignorant controversy arises; and such scenes, which are objectionable on all possible grounds, lead to the demand for a Court of Appeal, as if by that means they might be avoided. I do not believe it is possible to avoid them. Much occurs on such occasions which is to be regretted, but popular manifestations on such a subject are only the manifestations under an absurd form of that interest in public affairs which is the mainspring of modern political life. It is a grotesque but a powerful security against injustice and oppression, though it is as unequal to doing justice in any given case as to expressing itself in a rational form, with reasonable modesty and without foolish exaggeration.

The present system appears to me to deal with such occasional exhibitions of public feeling in the best possible

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manner. The Home Secretary has facilities for testing the truth of every conclusion arrived at, and for forming an opinion upon the correctness of verdicts after a trial, which can be equalled by no one else. He can and does see the judge, the principal witnesses, especially those on whose testimony special discussions have arisen, and, in fact, all persons who really know anything about the matter, in a perfectly easy natural way, and with entire freedom from the disturbing causes which may always arise from a trial. The Secretary of State is, as a rule, himself a distinguished lawyer. The Under-Secretary is, I think, always chosen with special reference to his qualifications in this matter, and the Secretary of State can, of course, command any special assistance he thinks proper. My belief, from personal experience during ten years, is, that any change which could be made would necessarily be for the worse.

It must be borne in mind that it is only in a small minority of cases that questions of law and fact are the only questions to be considered in such matters as these. Questions of popular feeling have, and ought to have, their importance. Assume that a person is capitally convicted upon evidence in which the jury have given an unpopular verdict, and suppose further that he contends both that he ought to be pardoned upon some general ground and also on the ground that the proof against him is deficient—it is hard not to allow him to rely upon both grounds at once, and to appeal to their combined effect. This he can do at present. Under the proposed system he would, I suppose, be obliged to rely upon the defects of the evidence before the Court of Appeal, on the other ground before the Secretary of State.

One suggestion as to the nature and powers of a Court of Appeal has been made which appears to me to deserve consideration. It was made by Lord Esher, and is to the effect that there should be a Court of five or seven judges which

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should be able to do all kinds of things—set aside the verdict, order a new trial, mitigate the sentence; in a word, do all that the Secretary of State can do and a great deal more besides. To this I say only that it appears to me that it would be to the last degree mischievous to create such a Court for such a purpose; that a Court of five or seven judges would be far too large, and that in practice a difference between the members would be far more awkward than anything which can be said to exist at present; that it would be practically impossible either to execute a man who had in his favour two or even one powerfully expressed judgment, and absurd to acquit a man convicted by a jury and by a majority of members of the Court of Appeal; that, after all, the only result would be to substitute five or seven Secretaries of State who are wholly irresponsible, for one who has always to think of the political effect of his decision. I can hardly imagine, in short, a proposal more unconstitutional and dangerous in all ways.

I do not say that the present system might not be improved, though I should not myself think it worth while to try to do so. I think it is true that a man ought not to be pardoned for being innocent. This anomaly might be set right by empowering Her Majesty to set aside a verdict on the express ground of the convict's innocence. I think the Secretary of State might have power, if he thought proper, to compel the attendance of witnesses who might be sworn and cross-examined. I do not attach much importance to this. Evidence can now be taken on a statutory declaration, which is much the same as an oath.

Where new evidence is discovered, or where perjury, is suspected, or where inconsistent verdicts have been delivered, but in no other cases, I would allow the Secretary of State to direct a new trial.

CHAPTER XVI.

ON EVIDENCE IN CRIMINAL CASES.

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I FIND much difficulty in writing on this subject in a manner altogether satisfactory to myself. In the first edition of this work, I entered, with what now strikes me as youthful enthusiasm, upon a variety of subjects connected with it which I should like to discuss at far greater length, and without special reference to law if I discussed them at all. I had also at that time failed to devise any arrangement of the purely legal part of the subject which deserved to be regarded as at all satisfactory. I have since that time thought and learnt much on the subject, having been called to legislate about it in India, and having written on it in England. The subject is far too interesting and characteristic a part of the criminal law to be completely passed over; and as it is always difficult to give an account of part of a system without giving some notion of the whole of which it is a part, I will say a few words of the nature of English rules of evidence as a whole before I go on to discuss the particular rules which apply more particularly to criminal proceedings.

The object—I believe for the most part the unconscious or half-conscious object—of English rules of evidence is to provide that conclusions in judicial cases should be founded on solid grounds. The leading principle of Bentham's specula-

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tions on this subject, and none were ever in their own line more influential, was that all objections to evidence ought to be objections not to its admissibility but to its weight. This, I think, was a not wholly unnatural exaggeration of the indignation excited in Bentham by the rules of evidence as he knew them, encumbered as they were with all manner of irrational matter from which they are now happily set free. His notice was never directed to the fact, that, in the first place, inexperienced persons continually mistake suspicions of all kinds for proof, and that in the absence of rules of evidence they have no sure test by which to distinguish them; that, in the second place, doubt is so unwelcome to the mass of mankind that in most cases there is more danger of believing too much than of believing too little; and thirdly, that in judicial affairs fraud, or at all events want of candour, is always to be carefully guarded against, and that for this purpose it is necessary to understand what is the nature of the real securities against fraud and want of candour—when they ought to be rigorously enforced, and when and to what extent they may be safely relaxed. The result of a long history, the principal points of which I have given in my *History*,[1] is that most of the rules of evidence now existing may be to a considerable extent justified on these grounds, though they have come into existence gradually and in spite of every sort of obstruction, arising from misapprehension of their nature, and from all the other causes, from which legal errors generally do arise.

The common accounts of the law of evidence are in many cases made impenetrably obscure by the non-recognition of the double meaning of the word "evidence," which is sometimes used in the sense (*a*) of testimony given orally by witnesses, and sometimes in the sense (*b*) of a fact taken to be

[1] See especially vol. i. chaps. viii.–xii., and the trials at the end of vol. iii.

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true and used as an argument to show the existence of a fact the truth of which is in question.

The word is sometimes used in both senses at once. Thus, according to the *evidence* of A, the money was paid. In this phrase "evidence" means testimony, it means that A says he saw the money paid, and is used in sense (*a*). In the phrase "Recent possession of stolen goods is *evidence* of theft," the word is used in sense (*b*). The meaning is, the one fact makes the other probable. In the phrase "Hearsay is no evidence," the word means both things at once. The witness is not to be allowed to repeat what was said, and if it is repeated, no inference is to be drawn from the fact that it was said. Of such facts it is commonly said that they are not evidence—that is, they are not evidence in sense (*b*).

This ambiguity in expression has for certain purposes its conveniences; but I here confine myself to the use of the word "evidence" in the sense of testimony. It will be found that the whole law of evidence may be thrown, by recognizing this distinction, into the following perfectly simple shape.

It supplies answers to three great questions:—

(1) What facts may be proved to be true upon a legal proceeding having for its object the ascertainment of any legal right or liability?

The answer is (1) All facts which, if proved, would establish or rebut the existence of any such right or liability; and (2) any facts which alone or with others render probable or improbable the existence of any such fact.

Facts of the first class I describe as facts in issue—they may always be proved, and the pleadings in each particular case show what they are; facts of the second class I describe as facts relevant, or deemed to be relevant, to the issue. But certain facts which might naturally be considered relevant to the issue are not considered as being so. These all fall under one of the following heads:—

(*a*) The fact that a person not sworn as a witness asserted something to be true. This is also called hearsay.

(*b*) The fact that something was asserted in a document not regarded as authoritative for the particular purpose.

(*c*) The fact that things similar to, but not specifically connected with, the matter inquired into occurred.

(*d*) The fact that any person had an opinion about its having occurred or not.

To each of these rules there are exceptions of great importance. I pass over the details, but I will give an illustration to show the form of the law.

Let the question be whether A committed a crime. The commission of the crime by A is the fact in issue. Evidence is tendered to show that A confessed that he committed the crime. This is a fact relevant to the issue, and evidence of it is admissible. It appears that the confession was preceded by an exhortation to confess made by B. This excludes the evidence of the confession if B was a person in authority in reference to the case. B was a person wholly unconnected with the case, and A did not suppose him to be so. The confession may be proved.

Thus the principal part of the working law of evidence consists of the application to particular cases of exceptions to exceptions to general rules which I was the first writer to state expressly.

(2) If a fact can be proved, how is it to be proved?

The answer is: The fact may be so notorious as to be judicially noticed, which dispenses with all proof; but if it requires proof at all, whatever the fact may be, and on whatever ground it can be proved, it must be proved by direct evidence. If it was a fact which could be seen, heard, or otherwise directly perceived by any of the senses, it must be proved by some one who directly perceived it by that

sense—who saw, or heard, or touched it. If it is the contents of a document, it must be proved by the production and verification of that document, or by a copy fulfilling the conditions of the law upon the subject of the proof of documents by copies.

(3) Lastly, who is to prove it?

The answer is, as a rule, that he who affirms must prove; but this rule is varied by presumptions—especially in criminal cases, by the presumption of innocence. There are many subordinate rules as to the manner in which evidence is to be given, &c., which I need not notice. Of all these matters a short but full, I believe I may say a practically complete, account may be found in my *Digest of the Law of Evidence*, to which I refer for fuller information.

Confining myself to the rules of evidence which are practically confined to criminal cases, I will refer to the following only.

In the first place, I may mention the general presumption of innocence, which, though by no means confined to the criminal law, pervades the whole of its administration. This rule is thus expressed in my *Digest of the Law of Evidence*[1]:—

"If the commission of a crime is directly in issue in any "proceeding, civil or criminal, it must be proved beyond all "reasonable doubt. The burden of proving that any person "has been guilty of a crime or wrongful act is on the person "who asserts it, whether the commission of such act is or is "not directly in issue in the action."

This is otherwise stated by saying that the prisoner is entitled to the benefit of every reasonable doubt. The word "reasonable" is indefinite, but a rule is not worthless because it is vague. Its real meaning, and I think its practical operation, is that it is an emphatic caution against haste in coming to a conclusion adverse to a prisoner. It may

[1] Art. 94.

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be stated otherwise, but not, I think, more definitely, by saying that before a man is convicted of a crime every supposition not in itself improbable which is consistent with his innocence ought to be negatived. But I do not know that "improbable" is more precise than "reasonable." Another way of stating it is that in order to justify a conviction, a jury ought to be in a state of moral certainty caused by legal evidence; but this, like the rest, is indefinite, for the phrase "moral certainty" is as vague as "no reasonable doubt." It is also closely connected with the saying that it is better that ten guilty men should escape than that one innocent man should suffer, an observation which appears to me to be open to two decisive objections. In the first place, it assumes, in opposition to the fact, that modes of procedure likely to convict the guilty are equally likely to convict the innocent, and it thus resembles a suggestion that soldiers should be armed with bad guns because it is better that they should miss ten enemies than that they should hit one friend. In fact, the rule which acquits a guilty man is likely to convict an innocent one; just as the gun which misses the object at which it is aimed is likely to hit an object at which it is not aimed. In the second place, it is by no means true that under all circumstances it is better that ten guilty men should escape than that one innocent man should suffer. Everything depends on what the guilty man has been doing, and something depends on the way in which the innocent man came to be suspected. I think it probable that the length to which this sentiment has been carried in our criminal courts is due to a considerable extent to the extreme severity of the old criminal law, and even more to the capriciousness of its severity, and the element of chance which, as I have already shown, was introduced into its administration by technical rules. In the Report

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already quoted,[1] M. Cottu remarks that, the English "not "thinking it for the advantage of the public to punish every "crime committed, lest the effect of example should be "weakened by the frequency of executions, they reserve the "full measure of their severity for the more hardened "offenders, and dismiss unpunished those whose guilt is not "proved by the most positive testimony. They are indifferent "whether among the really guilty such be convicted or "acquitted.[2] So much the worse for him against whom the "proofs are too evident, so much the better for the other "in whose favour there may exist some faint doubts; "they look upon the former as singled out by a sort "of fatality to serve as an example to the people, and "inspire them with a wholesome terror of the vengeance "of the law; the other as a wretch whose chastisement "Heaven has reserved in" (? for) "the other world." He adds that none of the English with whom he was in company "ever positively expressed such a sentiment, but they act as "if they thought so." There may be some exaggeration in this, but the sentiment here described is not altogether unlike the practical result to be expected from the maxim "*Timor in omnes, pœna in paucos*," a sentiment not unnatural when the practice and the theory of the law differed so widely as they did sixty years ago. It was natural that a convicted prisoner should be looked upon as a victim, chosen more or less by chance, when the whole law was in such a state that public sentiment would not permit of its being carried even proximately into effect.

I know of only four rules of evidence which can be said to be peculiar to criminal proceedings.

(1) The first, and by far the most important, is the rule that the prisoner and his wife are incompetent witnesses.

[1] *Cottu's Report*, p. 91, &c.

[2] This clumsy sentence is obviously the fault of the translator.

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The history of this rule is as follows:—The husbands or wives of prisoners were never, so far as I know, compelled to testify against their wives or husbands. But down to the Civil Wars, as I have already shown, the interrogation of the prisoner on his arraignment formed the most important part of the trial. Under the Stuarts, questions were still asked of the prisoner, though the extreme unpopularity of the *ex-officio* oath, and of the Star Chamber procedure founded upon it, had led to the assertion that the maxim "*Nemo tenetur accusare seipsum*," was part of the law of God and of nature (to use the language of the day), an assertion which was all the more popular because it condemned the practice of torture for purposes of evidence then in full use both on the Continent and in Scotland.

Soon after the Revolution of 1688, the practice of questioning the prisoner died out, and as the rules of evidence passed from the civil to the criminal courts, the rule that a party was incompetent as a witness, which (subject to occasional and partial evasion by bills of discovery in equity) prevailed in civil cases till 1853,[1] was held to apply to criminal cases. This, however, was subject to two important qualifications. First, the prisoner in cases of felony could not be defended by counsel, and had therefore to speak for himself. He was thus unable to say, as his counsel sometimes still says for him, that his mouth was closed. On the contrary, his mouth was not only open, but the evidence given against him operated as so much indirect questioning, and if he omitted to answer the questions it suggested he was very likely to be convicted. This was considerably altered by the Act which allowed prisoners accused of felony the benefit of counsel. The counsel was always able to say, "My client's mouth is closed. If he could speak, he might say so and so."

[1] It was repealed by 16 and 17 Vict. c. 83.

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For some years past, and by some judges, prisoners have been allowed to make whatever statements they please in their defence. I have done so for the last six or seven years, and I believe that course to be in accordance with principle, and not opposed to any enactment. I have, however, held that such a statement, if the prisoner is defended, gives a right of reply.

Secondly, the statutes of Philip and Mary already referred to, repealed and re-enacted in 1826 by 7 Geo. IV., c. 64, authorized committing magistrates to "take the examination" of the person suspected. This examination (unless it was taken upon oath, which was regarded as moral compulsion [1]) might be given in evidence against the prisoner.

This state of the law continued till the year 1848, when, by the 11 and 12 Vict., c. 42, the present system was established, under which the prisoner is asked whether he wishes to say anything, and is warned that if he chooses to do so what he says will be taken down and may be given in evidence on his trial. The result of the whole is that as matters stand the prisoner is absolutely protected against all judicial questioning before or at the trial, and that, on the other hand, he and his wife are prevented from giving evidence in their own behalf. He is often permitted, however, to make any statement he pleases at the very end of the trial, when it is difficult to test the correctness of what is said. I may just add that statutory exceptions to the general rule have been made in so many cases as to reduce the law to an absurdity. What can be more inconsistent than to prevent a man from contradicting an accusation of an unnatural crime and to allow him to contradict an accusation of rape?

This is one of the most characteristic features of English criminal procedure, and it presents a marked contrast to that

[1] See my *Digest of the Law of Evidence*, Art. 28, and note xvi.

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which is common to, I believe, all Continental countries. It is, I think, highly advantageous to the guilty. It contributes greatly to the dignity and apparent humanity of a criminal trial. It effectually avoids the appearance of harshness, not to say cruelty, which often shocks an English spectator in a French court of justice,[1] and I think that the fact that the prisoner cannot be questioned stimulates the search for independent evidence.[2] The evidence in an English trial[3] is I think, usually much fuller and more satisfactory than the evidence in such French trials as I have been able to study.

Such are the rules of evidence, the most celebrated and characteristic part of English criminal trials. I proceed to make some observations on their nature and value.

I do not think anyone at all acquainted with the subject practically can doubt their immense value as securities

[1] The contrast is described by M. Cottu in a singular passage, pp. 103–104. "The courts of England offer an aspect of impartiality and humanity which "ours, it must be acknowledged, are far from presenting to the eyes of the "stranger. In England everything breathes an air of lenity and mildness; "the judge looks like a father in the midst of his family occupied in trying "one of his children" (an extraordinary position certainly for a man to be placed in). "His countenance has nothing threatening in it. According to "an ancient custom, flowers are strewed upon his desk and upon the clerk's. "The sheriff and officers of the court wear each a nosegay. . . .

"Everything among us, on the contrary, appears in hostility to the prisoner. "He is often treated by the public officers with a harshness, not to say cruelty, "at which an Englishman would shudder. Even our presiding judge, instead "of showing that concern for the prisoner to which the latter might appear "entitled from the character of impartiality in the functions of a judge whose "duty is to direct the examination and to establish the indictment, too "often becomes a party against the prisoner, and would seem sometimes to "think it less a duty than an honour to procure his conviction."

[2] During the discussions which took place on the Indian Code of Criminal Procedure in 1872, some observations were made on the reasons which occasionally lead native police officers to apply torture to prisoners. An experienced civil officer observed:—"There is a great deal of laziness in it. "It is far pleasanter to sit comfortably in the shade rubbing red pepper into a "poor devil's eyes than to go about in the sun hunting up evidence." This was a new view to me, but I have no doubt of its truth.

[3] See the trials at the end of this work.

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for a healthy scepticism, as checks upon haste to convict, as being productive of industry in searching for evidence deserving of the name, and so preventing a vast amount of injustice. If anyone really doubts this, let them suppose what would have happened if the trials in Titus Oates's plot, or the cases tried before the French Revolutionary tribunal, had been subject to the modern rules of evidence. I doubt whether any equally valuable security for innocent people can be devised, except, perhaps, the necessity for a specific definite charge amounting to a known crime, which is secured by the law as to indictments.

Passing from this, however, what is the value of these rules, and of the evidence produced under them, with reference to securing a true result? This is quite a different question, and ought to receive a different answer. Laying aside all that can be described as speculation on a subject which at every turn suggests it, I think this much may be said with confidence.

All inquiries into assertions as to matters of fact rest upon the same foundations as assertions about physical science. At bottom they rest upon the same great assumptions—the general uniformity of Nature, and the general trustworthiness of the senses. The logic on which each proceeds is the same. In each case certain conclusions are drawn from certain facts, and in each case it is easy to err, either because any given premiss is false, or any given conclusion is incorrect. The certainty of the conclusions reached in each is proportional to the strength of the evidence.

But what is strong and what is weak evidence? Its strength is only a metaphorical way of asserting either that the assertions made by the witnesses are true, or that the inferences from them are highly probable: that it is true that the moon appeared at a certain hour to form a given angle with a given star, and that it is rightly inferred from that fact that

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the observer was then in a certain longitude; that a particular man actually was the person seen at a given time and place, and that it follows from thence that he committed such a crime.

Though science and law have this in common, there are also great differences between the sort of evidence on which scientific and legal inquiries depend.

The leading differences between them are as follows:—

(1) In physical inquiries the number of relevant facts is generally unlimited, and is capable of indefinite increase by experiments.

In judicial investigations the number of relevant facts is limited by circumstances, and is incapable of being increased.

(2) Physical inquiries can be prolonged for any time that may be required in order to obtain full proof of the conclusion reached; and when a conclusion has been reached, it is always liable to review if fresh facts are discovered, or if any objection is made to the process by which it was arrived at.

In judicial investigations it is necesary to arrive at a definite result in a limited time; and when that result is arrived at, it is final and unalterable, with exceptions too rare to require notice.

(3) In physical inquiries the relevant facts are usually established by testimony open to no doubt, because they relate to simple facts which do not affect the passions, which are observed by trained observers, who are exposed to detection if they make mistakes, and who could not tell the effect of misrepresentation if they were disposed to be fraudulent.

In judicial inquiries the relevant facts are generally complex. They affect the passions in the highest degree. They are testified to by untrained observers, who are generally

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not open to contradiction, and are aware of the bearing of the facts which they allege upon the conclusion to be established.

(4) On the other hand, approximate generalizations are more useful in judicial than they are in scientific inquiries, because in the case of judicial inquiries every man's individual experience supplies the qualifications and exceptions necessary to adjust general rules to particular facts, which is not the case in regard to scientific inquiries.

(5) Judicial inquiries being limited in extent, the process of reaching as good a conclusion as is to be got out of the materials is far easier than the process of establishing a scientific conclusion with complete certainty, though the conclusion arrived at is less satisfactory.

It follows from what precedes that the utmost result that can in any case be produced by judicial evidence is a very high degree of probability. Whether upon any subject whatever more than this is possible—whether the highest form of scientific proof amounts to more than an assertion that a certain order in nature has hitherto been observed to take place, and that if that order continues to take place such and such events will happen—are questions which have been much discussed, but which lie beyond the sphere of the present inquiry. However this may be the reasons given above show why courts of justice have to be contented with a lower degree of probability than is rightly demanded in scientific investigation. The highest probability at which a court of justice can, under ordinary circumstances, arrive is the probability that a witness or a set of witnesses tell the truth when they affirm the existence of a fact which they say they perceived by their own eyes, and upon which they could not be mistaken. It is difficult to measure the value of such a probability against those which the theories of physical inquiries produce, nor would it serve

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any practical purpose to attempt to do so. It is enough to say that the process, by which a comparatively low degree of probability is shown to exist in the one case, is identical in principle with that by which a much higher degree of probability is shown to exist in the other case.

There is thus in all verdicts in criminal cases a perceptible degree of doubt. Whether that doubt is "reasonable" or not is a question not of law, but of prudence; the danger of opposite mistakes being put in the two scales. If a neat phrase on such a subject were of any use, I should say that a verdict of guilty can be justified only by a moral certainty of guilt founded upon legal evidence, but I do not much like such phrases. I usually tell a jury that a reasonable doubt means a doubt which they feel it reasonable to act upon, and that the great object for which they are empanelled is to find out whether they have such doubts or not. I have never thought or heard of a better direction, and I believe that no one ever misunderstands it.

It is principally with reference to questions of evidence that I have inserted the accounts of trials which conclude this work. They show, as nothing else can, the characteristic features and the most important results of two judicial systems, each of which has had its own principles, history, and results. Accounts of the French system of procedure will be found in my *History*;[1] and the Code Pénal and other systems are compared in that work with our own on the principal subjects to which they relate.

It would be impossible to do anything like justice to the subject of evidence without treating of the most important parts of the great subject of the nature of knowledge, and of the conditions upon which its increase depends. That probability is the guide of life is an obvious truth. But though the expression has been a commonplace for more

[1] Vol. i. pp. 504–565.

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than a century and a half, and though there has been abundant discussion of the nature of probability, I do not think that more can well be said on this great subject than that a statement is probable to whatever extent it generically resembles the common course of human conduct and of physical nature, that it is improbable to whatever extent it involves any deviation therefrom, and that it is impossible if it contradicts the conceptions upon which all language and thought rest, as, if it were affirmed that a thing could be in two places at once, and that twice two could ever be more or less than four, that it is nonsense unless it can be in some way represented to the mind so as to be the object of thought; but I do not know that any rules wide enough to be valuable have been established, unless it is in relation to special themes or subjects of inquiry which are of much value in measuring the amount of it which ought to be ascribed to different propositions of fact. Who, for instance, can say how far a common proposition is made probable by the direct assertion of its truth by an unknown person? By what rule can anyone be required to believe a person who describes correctly the operations of the electric telegraph, and yet be justified in refusing to listen to a ghost story? Why is a judge required to listen with gravity to conflicting medical theories of the cause of a death, and to state to a jury the grounds on which they are to decide whether a man died of this disease or that, and yet to treat with contempt the notion that he died of witchcraft, and to reject all evidence tendered to prove it? Probably no more difficult question can be asked, and I doubt whether there is any which, if fully solved, would be of greater practical importance. To offer any opinion on this great problem as an incident in a general view of the criminal law of England would be idle presumption. Something, however, must be said, if not on these subjects, at all events on subjects cognate to these, in order to explain the prin-

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ciples on which the law of evidence is founded, and the circumstances which distinguish strong evidence from weak.

The law of evidence, like so many other parts of English law, has grown up to, and not out of, the general principles on which it may now be said to be founded. The oldest parts of it are simple practical rules from which inferences of gradually increasing width and importance have been drawn. It has been said that the oldest of all rules of evidence is that an attesting witness to a deed must always be called.[1] The rule now extends only to cases in which a document is required by law to be attested, and goes back to times when the parties to an attested document were supposed to contract that it should be proved by those witnesses only. It afterwards connected itself with other rules, each of which in its turn was established because it was found by experience to be convenient, and the whole at present admits, as I have tried to show elsewhere, of being stated in a clear systematic way, and is being continually tested by practical use.[2]

Indeed, the whole scheme, and the fundamental propositions of my *Digest of the Law of Evidence*, are only a scheme of the law as it stands, devised by myself for the purposes of the Indian Evidence Act (Act I. of 1872), which, with little if any alteration, has, since 1872, been the Act by which the law of evidence is regulated throughout the whole of the Indian Empire. So far as I can judge, it had occurred to no other writer on the subject that it is impossible to understand refined distinctions upon exceptions to exceptions of which the working part of the law of evidence is composed, until the positive qualities of a fact which entitle it to be called evidence at all are ascertained and stated. To be

[1] See my *Digest of the Law of Evidence*, Arts. 66 and 67, and see Note xxviii. for a statement of the rule and its history.

[2] *Ibid.*, chap. ix. Arts. 68–72.

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told that hearsay is not evidence is to be told nothing until you know what is evidence. It is like being told that a cat is not a lion without any account of a lion. Let a lion be produced, and it is easy at once to say in what respects a cat differs from a lion, and what are the similarities which make it worth while to insist upon the differences.

To be told that evidence in any given case means the proof of facts in issue between the parties, and of facts relevant, or by law deemed to be relevant, to such facts, is to rescue the whole subject from confusion. Bentham, I think, remarks that, where the power and the will to speak the truth co-exist, truth will necessarily be spoken; and I think it cannot be denied that whenever anyone speaks falsely either his power or his will to speak truly must be defective. Hence the probability of a witness's telling the truth varies according to his power and his will to do so, and the strength or the weight of his evidence varies according to these two variables; and if any rule for weighing evidence can be devised it must be done by noting the circumstances which increase or diminish the power or the will of witnesses to speak the truth. The importance of the evidence given varies according to a different set of considerations according to the nature of the crime under trial and the place which the fact alleged to be proved occupies in the theory that the accused person committed it.

First, then, as to the power of speaking the truth on any given subject. The first requisite of power to speak the truth is knowlege of it; and knowledge depends upon the power of observing, the power of recollecting, and the power of expressing what is recollected. I think few people are aware of the extremely imperfect way in which each of the operations in question is usually performed. Most persons observe partially and very incorrectly; their memories usually are still more imperfect; and their powers of expression,

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especially if they have to testify in a public Court, are often very bad indeed.

I have been told that it is a part of the discipline of the German cavalry to make the men take rides of a considerable length, and to receive on their arrival at their destination a message which is read to them, and carried back by them to the place whence they came. They are then required to repeat the message from memory, besides giving an account of the road they took and of the things and people they saw on the way. The game of Russian scandal is a well-known illustration of the same thing, and there are innumerable others. The simplest experiments will convince almost anyone of the imperfection both of his own memory and that of other people. Let anyone, for instance, after reading with common attention a paragraph in a newspaper, try to write down the substance of it, and see how much he will remember of it, or let him take a good look at a table, and then try to write a list of the things upon it.

There is no probability that the amount to be allowed in respect of the deviations from truth caused by these defects will ever be much varied, or that any rules will ever be devised by which it will become in any reasonable degree measurable, for it varies according to time, place, individual character, and also according to the subject spoken of.

Deductions to be made because of a deficiency in will to speak the truth are, I think, much more considerable than is usually supposed, but it is so difficult to specify or measure them that it is impossible to value them at all. The fullest and best marked form of want of will to speak the truth is to be found in wilful perjury. I believe it is very common—much commoner than people in general suppose it to be. In a very large proportion of civil cases, and in most of the criminal cases in which witnesses are called for the defence, contradictions occur, and in these cases it is certain that both sides

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cannot be right, and probable that on one side, at least, there is perjury, unless we extend defective powers of memory, observation, and expression to an incredible degree. It must be remembered that very little perjury is all that is wanted, in most cases, and that the chance of detection is in many cases exceedingly slight. It is frequently not required of a false witness that he should invent and stand to a false story. All that is required of him may often be to forget or falsely remember a few words in a conversation at which no one except his interlocutor and himself were present, or to change the time at which a real incident occurred. That this constantly happens I have no sort of doubt, and it greatly diminishes the value of all human testimony to matters of fact.

As the impediments to the power of speaking the truth arise from imperfect observation, recollection, and description, so circumstances favourable to speaking the truth are that the matters described would be easy to be observed, recollected, and described; and such facilities and difficulties suggest themselves upon any given set of circumstances. In the trials at the end of this book, of which I have given an account, it will be found that at least in the English trials, notwithstanding the very minute details given, hardly any incident is mentioned which might not be readily observed, remembered, and described by anyone who observed it. The only striking exception which occurs to me is in the case of Donellan, where Lady Boughton, the mother of the man supposed to be poisoned, swore, of the medicine which she gave her son, that she "observed it was very like the taste of "bitter almonds." This was one of the most important pieces of evidence in the case. Its importance was, however, much diminished by the fact being capable of being observed only for a very short time, and by the least trustworthy of all the senses. This is not noticed in the report of the summing up

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of Mr. Justice Buller. Apart from this, according to traditions still remembered, it is said that Lady Boughton was an extremely foolish person.

As to want of will to speak the truth, the causes of it are infinitely various. They are, indeed, as many as the causes which may lead people to wish for one result or another of any trial, and they operate to an extent which depends upon the strength of the wish felt and the character of the person by whom it is felt. The results are so various that no general observation upon them is worth making. I believe, however, that several observations may be made. In regard to perjury, and in regard also to those approaches to it which cover the distance between falsehood on oath and the complete candour which complies literally with the terms of the witness's oath to speak the truth, the whole truth, and nothing but the truth, I believe it to be strictly true that every witness has his price. I do not, of course, mean a price payable in money, but a price payable in a thousand other ways. When people think themselves incapable of perjury, or regard themselves as being so, they generally omit to think of cases of real temptation. I greatly doubt whether any large number of people would withstand such a temptation as that presented to Jeanie Deans in the *Heart of Midlothian*. Early in the present century, juries in criminal cases habitually perjured themselves to avoid a capital conviction, by finding goods stolen in a shop to be worth 39*s*. when they were really notoriously worth much more. From a perjury of this kind the step was short, in some cases it was almost imperceptible, to a perjury committed to save an innocent man or a man supposed by the perjurer to be innocent, or to save another from loss of character by making public circumstances which the witness is under the strongest moral obligation to conceal. An infinitely weaker temptation would be nearly sure to cause, if it did not altogether excuse, some of the minor

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reticences or defects in complete candour which would be inconsistent with telling the whole truth and nothing but the truth. The case of experts is as strong a one as can be mentioned. No one expects an expert, except in the rarest possible cases, to be quite candid. Most of them—for there are a few exceptions—are all but avowedly advocates, and speak for the side which calls them.

To take as an illustration of the limits within which perjury is all but inevitable, and would hardly be considered as blamable by people in general, the oaths of co-respondents in the Divorce Court are continually disbelieved—whatever, apart from the particular case, might be their character for truthfulness and candour. It is, indeed, not unfrequently maintained that a man in such circumstances is bound in honour to perjure himself. I do not mean in any degree to favour such an opinion: I merely refer to a notorious fact, to prove the essential weakness of a bare unsupported oath taken under a temptation to lie.

I must, however, point out that these remarks apply only to cases in which an oath is taken where the witness has a known interest in the result. Where no such interest can be pointed out, a direct positive oath has, as a fact, great weight. Many years ago a series of trials took place in which a will was supposed to have been forged, and many circumstances were proved which in themselves were highly suspicious. One of the alleged witnesses, however, a man of a good position in life, and as far as appeared wholly indifferent in the matter, swore most positively and circumstantially to its execution, and in the first and I think the second trial—for there were three—his oath was believed by the jury.

It will appear on the fullest investigation that all defects whatever in the truthfulness of evidence may be ascribed either to a defect of power or of will to tell the truth. I may

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add that some degree of oral evidence is necessary in all cases whatever, though admissions by the parties may often supersede the necessity for giving it. If the identity of any person or thing is disputed, it must be proved, unless it belongs to the small list of matters of which judicial notice is taken.

This consideration of the more general topics which affect the credibility of evidence naturally suggests the means which are available for testing its truth.

These are two—namely, first, corroboration and contradiction, and secondly, cross-examination, the process by which corroborations and contradictions are most frequently put forward and tested.

As to evidence in confirmation or in contradiction of a statement made, it is open, of course, to the same general observations as have been made already upon the general deductions to be made from the credibility of all oral evidence arising from want of power or want of will on the part of a witness to speak the truth.

Cross-examination requires some further remarks. It is a process by which the most severe of all tests may be applied to the witness under examination, and if he sustains it satisfactorily it may usually be said that nothing which makes his story improbable, or which would, if true, injure his character or shake his credit, is known to or has been heard of by those who represent the accused. So much is this the case, that, on a trial for felony, the fact that a witness is not cross-examined is almost always in practice equivalent to an admission that that to which he testifies is not contested by the other side.

Cross-examination is the part of a trial which gives rise to more popular misconception and misrepresentation, and which is more completely misunderstood, than any other part of it. A specially successful cross-examination is often supposed to arise from some singular gift of sagacity, knowledge of

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the world, or presence of mind, on the part of the cross-examiner. No one can know this from merely hearing a cross-examination. Counsel in such cases speak from instructions, and the effectiveness or otherwise of his instructions is the main source of the efficiency of a cross-examination, though to make a really good use even of good instructions, makes a great demand on all the lively and showy qualities of the mind.

In each of the accounts of English trials given at the end of this work, the importance of cross-examination was strikingly illustrated, if we except that of Donellan, which took place many years before counsel were allowed to the prisoner in cases of felony. If counsel had been employed to speak for the prisoner in that case, he might, I think, have easily pointed out and emphasized the difficulty under which the medical witnesses for the prosecution lay, of proving that Sir Th. Boughton was murdered at all, by distinguishing between the symptoms of poisoning by laurel-water and those of death by a fit of epilepsy or apoplexy, suggested as possible by John Hunter.

The most brilliant instances of cross-examination to be met with anywhere are to be found in the parts of Palmer's trial in which Sir Alexander Cockburn dealt with the medical witnesses for the defence, and reduced them all to the admission that, if their own particular solution of the question "What did Cook die of?" was rejected, the answer that he died of strychnine was the next most probable solution; and in the way in which, by taking them through the various symptoms, he showed that nothing that could be called a difference could be established between the symptoms of strychnine and those of which Cook admittedly died. Sir Alexander Cockburn's cross-examination of Smith was all the more remarkable, because notwithstanding the fact that Smith was right on a point on which

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the prosecution was mistaken, he was shown to be so infamously connected with the prisoner's admittedly criminal and fraudulent proceedings, that he must be regarded almost as an accomplice who thought that, by taking advantage of a mistake made by witnesses on the other side, he could prove a fact inconsistent with a great part of their case.

One great use of cross-examination is the fear which it excites, which must prevent many attempts to impose upon the Court.

The abuses of cross-examination are notorious. It may be conducted in a manner and carried to a length which make it an instrument of the worst kind of oppression; but if this is done, and I think it is done very seldom, it is, as a rule, the fault of the judge who permits it, instead of taking whatever responsibility is involved in keeping it within proper bounds. Its entire absence in a French Court is one of the most striking differences between French and English procedure. In every one of the French trials described at the end of this book, the proceedings suggest at every point that anything like an efficient cross-examination might have destroyed the case for the prosecution. Thus, for instance, the whole case against the monk Léotade was based upon inferences from the result of general inquiries made by official and judicial inquirers. Great weight, for instance, was laid upon the assertion that Léotade on the night of the crime wore a certain shirt. The proof that he did so was that all the shirts were used in common by all the monks, and were changed every Saturday. The judge of instruction is said, in the *acte d'accusation*, to have examined all the persons present in the monastery at the time (about 200) as to their dirty shirts. It is also said that each of the monks recalled with precision the particular marks which he had remarked on his shirt, and none of them resembled the shirt supposed to have been worn by the murderer. In England all the shirts

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would have had to be produced and identified in open Court by the persons who wore them. Practically this could not be done, but if the matter was handed over to a judge of instruction, the inevitable result was to put the greater part of the responsibility for the result of the trial upon him, and practically to relieve the jury of the responsibility which is supposed to belong to them.

The only attempt, which has attracted any attention, of which I am aware, to classify evidence at all with reference to its nature as evidence, is contained in the well-known expression which divides all evidence into direct and circumstantial. These are phrases which appear to me to be most objectionable on a variety of grounds, and especially on the following grounds:—

1. Evidence, as I have pointed out already, is itself an ambiguous word, meaning (1) testimony actually given; and (2) facts alleged to be proved by such evidence, and used as arguments to show the existence of other facts. Thus the evidence of A proves that B was in possession of goods recently stolen. Here evidence is used in sense (1). Recent possession of stolen goods is evidence of theft. Here evidence is used in sense (2).

In the phrases direct and circumstantial evidence, the word evidence is used in both senses. Direct evidence means an assertion that the witness actually perceived a fact. Circumstantial evidence means a fact alleged to exist, and to be relevant to the issue. Therefore, to distinguish between direct and circumstantial evidence is like distinguishing between hares with four legs and hairs which grow on the head. One illustration of the practical inconvenience of this division is that it conceals or denies the fundamental principle that all evidence without distinction or exception must be direct. If the thing to be proved is something seen, heard, felt, tasted, or smelt, it must be proved

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by some person who says he has seen, heard, felt, tasted, or smelled it. According to this principle, which is unquestionably true, there can be no such thing as circumstantial evidence at all. It would be correct, if this view is taken, to say, All circumstantial evidence must always be proved by direct evidence. Evidence is given that a man suspected of robbery sold shortly after the robbery part of the property obtained by it. The fact that he did so must be proved by an eye-witness, or must be direct.

The most serious practical objection to the use of the phrase is that it implies, and is generally used in order to imply, a distinction which does not really exist—namely, the distinction that circumstantial evidence, or the proof of a crime by facts which are not in issue, but are relevant to the issue itself, must in all cases be weaker than proof by an alleged eye-witness of the crime itself which is in issue. This is wholly untrue, and has a plausibility about it which is very apt to mislead. The fact that A had B's purse in his pocket is far less likely to mislead in considering A's guilt than the fact that someone says that he saw him take it. The most direct evidence imaginable of a crime would in many cases not be accepted in proof of it unless it were confirmed by circumstantial evidence of it. Suppose several persons swore that they had seen the prisoner push a man into the river above the falls of Niagara, and suppose no body was found, no one was missed, no one had been seen in the neighbourhood, and nothing was found upon the accused person to create suspicion, how many witnesses would it require to secure a conviction? I do not say that the expression circumstantial evidence is unmeaning, though I think it incorrect and misleading, and used mostly for the purpose of supporting commonplaces of the most fallacious kind. I think that the division between direct and circumstantial is an idle one—a distinction without a

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difference—and therefore a phrase which it would be well to discard.

There is a sense in which the more circumstantial evidence is the better and stronger it is, and that sense, I think, is the original and natural sense of the word. Circumstantial evidence in this sense means evidence in which a variety of circumstances are minutely detailed. "He broke open this door "standing at a place where are two footmarks minutely "corresponding with those of his shoes. The instrument "used to break open the door must have been this crowbar. "Here are the marks it made, and it was also used on this "plate-chest, as appears by similar marks," is a highly circumstantial statement, and each circumstance offers an opportunity for confirmation or refutation. In proportion as a statement is in this sense circumstantial, it is easy to prove or disprove.

A full classification of evidence so made as to explain fully the rules of evidence ought, I think, to have reference to the nature of crimes. It should, I think, be somewhat of the following kind. Every act and therefore every crime has its history, from the time when it is first conceived in the mind, if not, indeed, from the time when the circumstances occur which cause it to be conceived, till it is completed, and has produced its effects. It is first conceived or imagined; the occasion arises for its execution; it is executed; and certain consequences follow. It may, according to circumstances, be connected with an infinite variety of other matters, any or all of which it may be necessary to follow out to a greater or less extent. A complete sketch of a crime may be given in a very few words, marking these steps in it, such as motive, preparation, execution, consequences. The whole of the evidence will arrange itself in order of time according to the circumstances of each case. On the width of these inquiries, and on the way in which one bears upon another,

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it is easier to give specimens than rules. I do not think a more perfect one could be found than is afforded by Palmer's trial.

These few observations sum up what I have to say upon the nature of the English rules of evidence, which contribute perhaps the most characteristic part to the English criminal law regarded as a whole. I will conclude with a few words on their practical effect.

In his famous *Rationale of Judicial Evidence*, Jeremy Bentham wrote such an attack on the system of the then existing English law on the subject as was hardly ever written on any existing system whatever. It might be compared to a shell bursting in the powder-magazine of a fortress, the fragments of the shell being lost in the ruins which it has made. The main object of the book is to show that rules tending to the exclusion of evidence must be pernicious, and with some exceptions Bentham proved his point, and with immense advantage to the cause of truth and justice. One only of the rules which he attacked still survives, and I do not think it will do so long. This is the rule which excludes the evidence of accused persons in most cases, but the exceptions already made to it are fatal to its principle. I have dealt, however, with this matter separately.

One observation, however, must be made upon Bentham's book which applies to all his works in different ways. He assumes the existence of wholly imaginary states of fact to which the rules he proposes are to be applied, and his assumptions are often the very opposite of the truth. With reference to judicial evidence, for instance, it ought never to be forgotten that one of their great objects is to prevent fraud and oppression in their worst forms, to keep out prejudices which would be fatal to the administration of justice, and to protect character except in those cases in which justice demands that it should be exposed to attack. Criminal

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justice may be so administered as to make it a subject of universal horror, and to cause people to fear any connection with it like the plague. Rules of evidence which prevent these evils are not to be lightly tampered with. In Léotade's case, Conte, who brought the girl said to have been murdered into the monastery in which the crime was said to have been committed, and who said he saw Léotade in the passage to which he brought her, had, says the *acte d'accusation*, "the whole of his life explored with the greatest care." It was discovered that six years before he had seduced his wife's sister—a fact not even alleged to have the most remote connection with the crime. In England the counsel for the defence might possibly ask such a question, but the judge might, and probably would, disallow it.[1]

I believe that as they now stand the rules of evidence are consistent with, and to a great extent embody, the essential conditions of all careful inquiry upon all subjects, and I also think that they form the greatest protection against the principal abuses of judicial evidence which has ever been devised.

[1] *Digest of the Law of Evidence*, Arts. 129, 139A. At all events in a civil case. I think he might in a criminal case also, p. 196.