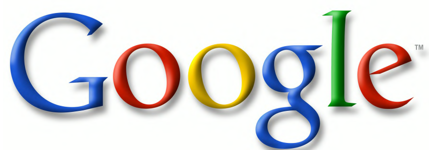

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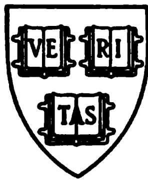


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# A HISTORY

OF

# THE CRIMINAL LAW OF ENGLAND.

BY

SIR JAMES FITZJAMES STEPHEN, K.C.S.I., D.C.L.,

A JUDGE OF THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION.

IN THREE VOLUMES.

VOL. II.

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## Note to Pages 386—392, Vol. II.

When this account of the laws relating to press offences in France was written, I was not aware of the law of July 29, 1881, which had been passed about a year before, and which was not referred to in the authorities which I consulted.

The new law repeals all the provisions creating offences cited on pages 390 and 391 from the laws of 1822, 1848, and 1849.

The law of 1819, quoted on p. 387, is modified by provisions which make an incitement to crime by the press punishable only when it is effective, except in cases of *meurtre*, arson, and a few others, and when it is direct. Moreover, such incitement cannot, under the new law, be made by pictures or emblems. Attacks upon "la morale publique et religieuse" are no longer subject to punishment, though attacks "aux bonnes mœurs" continue to be so.

The right to prove the truth of imputations made upon public functionaries is extended to imputations made upon "les corps "constitués, les armées de terre ou de mer, les administrations "publiques, les jurés, et les témoins." It is also extended to "les directeurs ou administrateurs de toute entreprise indus-"trielle, commerciale ou financière faisant publiquement appel à "l'épargne."—See *Collection des Lois* for 1881, pp. 291-324.

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# A HISTORY

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# CRIMINAL LAW.

## CHAPTER XVI.

### LIMITS OF CRIMINAL JURISDICTION IN REGARD TO TIME, PERSON, AND PLACE—ACTS OF STATE—EXTRADITION.

CH. XVI.

HAVING in the first volume fully considered the history and present state of the law relating to criminal procedure, I come to the substantive criminal law; and the first question which arises in connection with it is as to its extent? For what time, upon what persons, and within what local limits, is it in force? These questions involve several curious inquiries. I do not know that they have ever been fully considered, but they possess considerable interest, especially on account of their connection with international law, and the light which they throw on its nature. The law as to Acts of State and Extradition is closely connected with this subject, as in each instance the question arises, How far the criminal law of England concerns itself with offences committed out of England either upon or by foreigners?

### [1] I.—TIME.

With regard to limitations as to time, it is one of the peculiarities of English law that no general law of prescription in criminal cases exists amongst us. The maxim of our law has always been "Nullum tempus occurrit regi," and as a criminal trial is regarded as an action by the king, it follows that it may be brought at any time. This principle has been

[1] See *Digest of Criminal Procedure*, art. 15.



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carried to great lengths in many well-known cases. In the middle of the last century Aram was convicted and executed for the murder of Clarke, fourteen years after his crime. Horne was executed for the murder of his bastard child (by his own sister) thirty-five years after his crime. In 1802 Governor Wall was executed for a murder committed in 1782. Not long ago a man named Sheward was executed at Norwich for the murder of his wife more than twenty years before; and I may add as a curiosity that, at the Derby Winter Assizes in 1863, I held a brief for the Crown in a case in which a man was charged with having stolen a leaf from a parish register in the year 1803. In this instance the grand jury threw out the bill.

There are a very few statutory exceptions to this general rule. Prosecutions for high treason, other than treason by assassinating the sovereign, and for misprision of treason, must be prosecuted within three years (7 & 8 Will. 3, c. 3, ss. 5, 6).

Certain prosecutions for blasphemous writings and words must be within three months and four days respectively (9 Will. 3, c. 35) of the offence.

Offences against the Riot Act (1 Geo. 1, st. 2, c. 5) must be prosecuted within twelve months.

Illegal drilling (60 Geo. 3, 1 Geo. 4, c. 1) must be prosecuted within six months.

Certain offences against the Game Laws (9 Geo. 4, c. 69) must be prosecuted within six months.

Offences punishable on summary conviction must be prosecuted within six months (11 & 12 Vic. c. 43, s. 11).

Offences committed in India by official persons must, if prosecuted in England, be prosecuted within six years after the offence (33 Geo. 3, c. 52, s. 140); or, if prosecuted before the Special Parliamentary Court constituted by 24 Geo. 3, sess. 2, c. 25, within three years after the offender leaves India (see sec. 82).

## [1] II.—PERSONS.

As a general rule the criminal law applies to all persons whatever who are within certain local limits, the extent of

[1] *Dig. Crim. Proc.* art. 14.

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which is discussed below, whatever may be their native country. There are, however, a few exceptions, none of which can be regarded as of much practical importance.

The first exception is the sovereign for the time being. This is merely an honorary distinction of no practical importance. It is implied in the maxim, "The king can do no wrong." It may be observed that the penalties which would be attached to the commission of a crime by a reigning sovereign would, in the present state of society, be so much more serious than the risk of legal punishment, that a reigning sovereign of this country is under stronger motives to abstain from crime, as he has fewer temptations to commit crime than any other person in it.

How far this personal immunity from the criminal law would extend to a foreign sovereign resident in this country is a question not worth discussing.

The question of an ambassador's privilege is a little less remote from practice. The following is [1] Blackstone's account of the matter: "The rights, the powers, the duties, and the "privileges of ambassadors are determined by the law of "nature and nations, and not by any municipal constitutions. "For as they represent the persons of their respective masters, "who owe no subjection to any laws but those of their own "country, their actions are not subject to the control of the "private law of that state wherein they are appointed to "reside. He that is subject to the coercion of laws is neces-"sarily dependent on that power by whom those laws were "made; but an ambassador ought to be independent of every "power except that by which he is sent, and of consequence "ought not to be subject to the mere municipal laws of that "nation wherein he is to exercise his functions. If he grossly "offends, or makes an ill-use of his character, he may be sent "home and accused before his master, who is bound either to "do justice upon him, or avow himself the accomplice of his "crimes. But there is great dispute among the writers on "the laws of nations, whether this exemption of ambassadors "extends to all crimes, as well natural as positive, or whether "it only extends to such as are *mala prohibita*, as coining, and

[1] 1 *Com.* 253.



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CH. XVI. "not to those that are *mala in se*, as murder. Our law seems "formerly to have taken in the restriction as well as the "general exemption. For it has been held both by [1] our "common lawyers and civilians that an ambassador is privi-"leged by the law of nature and nations; and yet if he "commits any offence against the law of reason and nature "he shall lose his privilege, and that therefore if an ambas-"sador conspires the death of the king in whose land he is, "he may be condemned and executed for treason; but if he "commits any other species of treason it is otherwise, and "he must be sent to his own kingdom."

Blackstone's language about the law of nature and nations and his reasoning appear to me weak, but I apprehend that if the question should ever arise how far an ambassador's privilege against the criminal law extends, the great question for the court to decide would be as to English usage and authority, and as to actual usages, as illustrated by historical facts, between other nations. Why an English court should be bound to attach special importance to the theories upon international law of foreign writers whose language is obviously rhetorical and inaccurate, and whose views do not agree, I am unable to understand.

The application of the criminal law to alien enemies, or aliens on board English ships against their will, is subject to some modifications, though the question has so seldom arisen that there is little authority upon it. I will notice in their order the few authorities and cases which I have found. The first is [2] a passage in Foster's *Discourse on High Treason*. After referring to the case of ambassadors, he seems to put "spies taken in time of war, actual hostilities being on foot "in the kingdom at the time," and "prisoners of war," on a footing analogous to that of ambassadors. They may, he considers, be punished "for murder and other offences of

[1] The principal authority referred to by Blackstone for this is *4th Institute*, chap. xxvi. p. 152—157. Coke goes much further in restraining the privileges of ambassadors than Blackstone. "If a foreign ambassador being "*pro rex* committeth here any crime which is *contra jus gentium*, as treason, "felony, adultery, or any other crime which is against the law of nations, he "loseth his privilege . . . and may be punished here as any other private "alien." In the last edition of Stephen's *Commentaries* (ii. 485—486, edition of 1880) this passage of Blackstone is not modified.

[2] P. 188.

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"great enormity which are against the light of nature and "the fundamental laws of all society," but "they may "be thought not to owe allegiance to the sovereign, and so "to be incapable of committing high treason," or, as it appears from a note, any offence which might be regarded as peculiar to the country where they are. He illustrates this view by a note in these words: [1] "At the gaol delivery for "the city of Bristol" (where Foster was Recorder), "in "August, 1758, Peter Moliere, a French prisoner of war, was "indicted for privately stealing in the shop of a goldsmith "and jeweller a diamond ring valued at £20. I thought it "highly improper to proceed capitally upon a local statute "against a prisoner of war, and therefore advised the jury to "acquit him of the circumstance of stealing in the shop, and "to find him guilty of simple larceny to the value laid in the "indictment. Accordingly he was burnt in the hand and "sent to the prison appointed for French prisoners." There would be a degree of difficulty amounting to practical impossibility in drawing the line between offences "against the "light of nature" and local offences; indeed Foster's distinction in this particular case relates not to the crime but to the punishment. It seems wholly irrational to say that if a French prisoner of war and an Englishman jointly steal a ring in a shop the law of nature and nations is that both shall be convicted of the felony, and sentenced to death, but that in order that the Frenchman may have his clergy the jury shall in his case find that the crime was not committed "in a shop," though the Englishman's was.

The next case to be referred to is that of [2] R. *v.* Depardo, which occurred in 1807. It seems to imply that an alien enemy committing a crime on an English merchant ship was not within the provisions of statutes to be noticed immediately which enabled the king to issue commissions for the trial of murders and manslaughters committed abroad.

Depardo was a Spaniard who, being a prisoner of war, volunteered at Pulo-Penang to serve on board a British

[1] This was disapproved in the case of R. *v.* Johnson, 29 *St. Tr.* 398. Lord Ellenborough said, "it certainly is not law," and Grose, J., agreed with him.

[2] 1 Taunton, 26.

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CH. XVI. privateer, and committed manslaughter on board her in "the "Canton river about one-third of a mile in width within "the tideway, at the distance of about eighty miles from "the sea." A commission to try him was issued under 33 Hen. 8, c. 23, and 43 Geo. 3, c. 113, s. 6, and not under 28 Hen. 8, c. 15. The court seem to have thought that though he was on board an English merchant ship yet, as he was an alien enemy (for they considered apparently that his volunteering on board the privateer made no difference in his position), a crime committed by him in a navigable river in China could not be made the subject of prosecution in an English court. The case was reserved for the opinion of the judges under the old system, and no judgment was ever given, so that it is impossible to say that the case establishes any precise proposition. I do not see how to reconcile it with some [1] later cases, except upon the supposition that the statute under which the commission which tried Depardo sat was considered to apply to the case of British subjects committing murder or manslaughter abroad on land, that the Canton river at eighty miles from the sea was regarded as land though within the tideway, and that Depardo, having been a prisoner of war, and continuing in contemplation of law to be an alien enemy although he was on board an English ship, was not regarded as a British subject. The cases of R. *v.* Anderson and R. *v.* Allen show that the place where the crime was committed was within the jurisdiction of the Admiralty. In the argument in R. *v.* Depardo several cases are mentioned in which foreigners were tried under commissions issued under the Admiralty statute (28 Hen. 8, c. 15); in one of which a French prisoner of war was tried for the murder of another French prisoner of war on board an East Indiaman at the mouth of the Channel.

In 1845 [2] a case was tried at Exeter which supplies an illustration of the line at which the jurisdiction of the

[1] Especially with R. *v.* Anderson (*L. R.* 1; *C. C. R.* 161), see below, an R. *v.* Allen (1 Moody, 494), where the offence was committed "in the river "at Wampu, twenty or thirty miles from the sea." The statute 33 Hen. 8, c. 23, does not in terms apply to crimes committed abroad. It is a curious act. See some remarks on it below, p. 15.

[2] R. *v.* Serva and others, 1 Den. *C. C.* 104.

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English courts ceases. Her Majesty's ship *Wasp* took a ship called the *Felicidade*, fitted for the slave trade, but having no slaves on board, and Captain Usher, the commander of the *Wasp*, put Lieutenant Stupart in command of the *Felicidade* and directed him to chase in the *Felicidade* another ship called the *Echo*. Lieutenant Stupart chased the *Echo* accordingly, took her, and put Mr. Palmer, a midshipman, and eight men in charge of her. The *Echo* had a cargo of slaves on board. Part of the crew of the *Echo*, including all the prisoners, were transferred to the *Felicidade*, and Palmer and his men were placed in charge of her, Lieutenant Stupart taking charge of the *Echo*. The prisoners rose upon and killed Palmer and his men. They were captured, tried for murder at Exeter, and sentenced to death. The case being reserved for the opinion of the judges, was twice argued, and it was held by [1] eleven judges to two that the conviction was wrong. The ground of this decision was "want of jurisdiction in an "English court to try an offence committed on board the "*Felicidade*, and that if the lawful possession of that vessel "by the British Crown through its officers would be sufficient "to give jurisdiction, there was no evidence brought before "the court at the trial to show that the possession was law-"ful." It seems from the argument that the legality of the seizure of the *Felicidade* was considered by the court to turn upon the construction of certain articles of treaties between England, Brazil, and Portugal, upon one view of which the English officers had, while upon another they had not, a right to take possession of the *Felicidade* for the purpose of bringing her before a mixed commission.

The case, therefore, shows that the criminal law of England does not apply to foreigners on board a ship unlawfully in the custody of an English ship of war.

The liability to the English criminal law of foreigners on board English merchant vessels has been clearly established, even if they are on board without their own consent, and

[1] Tindal, C.-J., Pollock, C.-B., Parke, B., Alderson, B., Patteson, J., Williams, J., Coltman, J., Maule, J., Rolfe, B., Wightman, J., Erle, J., against Lord Denman, C.-J., and Platt, B. This was three years before the Court for Crown Cases Reserved was established, so that no judgments were delivered, though there is a short note of the opinion of the judges.

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even if a foreign court has concurrent jurisdiction over them. This was decided by three cases,—[1] R. *v.* Lopez, and R. *v.* Sattler, decided in 1858, and R. *v.* Anderson (L. R. 1 C. C. R. 161) decided in 1868. Lopez was a foreigner who committed an offence on board an English ship, which he had entered as a sailor voluntarily. Sattler was a foreigner who at Hamburgh was by the Hamburgh police put, against his will, on board an English steamer, to be taken to England and tried for a theft which he was said to have committed there. Anderson was an American sailor who committed a manslaughter on an English ship "in the Garonne, about thirty-"five miles from the sea, and about 300 yards from the "nearest shore, within the flow and ebb of the tide." It was held that all three were subject to the English criminal law. In the course of the argument in R. *v.* Sattler, [2] Lord Campbell intimated a doubt whether a prisoner of war attempting to make his escape would be guilty of murder if he killed a sentinel who tried to stop him.

It is difficult to extract any definite proposition from these authorities as to the cases in which foreigners are liable to English criminal law, when they are brought, against their will, into places where that law is, as a general rule, administered. None of them, however, is inconsistent with, and each of them more or less distinctly illustrates, the proposition that protection and allegiance are co-extensive, and that obedience to the law is not exacted in cases in which it is avowedly administered, not for the common benefit of the members of a community of which the alleged offender is for the time being a member, but for the benefit of a community of which he is an avowed and open enemy.

Thus, in the cases above referred to, Sattler and Lopez had the protection of the law of England, though Sattler was placed within its protection against his will. In the case suggested by Lord Campbell of the prisoner of war shooting the sentry the prisoner of war would be deprived of his liberty as an act of war, and his attempt to regain it would be an act of war. If, however, a prisoner of war committed a crime unconnected with an attempt to recover his liberty (for

[1] D. and B. 525. [2] *Ib.* 543.

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instance, rape or arson), he would be liable to the same punishment as other persons, because as regards all other matters than the deprivation of liberty he would be entitled to the same protection as others.

Serva's case proves [merely that a wrongful extension of military power does not carry with it a corresponding extension of the criminal law.

Depardo's case, for the reasons already given, is anomalous. It may show that the rule that foreigners on board British merchant ships in foreign harbours are liable to English criminal law was not fully established in 1807.

### III.—PLACE.

I now come to the question of the limits of the criminal law in relation to place, which is closely connected with the question of its limits in relation to persons. The subject is one of considerable intricacy, and involves the following classes of crimes:—

(1) Crimes committed on land in England.

(2) Crimes committed on land out of England.

(3) Crimes committed at sea, whether within the realm of England or without.

(4) Crimes committed on foreign ships of war in British waters.

(5) Crimes committed in places to which the Foreign Jurisdiction Acts extend.

Before the matters connected with these different classes of crimes can be considered it is necessary to consider a question which applies to all of them, namely, in what place is a crime committed if it is made up of acts and occurrences (both or either) happening in different places?

No general rule upon this matter has been, nor do I see how such a rule can be, laid down, as crimes differ greatly in their nature. Most of them can hardly be committed in more places than one. For instance, treason by levying war, riots, piracy, perjury, bigamy, the great majority of offences against the person, malicious injuries to property, and a great majority of the common offences against property, must be

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committed in a definite place. There are some on which a difficulty might arise, though I do not know that it ever has arisen. For instance, it is a misdemeanour to disobey the directions of a public statute. Suppose a man is commanded by statute to do something which he omits to do. Where is his offence committed? Suppose no time to be specified at which the act was to have been done, at what place can it be said with propriety that the person in default did not do it?

This, however, is a speculative puzzle not worth discussion. The cases of actual difficulty which have occurred are such as these. A in Devonshire fires a gun at B in Somersetshire and kills him. Is A's crime committed in Devon or Somerset? A on land shoots B in a boat at sea. Is A's crime committed on sea or on land? A wounds B in one place and B dies in another. In which place is the crime committed? A writes a libel in Leicestershire and sends it by post to London, where it is printed in a newspaper. Does A publish in Leicestershire or in London?

As regards crimes committed in England these difficulties have practically been removed by the legislation as to venue, the result of which has been given [1] above, and in particular by the 7 Geo. 4, c. 64, s. 12, which provides, amongst other things, that where an offence is begun in one county and completed in another the offender may be proceeded against in either. Where, however, the jurisdiction of a court or country over a crime depends on the place where the crime was committed, the difficulty still remains. The matter was discussed in the case of [2] R. *v.* Keyn, not so so fully as the other points which arose in that case, but much more fully than on any other occasion of which I am aware. The facts were these. Keyn, in command of the *Franconia*, a German ship, on the high seas, navigated her so negligently as to run into and sink the British ship *Strathclyde*, causing the death by drowning of a woman named Young. One of the questions raised in the case was whether Keyn's act was done on board the English ship. Mr. Justice Denman

[1] Vol. I. p. 276.
[2] L. R. 2 Ex. see p. 103 (judgment of Denman, J.), p. 158 (judgment of Lord Coleridge, C.-J.), pp. 232—235 (judgment of Cockburn, C.-J.).

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and Lord Coleridge thought it was. Their reasoning, or rather Mr. Justice Denman's reasoning, to which Lord Coleridge and [1] Mr. Justice Lindley assented, was founded principally on [2] Coombes's case. Coombes from the shore shot a man engaged in pushing off a boat aground on a sandbank in the sea, 100 yards from the shore. It was held that Coombes's crime was committed on the high sea, and that he was subject to the Admiralty jurisdiction. An [3] American case went further. An American sailor in a ship in one of the Society Islands' harbours fired a shot which killed a man in (apparently) a foreign ship. The American court held that the crime was committed on board the foreign ship, and that therefore the American court had no jurisdiction to try it. On these grounds the learned judges mentioned thought that Keyn committed a crime on an English ship.

Lord Chief Justice Cockburn agreed in the premiss, but denied the conclusion. He thought that Coombes's case was rightly decided, [4] putting his conclusion on the principle that "in such a case the act in lieu of taking effect immediately is "a continuing act till the end has been effected; that is, till "the missile has struck the blow, the intention of the party "using it accompanying it throughout its course." He thought also that it by no means followed that because the act was done where the bullet struck its mark it was not also done where the shot was fired, and considered that in holding the contrary the American case went too far; but he also thought that wherever the act was done the local presence of the agent within the country was necessary to give jurisdiction over him. He thought, in short, that a foreigner shooting an Englishman on shore from a foreign boat on the high sea would be guilty of murder in England, [5] but not of a murder for which an English court could try him.

Upon the whole, four of the judges who decided the case of R. *v.* Keyn seem to have been of opinion that a crime committed by an act which extends over more jurisdictions than one in space is committed in the jurisdiction in which it takes

[1] L. R. 2 Ex. 28.
[2] Leach, 388.
[3] United States *v.* Davis, 2 Sumner, 482.
[4] L. R. 2 Ex. 234.
[5] This would now be altered by the operation of the Territorial Waters Act.

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effect, whether or not it is also committed in the jurisdiction in which it begins to be done. In accordance with this view, Baron Pollock and I lately held that a man who obtained goods from a merchant in Prussia by false pretences contained in a letter sent from Amsterdam, where he lived when he wrote the letter, obtained them in Prussia, and we refused a *habeas corpus* to prevent his extradition accordingly.

CRIMES COMMITTED ON LAND IN ENGLAND.—There has been considerable discussion on the question whether any part of the sea forms part of the realm of England, but no question can arise as to the extent of that part of the realm of England which consists of dry land. It is bounded by the Scotch border and by low-water mark, and within these limits the criminal law prevails over all persons whatever with the exceptions already noticed.

CRIMES COMMITTED ON LAND OUT OF ENGLAND.—With regard to offences of this class also there is little difficulty. [1] I am not aware of any exception to the rule that crimes committed on land by foreigners out of the United Kingdom are not subject to the criminal law of England, except one furnished by the Merchant Shipping Act of 1854 (17 & 18 Vic. c. 104, s. 267), noticed below. There may be exceptions in the orders made under the Foreign Jurisdiction Acts.

A question of the greatest importance and delicacy is connected with this matter which has never yet been judicially decided, and which, when it occurs, will deserve the most careful consideration. It is this: How far are acts committed abroad, which if committed in England would be crimes, recognised as crimes by the law of England for the purpose of rendering persons in England criminally responsible for steps taken in relation to them, which if taken in relation to crimes committed in England would make them accessories before or after the fact, or which would amount to a conspiracy to commit it? For instance, A

[1] The Government of India has power to legislate for public servants, both in native states included in British India, and in native states adjacent to British India. There are a certain number of European and American foreigners in the service of the Government of India, and many native foreigners, Afghans, Persians, &c., and the Government of India claims a right to legislate with respect to them whilst they are beyond the limits of British India, either in protected states or beyond the border.

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and B in England conspire to commit a robbery in France. A, in England, advises B to commit a robbery in France, and supplies him with means to do so. B steals goods in France, and A, knowing them to be stolen, receives them in England. Are A and B in the first case guilty of an indictable conspiracy? Is A in the second case an accessory before the fact if the robbery is committed, and is he guilty of inciting B to commit a crime if the robbery is not committed? Is A in the last case an accessory after the fact, or a receiver of stolen goods? These questions were raised in the famous case of R. *v.* Bernard, who was tried, at the Central Criminal Court in 1858, as an accessory before the fact to the murder in Paris of several persons, killed by a shell thrown by Orsini at the carriage of Louis Napoleon. There were three judges, and the case was left to the jury, but with an intimation that in case of a conviction the question whether the prisoner had committed a crime against English law would be stated for the Court for Crown Cases Reserved. The jury acquitted the prisoner. As regards the particular case of murder and incitement to commit murder, the matter is now set at rest by 24 & 25 Vic. c. 100, ss. 4 and 9. These sections provide in substance that persons who conspire in England to murder foreigners abroad, or in England incite people to commit murders abroad, or become in England accessories (either before or after the fact) to murder or manslaughter committed abroad, shall be in the same position in every respect as if the crime committed abroad had been committed in England. The question, however, still remains unsettled as regards all offences except murder. I do not think it proper to give a decided opinion upon this subject, because it is by no means unlikely to be raised judicially, but I will make one or two observations upon it. One strong argument against the criminality of such acts is that the law of England does not deal with crimes committed abroad at all. The law of England does not forbid a Frenchman in France to rob another Frenchman in France. This being so, it seems difficult to say that it forbids an Englishman to incite in England a Frenchman to commit a robbery in France. The argument on the other side is that in all common cases it would

 be highly expedient that all civilised countries should recognise offences, committed in each other's territories, as offences for the purpose in question. But to this it may be replied that this is an argument for the legislature and not for the judges. The law as to conspiracies to commit crimes abroad stands on a footing rather different from the question as to accessories. A crime committed abroad is morally as bad as a crime committed in England, and there is authority for saying that any agreement to do an act of that nature is indictable. Whatever may be the merits of the case legally, it seems to me clear that the legislature ought to remove all doubt about it by putting crimes committed abroad on the same footing as crimes committed in England, as regards incitement, conspiracy, and accessories in England. Exceptions might be made as to political offences, though I should be sorry if they were made wide.

As a general rule offences committed by British subjects out of England are not punishable by the criminal law of England, but this is subject to several exceptions. [1] In ancient times the constable and marshal had a jurisdiction over some offences committed by Englishmen abroad. War was, for a great length of time, the principal occasion of the collection of any considerable number of British subjects in foreign countries, and when an English army was in the field the constable and marshal had charge of all that related to its discipline, and put in force the law martial. They had jurisdiction in appeals, and perhaps in cases of common offences, committed either by soldiers or persons in the camp ; but whatever their jurisdiction may have been, it has long since become entirely obsolete. There is no longer a constable, and the office of the earl marshal is no more than a hereditary honour, with ceremonial duties on rare occasions. All cases in which crimes committed abroad can now be tried in England are cases in which statutory provisions have been made to that effect. These exceptions are as follows :—

(1.) By 35 Hen. 8, c. 2, it is enacted that all offences

[1] As to the Constable and Marshal's Court, see Coke, *4th Institute*, cap. xvii. pp. 123—128. As for their authority in time of war, see the Ordinances of War, supposed to be of the time of Henry IV., or perhaps Richard II. *Black Book of the Admiralty*, i. 288—297.

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already made or declared, or hereafter to be made or declared, to be treason, misprision of treason, or concealment of treason, committed by any person out of the realm of England, may be tried before the Court of King's Bench by a jury of the shire in which the court sits, or before commissioners assigned for the purpose by the king in any shire. This is not to interfere with the privilege of peers to be tried by their peers.

(2.) By 33 Henry 8, c. 23, power is given to the king to issue a commission to try any person who is examined before the King's Council, or three of them "upon any "manner of treason, misprision of treason, or murder," and who is thought to "be vehemently suspected of any" such offence. The trial is to be in any county, and the commissioners are to have power to try the suspected person in whatsoever time or place, within the king's dominions or without, the offence was considered to be committed. [1] This was repealed as to treason and misprision of treason by 1 & 2 Phil. & Mary, c. 10, s. 7, but it was extended to manslaughter by 43 Geo. 3, c. 11, s. 6. It was repealed by 9 Geo. 4, c. 31, which, however, enacted in place of it, by s. 7, that any of his Majesty's subjects might be indicted and tried in England for murder or manslaughter, or for being accessory before the fact to murder, or after the fact to murder or manslaughter, "on land out of the United Kingdom, whether "within the king's dominions or without." This provision was repealed and re-enacted in 1861 by 24 & 25 Vic. c. 100, s. 9, which enacts that where any murder or manslaughter is committed on land out of the United Kingdom, whether within the queen's dominions or without, and whether the person killed were a subject of her Majesty or not, the offence may be dealt with in all respects as if it had been committed in England in the county or place in which the suspected person is apprehended or in custody.

(3.) The Foreign Enlistment Act (33 & 34 Vic. c. 90), creates many offences, most of which can be committed either within or without her Majesty's dominions.

(4.) It is not quite certain how far the offences created by

[1] *3rd Institute*, p. 27.

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the acts prohibiting the slave trade are locally confined to the queen's dominions. [1] It seems that they apply to all parts of the world, but this is doubtful.

(5.) There are several statutes by which governors, lieutenant-governors, and other civil and military officers of colonies and other British possessions abroad, may be tried in England for acts of oppression done in the discharge of or under colour of their official powers. The Acts are 11 Will. 3, c. 12, 42 Geo. 3, c. 85, and as regards India in particular, 10 Geo. 3, c. 47, 13 Geo. 3, c. 63, 24 Geo. 3, sess. 2, c. 25, and 26 Geo. 3, c. 57.

CRIMES COMMITTED AT SEA.—The subject of crimes committed at sea may be considered under the following heads:

(1.) The ancient jurisdiction of the admiral of England. (2.) The transfer of this jurisdiction to the ordinary courts. (3.) The local extent of this jurisdiction, and in particular the question of the jurisdiction over the territorial waters forming part of the high seas. (4.) The question of jurisdiction over foreign ships of war in British harbours and other landlocked waters.

Crimes committed at sea were anciently under the jurisdiction of the admiral. The origin of the office of the admiral is obscure. It is obvious that from the very earliest times there must have been some such officer. Coke quotes a record which he says dates from about 22 Edward I. (1294), which shows that at that time there was an "[2] Admirale de "la Mier d'Angleterre," and he refers to other records which show that in early times there were often many admirals at once, who exercised jurisdiction within specified limits; [3] for instance, in Edward I.'s reign Botetort was admiral from the mouth of the Thames northwards. In Edward II.'s time Kyriell was admiral from the Thames westwards including the Cinque Ports. Perhaps the most curious instance of this occurred in 1406 (7 & 8 Henry 4), when [4] "the "merchants of England," undertaking to guard the seas, were allowed to choose "two sufficient persons, one for the

[1] See R. *v.* Zulueta, 1 *C. and K.*, 226–227; also Santos *v.* Illidge, 8 *C. B.* (N. S.), 861.

[2] *4th Institute*, 143.

[3] *Ib.* 145.

[4] *Rot. Par.* 569, 571.

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"south, the other for the north, who shall have by Royal "Commission such power as other admirals have hitherto "reasonably had, and shall cause malefactors, if any such "there are to be punished" (*ferrount justifier les malfaisours si ascuns y soient*). In process of time, however, a single officer bearing the title of Lord High Admiral came to be appointed, whose duties were principally discharged by deputies or vice-admirals within particular local limits.

The admiral had a court, the proceedings of which were regulated according to the course of the civil law. Such at least is the common statement of the text writers, and it is also countenanced by statutes. It appears, however, to require some limitation, for the [1] *Black Book* of the Admiralty shows that it was not always the case. In the "rules or orders about matters which belong to "the Admiralty," many regulations are contained showing that in some cases the procedure was by jury. For instance, [2] "If any one be indicted that he hath willingly "cut the cable of a ship without any reasonable cause "whereby a ship is lost or any man killed, for the death "of the man he shall be hanged; and if no man be killed "he shall restore to the owners of the ship the value of "the ship and damages according to the discretion of the "admiral, and shall pay a fine to the king if he hath "wherewithal. And if he hath not wherewith to satisfy "for the said ship, and the owner thereof will prosecute him, "if he *be thereof convicted by twelve men he shall be hanged*, "and in such case he shall not be condemned at the king's "suit, and there doth not lie a quarrel" (trial by battle) in this case. Again, [3] "If a man be indicted that he hath "feloniously taken an oar or an anchor or other small thing,

[1] Published by the orders of the Master of the Rolls in 1871, and edited by Sir Horace Twiss. The rules and orders are at vol. i. p. 41 and following. They are supposed to have been written about the middle of the fourteenth century, and perhaps for the government of the fleet preparatory to the expedition which terminated in the great battle of the Swin, in 1340. (Vol. i. xxxi.)

[2] P. 45.

[3] P. 49. See also pp. 50, 53, 55, 63, 64, 81, 83, 87, in all of which reference is made to convictions "by twelve men." Perhaps the most curious instance is at p. 83, where it is provided that if a man is convicted by twelve men of suing at common law any merchant "for any thing of ancient right belonging "to the maritime law," he is to be fined.



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CH. XVI. "and be thereof convicted by twelve men, he shall be im-"prisoned forty days, and if he be convicted again, in such "case he shall be imprisoned half a year, and if he be con-"victed of any such thing a third time he shall be hanged." Many other instances of the same kind might be given.

The ordinance quoted may have been local and temporary, but, however this may have been, it is clear that in early times the jurisdiction of the Admiralty courts was ill-defined, and was the subject of great dispute. No doubt the Admiralty judges would do their utmost to extend it by all means in their power. That they did so appears from statutes passed in the reign of Richard II. The first of these (13 Rich. 2, st. 1, c. 5, A.D. 1389) recites that "a "great and common clamour and complaint hath been often-"times made before this time, and yet is, for that the admirals "and their deputies hold their sessions within divers places of "this realm, as well within franchises as without, encroaching "to them greater authority than belongs to their office, in pre-"judice of our Lord the King and the common law of the realm, "and in diminishing of divers franchises, and in destruction "and impoverishing of the common people." Two years afterwards (in 1391) this recital was repealed by 15 Rich. 2, c. 3, and it was enacted that the admiral's court shall have no cognizance of "contracts, pleas, and quarrels, and all other "things rising within the bodies of the counties. Never-"theless," it is added, "of the death of a man and of a may-"hem done in great ships, being and hovering in the main "stream of great rivers, only beneath the [1] bridges of the "same rivers nigh to the sea, and in none other places of the "same rivers, the admiral shall have cognizance."

From 1391 to 1536, the jurisdiction of the Admiralty courts was regulated by these statutes, but in the latter year was passed the statute 28 Hen. 8, c. 15, which may be regarded as the foundation of our present law. It recites that persons committing crimes upon the sea often escaped punishment "because the trial of their offences hath hereto-"fore been ordered, judged, and determined before the admiral

[1] In old printed copies it is "pointz"; in old abridgments "portes"; in the parliament roll "pontz."—*Revised Statutes, note.*

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"or his lieutenant and commissary, after the course of the "civil laws, the nature whereof is that before any judgment of "death can be given against the offenders, either they must "plainly confess their offences (which they will never do "without torture or pains), or else their offences be so plainly "and directly proved by witnesses indifferent, such as saw "their offences committed, which cannot be gotten but by "chance at few times, because such offenders commit their "offences upon the sea, and many times murther and kill such "persons being in the ship or boat where they commit their "offences which should witness against them on their behalf." It is enacted by way of remedy that "all treasons, felonies, "robberies, murders, and confederacies, hereafter to be com-"mitted upon the sea, or in any other haven, river, creek, or "place where the admiral or admirals have, or pretend to "have, power, authority, or jurisdiction, shall be inquired "tried, heard, determined, and judged according to the course "of the common law, and as if they had been committed on "land, in shires or places," within the realm limited by the king's commission to the admiral or his deputy, "and to three "or four such other substantial persons" as the king should appoint. These "substantial persons" were always in practice judges of the common law courts.

This passage is in many ways remarkable. It suggests a suspicion that in Admiralty cases torture may have been in use. It also throws light on what has already been said as to the contrast between trial by jury and trial by witnesses, and in particular, it proves that the former was considered as being the more likely of the two systems to secure convictions.

Be this as it may, the change made by this statute has formed the foundation of subsequent legislation, strangely clumsy and intricate in its form, but which has ultimately produced the simple result that all crimes committed at sea can be tried before any court in England, otherwise competent, before which the offender may be brought, or before any Supreme Court in a colony, or any High Court in India.

The details are a highly characteristic instance of the peculiarities of our statute book.

The act of Henry VIII. already referred to, enabled the

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king to issue a commission for the trial in any "shire or "place" in England of "treasons, felonies, robberies, murders, "and confederacies" committed at sea.

In 1700, when piracy was very prevalent, and colonies and plantations had multiplied, an act was passed (11 & 12 Will. 3, s. 7) applying only to "piracies, felonies, and robberies." It authorised the king to issue commissions to certain military, naval, or official persons in any colony or foreign possession, to hold courts consisting either of seven or three members, with power first to commit for trial, and afterwards to try, sentence, and execute persons accused of piracy, felony, or robbery on the sea. They were to follow a simple method of procedure laid down in the act (s. 6), which provided, amongst other things, that the prisoner might call witnesses who shall be sworn.

In 1717, by the 4 Geo. 1, c. 11, s. 7, it was enacted that persons tried under the act of William III. *might* be tried according to the provisions of the act of Henry VIII., which, I suppose, meant that[1] in colonies, &c., where juries could be had, the trial might be by jury.

In 1719, the act of William III. was made perpetual.

In 1799, by 39 Geo. 3, c. 37, the act of Henry VIII., which had been confined to "treasons, felonies, robberies, murders, and confederacies," was extended to all other offences whatever committed on the high seas, and such offences were declared to be of the same nature and liable to the same punishment as if they had been committed on shore, and it was enacted that they should be tried as if they had been included in the act of Henry VIII. This act applied only to trials in England.

In 1806, by 46 Geo. 3, c. 54, the acts of Henry VIII. and William III. were recited, and it was also recited that "divers "treasons, [2]murders, and divers other felonies and misde-

[1] It is often necessary, in considering Indian and colonial legislation, to remember that it is meant to apply to cases in which the free population, or the white population, is extremely small. Many provisions in the old Jamaica Acts, for instance, become intelligible only when it is remembered that in many parts of the island the free whites were a mere handful.

[2] I should have thought the word "felonies" in the act of William III. would have included murder, but this throws a doubt upon it. The "divers other felonies" are, I suppose, statutory felonies created subsequently to the act of William III.

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"meanours not mentioned in" the statute of William III. could not be tried by virtue of commissions under that act, and could be tried only by bringing the accused person to England to be tried under the act of Henry VIII. It then gave the king power to issue his commission to any "four "discreet persons" in any colony, who were to try any offence whatever committed on the sea "according to the common "course of the laws of this realm used for offences committed "upon the land in this realm." In 1826 (7 Geo. 4, c. 38) these commissioners were enabled to take examinations in respect of such offences, and to commit the offenders for trial.

Under all these statutes, which are still in force, though they have practically gone out of use on account of the later legislation now to be mentioned, a special commission is necessary to give authority for the trial of offences committed on the sea, but this necessity has been gradually removed. In 1834, by the Central Criminal Court Act (3 & 4 Will. 4, c. 36. s. 22), that court was empowered to try all offences committed within the jurisdiction of the Admiralty, and in 1844, it was provided by the 7 & 8 Vic. c. 2, that all commissioners of Oyer and Terminer, or gaol delivery, should have all the powers which commissioners under the act of Henry VIII. would have as to trial of offences committed at sea.

These acts gave all courts in England jurisdiction over all offences committed at sea, but they did not apply to India, and left the Colonies in general under the Acts of William III. and George III. The Supreme Courts of Calcutta, Madras, and Bombay, and the High Courts which were substituted for them, had Admiralty jurisdiction by virtue of the acts by which they were constituted, and by the charters issued under the provisions of those acts. This jurisdiction was at first local, but was extended to the whole sea by 33 Geo. 3, c. 52, s. 156, and the same was the case with some colonial courts. For instance, the Supreme Courts in New South Wales and Van Dieman's Land had Admiralty jurisdiction by 9 Geo. 4, c. 83, s. 4, and also jurisdiction over all offences committed by British seamen in New Zealand, Otaheite, or other islands in the Pacific Ocean. The first general measure

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CH. XVI. on the subject, however, was the 12 & 13 Vic. c. 96 (passed in 1849), which empowers all colonial courts to proceed against persons charged with crimes on the sea, or within the jurisdiction of the Admiralty, in the same way as if the offence had been committed upon any waters situate within the limits of the colony and within the limits of the local jurisdiction of the criminal courts of the colony. In case of conviction, offenders were to be punished as if their crime had been committed in England. This act was extended to India by 23 & 24 Vic. c. 88. In 1874 these acts were modified by [1] 37 & 38 Vic. c. 3, which extends both to the Colonies and to India. It provided that in such cases the offender should be liable to the same punishment as if his offence had been committed in the colony, or (if the act constituting the offence was not punishable by the law of the colony) to such punishment as should seem to the court most nearly to correspond to the punishment to which he would have been liable in England.

Notwithstanding all this legislation the subject has, to a great extent, been provided for over again by two other sets of acts.

Each of the [2] Consolidation Acts of 1861 contains a section providing that all the offences which it creates shall, if committed within the jurisdiction of the Admiralty, be regarded as being of the same nature and shall be subject to the same punishment, and be tried, &c., in the same manner as if it had been committed on shore in any place in which the offender may be apprehended or be in custody. As all the common offences are included under the provisions of these acts (which, as I shall have occasion to show hereafter, form a near approach to a penal code), the effect of these sections is to re-enact in a rather different form, the greater part of 7 & 8 Vic. c. 2.

Besides these enactments, the Merchant Shipping Acts make an entirely separate and independent provision for by far the largest class of crimes which fall within the

[1] Passed in consequence of the case of R. *v.* Mount, *L. R.* 6 *P. C.* 283.

[2] 24 & 25 Vic. c. 96, s. 115; c. 97, s. 72; c. 98, s. 50; c. 99, s. 36; c. 100, s. 68.

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Admiralty jurisdiction, namely, crimes committed on British ships or by British seamen.

The first of these provisions occurs in the Merchant Shipping Act, 1854 (17 & 18 Vic. c. 104, s. 267), which provides that "All offences against property or person committed in "or at any place either ashore or afloat out of her Majesty's "dominions, by any master, seaman, or apprentice who, "at the time when the offence is committed, or within "three months previously, has been employed in any "British ship, shall be deemed to be and be dealt with in "all respects as offences committed within the jurisdiction "of the Admiralty." So that a Greek sailor belonging to a British ship who stabs a man in a quarrel at Marseilles may be tried for it in England.

This was followed, in 1855, by a provision (18 & 19 Vic. c. 91, s. 21) that "If any person, being a British subject, charged "with having committed any crime or offence on board any "British ship on the high seas, or in any foreign port or harbour, "or if any person not being a British subject, charged with hav-"ing committed any crime or offence on the high seas, is found "within the jurisdiction of any court of justice in her Majesty's "dominions which would have had cognizance of such crime "or offence, if committed within the limits of its ordinary "jurisdiction, such court shall have jurisdiction to hear and "try the case as if such crime or offence had been committed "within such limits." So that if one British seaman stabs another in Marseilles harbour, or if an American on a British ship stabs a fellow-passenger on the high seas, either can be tried under the Indian Penal Code by the High Court or Calcutta, if the ship goes to India, or under the common law and the 24 & 25 Vic. c. 100, in any competent court in England, if the ship goes to England.

The Merchant Shipping Acts also contain provisions by which consular officers and naval courts are authorised to take depositions which may be used in evidence in [1] England, and by which a consular officer may send alleged offenders either to England, or to any British possession, to be tried for their offences.

[1] 17 & 18 Vic. c. 104. ss. 260—263, 268, and 270.

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The result is that no less than four methods are provided by the existing statute law for punishing offences committed at sea, namely, *first*, by commissions issued under the acts of Henry VIII., George III., and George IV., which are unrepealed though they are superseded; *secondly*, by the jurisdiction given to the ordinary criminal courts in England by the Central Criminal Court Act and the 7 & 8 Vic. c. 2, and to the ordinary criminal courts in India and the colonies by the other acts above referred to; *thirdly*, in the case of all common crimes, by the provisions of the Consolidation Acts of 1861; and *fourthly*, in the case of crimes committed on British ships or by British seamen either on board or in foreign ports, by the Merchant Shipping Acts.

This is a good illustration of one of the latest phases of English legislation—its extraordinary luxuriance and want of unity. The old acts of Henry VIII. and William III. were first amended by the 46 Geo. 3, and then superseded by the more general enactments of 1844 and 1849, first as to England, and then as to the colonies. The Merchant Shipping Act of 1854, a most elaborate and singularly well-arranged, comprehensive, and well-drawn code of all that relates to merchant shipping, aiming at completeness, provided for the greater part of the subject over again from a point of view, and for a purpose entirely different from those which caused the other acts to be passed. When the greater part of the criminal law was consolidated in 1861, the same process was gone through for the fourth time, and again from a different point of view.

Passing from the jurisdiction of the courts over crimes committed at sea, I come to the question of the local limits of the Admiralty jurisdiction. The Admiralty jurisdiction upon the high sea, that is to say upon the sea beyond low water mark and not within the body of any county, has never been disputed, and since the time of Edward III. has been admitted to be exclusive.

There was indeed a time when the Court of King's Bench is said to have claimed to have jurisdiction over crimes committed on the narrow seas. [1] Hale quotes eight cases from

[1] 2 Hale, *P. C.* 13. These cases are carefully examined by Cockburn, C.-J.,

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the records in illustration of this, but he says that he finds no such instance later than 38 Edward III. (A.D. 1363). It also is clear that there were disputes as to the limits between the jurisdiction of the Common Law Courts and the Admiralty Courts during the reigns of Edward III. and Richard II.; the former claiming exclusive jurisdiction (which the latter contested) over all waters included within the body of any county, that is say, over ports, havens, arms of the sea, and mouths of rivers. These disputes were settled as far as criminal jurisdiction was concerned ([1] for as to civil jurisdiction the difference long continued) by the statute of Richard II. already quoted, which affirmed the admiral's jurisdiction in cases of homicide and mayhem only in respect of "great "ships being and hovering in the main stream of great rivers "only beneath the bridges of the same rivers nigh to the sea." Taken with the act of Henry VIII., which related to "crimes "committed upon the sea, or in any other haven, river, creek, "or place where the admiral or admirals have, or pretend to "have, power, authority, or jurisdiction," [2] this act has been construed to mean that the admiral has jurisdiction over all waters within the body of any county concurrently with the Courts of Common Law, and also that he has jurisdiction in all such waters in foreign countries concurrently with the foreign courts. It has been [3] held, for instance, that a crime committed by an American seaman on board a British ship at Bordeaux, below the lowest bridge of the Garonne, is committed within the jurisdiction of the Admiralty of England though the French courts would have concurrent jurisdiction. The jurisdiction would also, I suppose, extend up to London Bridge, though concurrently with that of the Central Criminal Court and the Assize Courts of Essex and Kent.

There are some particular places as to which it is difficult to say whether they do or do not form part of the body of a

in R. v. Keyn, *L. R.* 2 *Ex. Div.* 163-167. He considers that they do not establish Hale's view.

[1] See Coke, *4th Institute*, ch. xxii. p. 134, &c.

[2] R. v. Bruce. 2 Leach, *C. C.* 1093. In this case it was held that a crime committed on Milford Haven was within the Admiralty jurisdiction.

[3] R. v. Anderson, *L. R.* 1 *C. C. R.* 161. In R. v. Allen, 1 *Moo. C. C.* 494, a similar decision was given as to an offence committed at Wampu, "twenty "or thirty miles from the sea." No evidence was given about the tide, but it was shown to be a place "where great ships go."

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county. It was held in [1] one case that the whole of the Bristol Channel at Cardiff (where it is about ten miles broad) forms, I suppose up to the midstream, part of the bodies of the counties of Glamorgan and Somerset respectively, but it is difficult to say how far down the channel this extends, and the decision supplies no principle upon the subject. The case was elaborately argued, and the only authority quoted which bears the least appearance of laying down a principle is a passage in Hale, *de jure Maris*, which says, "[2] that arm or "branch of the sea which lies within the *fauces terræ*, where "a man may reasonably discern between shore and shore is, "or at least may be, within the body of a county, and there- "fore within the jurisdiction of the sheriff or coroner." The judgment in Cunningham's case may perhaps be thought to have gone beyond what was necessary to the decision of that case. The offence was committed in Penarth Roads in a position difficult to explain fully without a map, but so situated that the judgment might perhaps have been given on the narrower ground that the ship was within islands forming part of the county of Glamorgan, and in a bay from one point of which people could see what passed on board. There were, however, difficulties in drawing any narrower line than the court actually drew.

One matter of minor importance is quite clear. The part of the coast between high and low water mark over which the tide flows is subject to the jurisdiction of the Courts of Common Law when the tide is out; and to the Admiralty jurisdiction when the tide is in.

[1] R. *v.* Cunningham, Bell *C. C.* 72.

[2] The original authority is a passage in FitzHerbert, *Corone*, 399. It is not to be found in the Yearbooks, but is said in FitzHerbert to have been decided on the Kentish Iter in 8 Edward II. (A.D. 1315). It is in these words: "Nota "per Stanton justice que ceo nest pas faũce de mere ou homme puit veier "ceo q̄ est fait del un part del ewe et del autre comme a veier̄ de lun terre "tanq. a laũt, q̄ le coroñ viendr̄ en ceo cas et fr̄a son offic̄ auxi c̄oe auent "avyent en un brace del mer̄ la ou home puit veier de lun parte tanque a "lauter del" (unintelligible word—"auĕt") "que en cel lieu auient puyt pais "auer conisanes," &c. Coke (*4th Institute*, 140) translates this thus: "It is "no part of the sea where one may see what is done of the one part of the "water and of the other, as to see from one land to the other, that the coroner "shall exercise his office in this case, and of this the country may have "knowledge." Hale, Hawkins, Leach, and East, all say much the same, but they all quote this passage from FitzHerbert. One or two of the words and the grammar puzzle me, but the general meaning is clear.

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The next question which arises is as to the persons over whom the admiral has jurisdiction within the limits thus defined. It is well settled, as I have already shown, that his jurisdiction applies to all persons on board British ships, whether natural-born subjects or foreigners.

It is equally well settled that the admiral has jurisdiction over all persons of whatever nation who commit the crime of piracy on any part of the sea. A pirate, as the old writers say, is an enemy of the human race, and is to be dealt with as such. It must, however, be observed that there are two kinds of piracy, namely, first, piracy at common law, or (as it is often called) piracy by the law of nations; and secondly, piracy by statute; and the jurisdiction of the admiral extends to foreign pirates only when they commit piracy at common law. Of this offence there is not, and cannot be, any authoritative definition agreed to by all nations alike.[1] The latest authoritative English definition of the offence is contained in the case of [2] A.-G. of Hong Kong *v.* Kwok-a-Sing, in which the question was whether there was evidence that a Chinese passenger who helped to take possession of a French ship and kill the captain was guilty of piracy by the law of nations. In delivering the judgment of the court, Lord Justice Mellish said, "Their lordships .... see no reason to doubt that "the charge of Sir Charles Hedges, Judge of the High Court "of Admiralty, to the grand jury, as reported in the case of "R. *v.* Dawson (13 *St. Tr.* 454) and which was made in the "presence and with the approval of Chief Justice Holt and "several other Common Law Judges, contains a correct expo-"sition of the law as to what constitutes piracy *jure gentium.* "He there says; 'Piracy is only a sea term for robbery; piracy "'being a robbery within the jurisdiction of the Admiralty.... "'If the mariners of any ship shall violently dispossess the "'master, and afterwards carry away the ship itself or any of "'the goods with a felonious intention, in any place where

[1] A large collection of definitions given by different writers will be found in a note to the American case of the United States *v.* Smith, 5 Wheaton, 153. The list is at p. 163, *note.*

[2] *L. R.* 5 *P. C.* pp. 199, 200. The coolie's own account of the matter was that he had been entrapped on board by false pretences, that he was practically being kidnapped as a slave, and that what he did was done in order to regain his liberty. See also my *Digest of the Criminal Law*, p. 64.

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CH. XVI. "'the Lord Admiral hath jurisdiction, this is robbery and "'piracy.'" With every respect for so high an authority, this definition, though no doubt correct as far as it goes, can hardly be regarded as complete. If it asserts that every act done in any part of the high seas is piracy, which, if done in England would be robbery, it would follow that if a French sailor on a French ship extorted money from one of his fellow sailors on the middle of the Atlantic, by threatening to accuse him of infamous crimes, he would be guilty of piracy, for such an act would undoubtedly be robbery if done in England. On the other hand, according to the definition quoted, if an armed ship full of men made a desperate attempt to capture a merchantman with a view to plunder, and was, after a severe action, herself captured, the captain and crew would not be guilty of piracy, for their act done on land would have been not robbery, but an assault with intent to rob, even though it might have been accompanied by murder. Hence it seems to follow that some acts done at sea, which would be robbery if done on shore, are not piracy; and that some acts which would not be robbery if done on shore, would, according to the common use of language, be piracy if done at sea. I have never met with a definition of the offence which dealt with or appeared to recognize these difficulties. I think, however, it may be safely stated that in modern times at least no case has been treated as piracy unless the ship itself has been taken from the control of its lawful master and either plundered or carried off or scuttled by the criminals, or unless the criminals have been cruising as robbers and thieves. Whether mere cruising in order to commit piracy has been treated as piracy by courts of law, I cannot say, but I think that commanders of British men-of-war would feel no hesitation in treating as a pirate an armed vessel cruising for piratical purposes even if there were no proof that it had accomplished them.

There are a [1] certain number of offences which have been declared by statute to be piracy. They are committing acts of hostility under a foreign commission, various acts done in

[1] See my *Digest*, Articles 105—109, 114, and 11 & 12 Will. 3, c. 7, 8 Geo. 1, c. 24, 18 Geo. 2, c. 30, 5 Geo. 4, c. 113.

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aid of pirates by mariners, and slave-trading. The admiral has no jurisdiction over such offenders unless they are British subjects, and I do not know what use there is in describing such acts as piracy. The description might in some cases slightly extend the risk of an underwriter on a policy of marine insurance, but it would have no other effect.

So far I have assumed that the jurisdiction of the admiral is subject to the same limitations on every part of the high seas wherever situated, but this is no longer true, though the famous case of [1] R. v. Keyn, often called the *Franconia* case, decided that it was so at common law. This remarkable case was in itself so instructive and curious, that though the doctrine which it established was altered by the Territorial Waters Act (40 & 41 Vic. c. 73, 1878), I will make some observations upon it.

The case was this. Keyn was in command of the *Franconia*, a German ship, on a voyage from Hamburg to St. Thomas. When within two and a half miles from the beach of Dover, and less than two miles from the head of the Admiralty Pier, the *Franconia*, by the negligence (as the jury found) of the prisoner, ran into the British ship *Strathclyde*, sank her, and caused the death of one of her passengers. Keyn was tried for manslaughter and convicted at the Central Criminal Court, and the question was whether he had committed any offence within the jurisdiction of the admiral of England. The case was twice argued, once before six, and again before fourteen judges, on seven different days. Of the fourteen judges one (Mr. Justice Archibald) died before judgment was delivered. Of the remaining thirteen [2] seven were of opinion that the conviction must be quashed, and [3] six were of opinion that it must be confirmed.

The length of the judgments delivered (which fill 176 octavo pages) and the number of the authorities referred to and discussed is so great that the nature of the differences of opinion upon which the court were divided may easily escape

[1] *L. R.* 2 *Ex. Div.* 63—239.

[2] Cockburn, C.-J., Kelly, C.-B., Bramwell, L.-J., Lush and Field, J.J., Sir R. Phillimore, and Pollock, B. Archibald, J., was of the same opinion.

[3] Lord Coleridge, C.-J., Brett and Amphlett, L.-J.J., Grove, Denman, and Lindley, J.J.

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attention. The following is the result of a study of all the judgments.

The following matters were undisputed, and formed the ground common to both parties in the discussion.

1. It was conceded that at common law the jurisdiction of the courts of Oyer and Terminer and gaol delivery, was bounded by low water mark, except only in the case of land-locked waters such as ports, havens, and arms of the sea.

2. It was further conceded that the admiral had jurisdiction over all persons in British ships on the high seas all along the coast from low water-mark seawards, and indeed it might be said from the line covered by the sea at any given moment seawards.

3. It was affirmed by the majority of the judges that the jurisdiction of the admiral, so far as persons were concerned, was the same on every part of the high seas, that is to say, that it extended to all persons, whether natural-born subjects or not, on board of British ships, but to no others.

4. It was affirmed by the minority of the judges that within a marine league of low water-mark the Admiral had jurisdiction over all persons whatever in all ships whatever.

The controversy thus turned upon the question whether this last assertion could be made out.

Those who asserted it argued that all or a great majority of writers on international law affirm that every nation has jurisdiction over a strip of the sea adjacent to the coast at least a maritime league in width; that it follows from this that England has such a jurisdiction; that if so the jurisdiction must be vested in the admiral because it is not vested in the ordinary courts unless as possessed of the admiral's jurisdiction; that the criminal jurisdiction of the admiral was never expressly restricted, and was probably intended to be as wide as it could be; that therefore it must be presumed to have extended to all persons whatever in ships of whatever nation within at least three miles of the coast.

The majority of the judges was not altogether unanimous, but most of them agreed in the judgment of Lord Chief Justice Cockburn, the effect of which was very shortly as follows:—

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The extent of the realm of England is a question, not of international, but of English law.

There is no evidence that the sovereigns of this country ever either claimed or exercised any special jurisdiction over a belt of sea adjacent to the coast, though there is evidence that the admiral has always claimed jurisdiction over persons on board of British ships, wherever they might be, and that he formerly claimed jurisdiction over all persons and all ships in the four narrow seas. This claim, however, has long since been given up, and no other claim has ever been substituted for it.

Hence there is no evidence that any British court has jurisdiction over a crime committed by a foreigner on board a foreign ship on the high sea but within three miles of the coast.

This view prevailed by the narrow majority already mentioned. The case led to the passing of the Territorial Waters Jurisdiction Act, 1878 (40 & 41 Vic. c. 73). This act declares that the rightful jurisdiction of Her Majesty, her heirs, and successors, extends and has always extended over the open seas adjacent to the coasts of the United Kingdom, and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defence and security of such dominions. It further declares that an offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the admiral, although it may have been committed on board a foreign ship. It is, however, provided that proceedings for the trial and punishment of a person who is not a subject of Her Majesty, and who is charged with any such offence as is declared by this act to be within the jurisdiction of the admiral, shall not be instituted in any court in the United Kingdom except with the consent of a Secretary of State, and on his certificate that the institution of the proceedings is in his opinion expedient. It is also provided that for the purpose of any offence declared by the act to be within the jurisdiction of the admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be

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CH. XVI. deemed to be open sea within the territorial waters of Her Majesty's dominions.

This enactment has decided the question which was so elaborately discussed in R. *v.* Keyn, but the case still deserves careful study, not only on account of the extraordinary profusion of learning and of ingenious and interesting argument which it contains, but because it suggests several questions of great interest which it does not decide, but merely illustrates. The most interesting of these questions is the general one: What is the true relation of international law to the law of England? Where does the one begin and the other end? The following extracts from the judgments of Lord Coleridge and Lord Chief Justice Cockburn set in a clear light the nature of these questions and their relation to the matters argued in the case of R. *v.* Keyn.

The following passage occurs in the judgment of Lord Coleridge:—

"[1] My brothers Brett and Lindley have shown that by a "consensus of writers, without one single authority to the "contrary, some portion of the coast waters of a country is "considered for some purposes to belong to the country the "coasts of which it washes. I concur in thinking that the "discrepancies to be found in these writers as to the precise "extent of the coast waters which belong to a country (dis-"crepancies after all not serious since the time at least of "Grotius) are not material in this question: because they "all agree in the principle that the waters to some point "beyond low-water mark belong to the respective countries, "on grounds of sense if not of necessity, belong to them as "territory or sovereignty, in property exclusively so that the "authority of France or Spain, Holland or England is the "only authority recognised over the coast waters which "adjoin these countries. This is established as solidly as "by the nature of the case any proposition of international "law can be. Strictly speaking international law is an "inexact expression, and it is apt to mislead if its inexact-"ness is not kept in mind. Law implies a lawgiver and a "tribunal capable of enforcing it and coercing its trans-

[1] *L. R.* 2 *Ex. Div.* 153.

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"gressors. But there is no common lawgiver to sovereign "states; and no tribunal has the power to bind them by "decrees or coerce them if they transgress. The law of "nations is that collection of usages which civilized states "have agreed to observe in their dealings with one another. "What these usages are, whether a particular one has or has "not been agreed to, must be matter of evidence. Treaties "and acts of state are but evidence of the agreement of "nations, and do not in this country at least bind the "tribunals. Neither certainly does a consensus of jurists; "but it is evidence of the agreement of nations on "international points; and on such points when they arise "the English courts give effect as part of English law to such "agreement."

Lord Chief Justice Cockburn, on the other hand, after considering at great length the views of more than thirty writers of different countries on the subject, and commenting upon the differences between them, makes [1] the following remarks: "Can a portion of that which was before high sea "have been converted into British territory without any "action on the part of the British Government or legislature "by the mere assent of writers on public law or even by "the assent of other nations? And when in support of "this position or of the theory of the three-mile zone in "general the statements of the writers on international law "are relied on, the question may well be asked upon what "authority are these statements founded? When and in "what manner have the nations who are to be affected by "such a rule as these writers following one another have "laid down signified their assent to it? to say nothing of "the difficulty which might be found in saying to which of "these conflicting opinions such assent had been given.

"For even if entire unanimity had existed in respect of "the important particulars to which I have referred, in place "of so much discrepancy of opinion, the question would still "remain how far the law as stated by the publicists had "received the assent of the civilized nations of the world. "For writers on international law, however valuable their

[1] *L. R.* 2 *Ex. Div.* p. 202.



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" labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding the law must have received the assent of the nations who are to be bound by it. This assent may be express, as by treaty, or the acknowledged concurrence of governments; or may be implied from established usages, an instance of which is to be found in the fact that merchant vessels on the high seas are held to be subject only to the law of the nation under whose flag they sail, while in the ports of a foreign state they are subject to the local law as well as to that of their own country. In the absence of proof of assent so derived from one or other of these sources, no unanimity on the part of theoretical writers would warrant the judicial application of the law on the sole authority of their views or statements. Nor in my opinion would the clearest proof of unanimous assent on the part of other nations be sufficient to authorize the tribunals of this country to apply without an Act of Parliament what would practically amount to a new law. In so doing we should be undoubtedly usurping the province of the legislature. The assent of nations is doubtless sufficient to give the power of parliamentary legislation in a matter otherwise within the sphere of international law, but it would be powerless to confer without such legislation a jurisdiction beyond and unknown to the law, such as that now insisted on, a jurisdiction over foreigners in foreign ships on a portion of the high seas."

With much of the language of each of these eminent judges I agree, and in particular with what is said by Lord Chief Justice Cockburn, but there are in each passage some expressions with which I do not concur, and it seems to me that the principle laid down by Lord Chief Justice Cockburn deserves to be dwelt upon, and perhaps to be carried somewhat further than he has carried it in the passage quoted.

The expression "International Law" is, I think, inexact and misleading, not only on the ground mentioned by Lord Coleridge in the passage cited, but also because it is commonly applied to different classes of laws, rules, or principles, some of which are laws in the strict sense of the word, though

others are not. To distinguish the different classes of laws, rules, and principles, to which the name of "international "law" is commonly applied, and to show the relation in which they stand to each other would be an interesting and important inquiry. It will be enough for the present purpose to make and to illustrate a single remark. The expression, "international law," is sometimes applied to principles and rules which obtain, or are said to obtain, as between nation and nation, and sometimes to parts of the law of one nation in which other nations are interested. In each of these senses the expression is likely to mislead, unless its inexactness and ambiguity is borne in mind. When it is applied to principles and rules prevailing between independent nations, the word "law" conveys a false idea, because the principles and rules referred to are not and cannot be enforced by any common superior upon the nations to the conduct of which they apply. When it is applied to parts of the law of each nation in which other nations are interested, the word "law" is correct, but the word "inter-"national" is likely to mislead, because though such laws are laws in the fullest sense of the word, and are enforced as such, they are the laws of each individual nation, and are not laws between nation and nation.

I will give an instance of each of the two classes of rules to which the name "international law" is applied. It is often said that treaties form a part of international law, but it is obvious, for the reason given by Lord Coleridge, that the obligation which they impose is not, properly speaking, a legal but a moral one. On the other hand, it is often said that by international law any nation may seize and condemn as prize any ship with its cargo which attempts to break a blockade. In this case there no doubt is a proceeding which in the very strictest sense of the word is legal, but if the matter is carefully considered it will, I think, appear that the law enforced is not a law common to all nations, but the law of the nation which seizes the ship. Each nation in this matter legislates concurrently for all mankind, and as upon the whole this is regarded as convenient for all mankind, no one nation objects. The law, however, is not a law made by



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CH. XVI. all nations, but a law which each nation makes for all mankind, just as each nation makes a law binding upon all mankind, that no man shall commit certain kinds of piracy. The consent of nations does not impose this law. It is merely a circumstance which enables it to be imposed by individual nations, and it is not even an absolutely indispensable circumstance. Proof of this is supplied by the fact that at different times different nations have held different views as to belligerent rights, and their respective admiralty courts have always given effect to those views in preference to any others. The English courts no doubt administer in such cases what they conceive to be the principles accepted by all nations, but they do so because they are part of the law of England, and if Parliament were to pass an act expressly and avowedly opposed to the law of nations, the English courts would administer it in preference to the law of nations, whatever that may be. For instance, it is commonly said that by the law of nations the person of an ambassador is, generally speaking, inviolable, and by the law of England it is a misdemeanour to violate his privileges; but if Parliament were to pass an act putting ambassadors upon the same footing in all respects as private persons, the courts, in case of need, would apply that like any other act of Parliament to any particular case which might arise. Within its own local bounds the sovereign power of each nation is absolute so long as it subsists. At all events it must be regarded as absolute by its own courts of justice. It may, no doubt, be so tyrannical as to provoke resistance at home, or so arrogant and indifferent to the interests of other states as to provoke war from abroad, but as long as it exists courts of justice [1] cannot refuse to put in

[1] When I say "cannot," I use the word in its strict sense, not for "ought "not." If a court of justice avowedly refused to execute an Act of Parliament on the ground that it was opposed to some moral principle, or to the law of nations, I think that the executive government would not carry out its orders, and that the judges would probably be impeached and punished. All that the courts could do in a direct conflict with Parliament would be to protest against its legislation. Judges who regarded it as intolerably wicked might resign or be removed, but they could not alter it. A nation might no doubt be so organised that the judges could overrule the legislature, and that their decisions would be enforced by the executive power if they did so. If such a case occurred, the judges would be the legislature making the law under the form of declaring it. In some English possessions (in India, for instance) the judges can, in certain cases, and occasionally do, declare laws made by the

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force its clearly expressed will. If (to take an impossible case) Parliament were to pass an act to the effect that the whole criminal law of England should apply to the conduct of Frenchmen in France, and that the Central Criminal Court should have jurisdiction over all offences against that law committed in France; and if a Frenchman who had murdered another Frenchman in Paris were brought for trial before the court, the court would try him as it would try an Englishman who had committed a murder in London, but the result might probably be war between France and England.

In precisely the same way it appears to me that the question whether the realm of England extends or not over a certain portion of the high seas is a question of English law which can be called international only if that phrase is taken to mean that foreign nations are interested in it, and that the question whether they are likely to object to it is one to which the legislature ought to have regard in enacting it. The opinions of writers on the subject of international law thus appear to me to be relevant rather to the question, What law can the legislature enact without giving offence to other countries? than to the question, What actually is the law? This view, I think, is favoured by the case of R. *v.* Keyn, as well as by the Territorial Waters Act, though the act being declaratory in its form it may be said to be founded on a different view of the law.

The soundness of this view seems to be proved by the language of the writers upon international law themselves.

In the various judgments delivered in the case of R. *v.* Keyn, will be found a collection of all that has been said upon the subject by any writer of note. No single passage

local legislature to be beyond their powers, and so to be void, but this is always in virtue of power conferred upon them by Parliament. There is no case whatever in which any English court of justice could overrule the provisions of a public Act of Parliament. It is conceivable, indeed, that Parliament might pass an act so outrageous, so unpopular, and supported by so narrow a parliamentary majority that if the judges had and took an opportunity of declaring that it was void upon any ground which had a solemn and plausible tone, as for instance that it was opposed to the elementary principles of justice, or the laws of God and nature, an effective majority of the public at large might refuse to obey it, and so give effect to the judicial instead of the legislative view; but this would be anarchy in disguise, and the possibility of such an event is equivalent to saying that it is imaginable that the judges might put themselves at the head of a revolution.

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is quoted in which any such writer discusses, or professes to state, the actual practice of any nation. All the passages collected are statements of the theories of the various writers as to the rule which ought to prevail; for, in their language, "is" in nearly every case means "ought." A single illustration will be sufficient, for the fact is so notorious that it scarcely requires proof. In the *Mare Liberum* the whole of Grotius's argument in favour of the freedom of the sea is contained in these words:—"Fundamentum struemus hanc "juris gentium quod primatium vocant, regulam cestiprimam "cujus perspicua atque immutabilis est ratio: licere cuivis "genti quamvis alteram adire, cumque eâ negotiari." Selden proves clearly that this was opposed to the practice of the Spaniards, the Portuguese, the English, the Danes, and other nations, and, indeed, the very complaint of Grotius was, that the practice of the Portuguese was opposed to what he describes as the "jus gentium primatium." Obviously, therefore, he opposes to facts an ideal of his own.

The *à priori* character thus claimed for international law by its founder has never, in modern times, been effectually disclaimed by his successors. Their theories all rest at last neither upon common usage, nor upon any positive institution, but upon some theory as to justice or general convenience, which is copied by one writer from another with such variations or adaptations as happen to strike his fancy. Moreover, the history of these theories shows how uncertain and variable they are.

[1] Lord Chief Justice Cockburn gives a complete history of the doctrine of the three mile limit. Down to the earlier part of the seventeenth century various maritime nations claimed, and to a great extent exercised, the right of dominion over greater or less portions of the sea; the kings of England claiming sovereignty in some sense over the narrow seas. "Venice in like manner laid claim to the "Adriatic, Genoa to the Ligurian Sea, Denmark to a portion "of the North Sea, the Portuguese claimed to bar the ocean "route to India and the Indian Seas to the rest of the world, "while Spain made the like assertion with reference to the

[1] *L. R.* 2 *Ex. Div.* 176—191.

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"West." These claims were resisted both in practice by refusal to submit to them, and in theory by arguments, of which those of Grotius may be regarded as for practical purposes the earliest. Grotius maintained in general that the sea was free to all, but admitted that empire could (*i.e.* might rightfully, according to his theories of right and wrong) be obtained over some part of the sea to some extent. Bynkershoek afterwards suggested that as the opinions of earlier writers on the subject were vague "videtur rectius eo potes-"tatem terræ extendi quousque tormenta exploduntur" . . . "generaliter dicendum esse potestatem terræ finiri ubi finitur armorum vis." The very turn of the expression shows that Bynkershoek in this passage was not recording an established usage, but suggesting a practical rule grounded on an intelligible reason. The history of the suggestion thus made is related at great length by Lord Chief Justice Cockburn, who at length arrives at the following result:—[1] "There can be no "doubt that the suggestion of Bynkershoek, that the sea "surrounding the coast to the extent of cannon range should "be treated as belonging to the state owning the coast has, "with but very few exceptions, been accepted and adopted "by the publicists who have followed him during the last two "centuries, but it is at least equally clear in the practical "application of the rule in respect of the particular of distance, "as also in the still more essential particular of the character "and degree of sovereignty and dominion to be exercised, "great difference of opinion and uncertainty have prevailed "and still continue to exist." The Lord Chief Justice then proceeds, in a passage too long for quotation, to specify the differences of opinion to which he refers, and he appears to me to prove to demonstration that though there is a good deal of general resemblance between the views of the different writers, it is impossible to find in their writings any evidence at all that any two nations even, to say nothing of all nations, ever agreed upon any definite rule on this subject. His quotations, indeed, appear to me to establish the conclusion that the writers quoted cannot be regarded as witnesses to the existence in fact of any rule whatever upon

[1] *L. R.* 2 *Ex. Div.* 191.

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CH. XVI. the subject in question, but that they must be regarded in the light of theorists as to what ought to exist whose theories do not agree. This conclusion might be established by reference to their views upon every, or almost every, subject which is commonly considered to be a question of international law.

I now return to the views on the subject of international law expressed by Lord Coleridge and Lord Chief Justice Cockburn. Lord Coleridge says, [1] "The law of nations is that "collection of usages which civilized states have agreed "to observe in their dealings with one another," and he adds that "a consensus of jurists . . . . is evidence of the "agreement of nations on international points, and on such "points, when they arise, the English courts give effect as "part of English law to such agreement."

This passage seems to me to be not altogether correct, or at least complete. It overlooks the distinction between cases in which writers on international law agree in their relation of actual occurrences, implying or constituting usage as between nation and nation, and cases in which they agree in speculative opinions as to what is desirable or just. Where a definite usage between nation and nation exists, and where there is no special law upon the subject to be found in the Statute Book or elsewhere, it is undoubtedly part of the law of England that such usage should be enforced as law, and the works of writers on the subject are the evidence by which the existence of such usages is commonly proved. For instance, it would be easy to collect from such writers evidence of usages observed by all nations with regard to ambassadors, and such usages are recognised as part of the law of England, and are in part embodied in statutes.

In other cases, however, the agreement of the writers in question is not an agreement as to the existence as a matter of fact of any definite usage, but an agreement in a speculative opinion as to what usage would be just or convenient. The opinion that it is just or convenient that every nation should exercise jurisdiction over some part of the sea adjacent to its coasts is an instance of an agreement of this sort, but

[1] *L. R.* 2 *Ex. Div.* 153—154.

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the differences which prevail amongst the various writers both as to its local extent, and as to the character and degree of power over the place (whatever it may be) in which it exists, prove that the writers differ not upon what as a matter of fact is the usage between nations, but upon the merits of theories more or less inconsistent with each other as to what that usage ought to be.

This view I think is substantially that of Lord Chief Justice Cockburn, as delivered in the passage quoted above. I entirely agree with the general drift of the passage quoted, as well as with that of the whole judgment, but there are a few words in it which may not be entirely in accordance with what I have said. The Lord Chief Justice says; "Writers on international law . . . . cannot make the "law. To be binding the law must have received the assent "of the nations who are to be bound by it." If this passage is meant to imply that there are or can be legal relations between independent nations, and that the assent of two nations can constitute a law existing between them, I think that the expression is inexact for the reason which Lord Coleridge gives; but I am not sure that this is the Lord Chief Justice's meaning, for when the passage is read as a whole I find no other expression in it even apparently inconsistent with the view which I have tried to explain, and much which supports and confirms it. That view may be shortly summed up as follows:

As between nation and nation there are no laws properly so called, though there are certain established usages of which the evidence is to be found in the writings of persons who give the history of the relations which have prevailed between nation and nation. Such usages are by the law of England a part of the law of England if no other law overrules them.

There are some particular subjects upon which the laws of each nation affect the interests of all other nations, and in respect of such subjects every nation exercises a power of concurrent legislation over all mankind which is recognised by all other nations. This legislative power may be exercised either in the way of positive enactment by the legislature or in the form of a judicial declaration. When direct legislation

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CH. XVI. takes place the opinion of writers on international law as to what usages are just or convenient is useful as indicating to the legislature what are the limits within which other nations are likely to acquiesce in their legislation. When law upon such a subject has to be judicially declared it is the duty of the judges (in England at least) to recollect that they are declaring a part of the law of their own country, and that the statements of writers upon international law are valuable only in so far as they establish the existence as a historical fact of some positive usage, and that their opinion that a given usage would be just or convenient does not prove that it has in fact existed. If no such usage is shown to exist the result will be that the general law must prevail, even though it may be shown that it is defective, and that it would be just, necessary, or expedient to supplement it by legislation.

These principles appear to me to have been recognised not only by the Court in its decision in R. *v.* Keyn, but by the legislature in passing the Territorial Waters Act, though I admit that the form of the preamble indicates a different conclusion. They no doubt profess to be appealing to an existing system of law, but in truth they are making a new law.

In concluding my references to the case of R. *v.* Keyn, I may observe that my view as to international law seems to me to be strengthened by the fact that several acts have been passed by the Parliament of this country which are distinct cases of legislation for foreigners far beyond any limits which can be assigned to territorial waters. A single instance will illustrate my meaning. By the 39 & 40 Vic. c. 36, s. 179 it is enacted that foreign vessels having on board spirits, tea, or tobacco, otherwise than in certain specified shapes, shall be liable to forfeiture, and their crews to fine, if they are found within various specified distances from the coast; the distances being three miles, three leagues, four leagues, or eight leagues, according to circumstances. Moreover, such vessels may be fired into in order to bring them to. This is clearly a case of legislation over foreigners out of the Queen's dominions. It is tolerated by other nations because they wish to do the same thing, but these are the laws of each nation, not international laws or laws for all nations.

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(4) The topic next to be dealt with, may be regarded as the converse of the case of R. *v.* Keyn. It relates to the question whether a foreign ship of war in an English harbour or other landlocked water is subject to the criminal law of England. Such vessels have been regarded by many writers, especially by French writers, as being invested with the character of what they have called "ex territoriality." It has been said that a ship of war is a floating part of the nation to which it belongs, and that when in the harbour of a foreign state the law of that state does not extend to it. This topic was much discussed in the year 1876, when a question arose as to the conduct to be pursued when a slave contrived to get on board an English ship of war in a foreign harbour, belonging to a country where slavery was practised. It was contended on the one hand that according to international law, the slave in such cases ought to be given up to the local authorities. It was contended on the other, that as by international law the ship was part of the nation to which it belonged the slave ought not to be given up to the local authorities, but to be protected as if he had reached British soil. [1] A commission was appointed in February, 1876, to inquire into the subject. In the course of their inquiries it appeared that there was a difference of opinion between the legal members of the commission on the principles of international law which applied to the case. [2] Six of the commissioners were of opinion that international law required that fugitive slaves should, under the circumstances supposed, be given up, but that "a rigid adherence to that theory by "the commanding officers of British ships in foreign terri-"torial waters in all cases whatever, would be neither "practicable nor desirable." In short, we were of opinion that there was an existing usage between nation and nation, which, in this instance might produce cruelty, and ought, therefore, to be departed from. Sir Robert Phillimore, Mr. Bernard,

[1] The commissioners were the Duke of Somerset, Lord Chief Justice Cockburn, Sir Robert Phillimore, Mr. Mountague Bernard, Mr. Justice Archibald, Mr. (afterwards Lord Justice) Thesiger, Sir Henry Holland, Admiral Sir Leopold Heath, Sir Henry Maine, Sir George Campbell, myself, and Mr. Rothery.

[2] The Lord Chief Justice, Mr. Justice Archibald, Mr. Thesiger, Sir H. Holland, myself, and Mr. Rothery.

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CH. XVI. and Sir Henry Maine thought that "international law . . . . "is not stationary; it admits of progressive improvement, "though the improvement is more difficult and slower than "that of municipal law, and though the agencies which affect "it are different, it varies with the progress of opinion and the "growth of usage." They considered, in short, that no usage which justifies cruelty can be, at all events to that extent, a branch of international law. This difference of opinion in the commission represented two different ways of looking at international law. The Lord [1] Chief Justice, Mr. Rothery, and I, recorded in separate papers our views upon the subject. The Lord Chief Justice and Mr. Rothery examined in great detail all that has been said by writers on international law upon the subject of the "ex territoriality" of ships. My own observations I reprint, as, though they are directed to the special question referred to the commission, they express fully, and after as careful a consideration of the subject as I could give to it, the views which I was led to form on the subject of the liability of persons on board foreign ships of war in English harbours to the criminal law of England.

After saying that the commission was directed to report, amongst other things, upon the nature and extent of such international obligations as are applicable to questions as to the reception of fugitive slaves by Her Majesty's ships in the territorial waters of foreign states, my opinion proceeded as follows:—

Three distinct sets of rights and duties appear to be included under this description:—

1. The rights and duties of the commanding officer acting in his public capacity on the one hand, and those of the local authorities in whose territorial waters the ship is lying, acting in their public capacity on the other.

[1] See *Report of Royal Commission on Fugitive Slaves*, opinion of six commissioners, p. xxiii.; opinion of three commissioners, p. xxiv.; paper by the Lord Chief Justice, pp. xxviii.—lvi.; paper by me, lvi.—lxii.; paper by Mr. Rothery, pp. lxii.—lxxxv. The Lord Chief Justice's paper is one of the many monuments of his extraordinary industry, learning, and literary and mental power, which are scattered about in obscure places, and which ought to be collected and republished in a separate form. Mr. Rothery has gone to the very bottom of the doctrine of "ex territoriality," and shown, in my opinion conclusively, how totally it had been misapprehended by those who advanced it.

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2. The rights and duties of the commanding officer, acting either in his public or in his private capacity, on the one hand, and those of the slave supposed to be on board his ship on the other.

3. The rights and duties of the commanding officer, acting either in his public or in his private capacity on the one hand, and those of the owner of the slave on the other.

Each of these sets of rights and duties may in a certain sense be called international obligations, as each may affect the relation between nations, but as they differ in their origin, their nature and extent must be determined by reference to different laws.

The nature and extent of the first set of rights and duties depend upon [1] international law. If the commanding officer being called upon by the local authorities to perform any act which he was bound to perform by international law, were to refuse to do so, the authorities would have to seek their remedy by diplomatic means, by reprisals, or, in the last resort, by war.

The nature and extent of the second and third sets of rights and duties depend both upon the law of England, and upon the law of the country in the territorial waters of which the British ship is supposed to be lying.

If the commanding officer of a British ship, being under an obligation by the laws of England to afford protection to a slave who had got on board his ship, was nevertheless to deliver him up to his master, and if the slave were afterwards to escape to England, the slave could sue the commanding officer in England for damages for the injury which he had sustained. If, on the other hand, the commanding officer, being under an obligation, either by the law of England or by the law (for instance) of Brazil, not to harbour a slave who has escaped from his master, does so harbour such a slave, the master of the slave might sue him for damages in England, or (I suppose) in Brazil. Whether a judgment recovered in a Brazilian or Cuban court on such a cause of

[1] This expression is used throughout in the sense given to it in my remarks on R. *v.* Keyn. I mean by it actually existing usages or treaties between nation and nation.

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CH. XVI. action could be enforced in England is a question too special and technical to be considered here. For the present purpose it will be sufficient to consider the second and third sets of rights and duties in relation to the law of England only.

In order to give a full answer to the questions proposed in the Commission, it is necessary to consider each of the three sets of obligations above mentioned. In order to make the answers clear they must be considered separately.

First, then, as to the question of international law. To raise this question we must suppose that the local authorities have in accordance with the local law called upon the commanding officer to deliver up a fugitive slave who has taken refuge on board his ship, and that he has refused to do so. Has he or has he not committed an international wrong by such refusal?

I think he has, on the ground that when lawfully required to do so he has prevented the local law from having its due course over a person subject to it.

The only answer which can be given to this is, that it is a principle of international law that a ship of war entering the territorial waters of a foreign state is so completely invested with the character of a part of the country to which it belongs, that every person who comes on board of it must be regarded for every purpose as being in that country; so that a slave on the deck of an English or French ship in Rio Harbour is for all purposes in precisely the same position as if he were in London or Paris.

I know of no authority whatever for this assertion. I think that the authorities upon the subject of the privileges of ships of war prove that in all that concerns the discipline and internal government of the ship, her officers and crew are exempt from the local law. They also prove, perhaps not so decisively, that the ship itself is free from legal process in nearly every case. They may be held to show that neither criminal nor civil process could be executed on board of her, but as far as I know they are silent as to the exoneration of natives of the country who happen to be on board from laws to which they would otherwise be subject. Any privilege short of this which may be accorded by international

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law to ships of war can have only a slight and incidental connection with the question under consideration, because any such privilege put at the highest would affect not the right of the foreign country, but its remedy. It would go only to show that if the commanding officer of a ship of war refuses to deliver up a fugitive slave the foreign power ought not, according to international law, to take him by force, but ought to treat the question as an international one, and to proceed to obtain redress by diplomatic complaints, by reprisals, or, in the last resort, by war. The inference from such a state of things would not be that a commanding officer is at liberty to do as he pleases. The captain of a man-of-war could not wish to say, "I will violate the laws of the country in which "I am received, because my official character enables me to "do so without running any personal risk." On the contrary, his immunities, whatever may be their extent, would impose upon an honourable man a special obligation to observe the laws of the country in which he finds himself, as far as the laws of his own country will permit him to do so. Language is sometimes used implying that, as a commanding officer's obligation to observe foreign laws is only moral, he may disregard them if they are condemned by the moral feelings of his own country. I think that there are cases in which the nation itself may fairly look beyond international law, and direct its officers to disregard it in the interests of persons subjected to cruelty, but such an act is like a declaration of war. It should be done, if at all, by the express order of the sovereign power itself, and by no inferior authority. As a general rule naval officers ought to observe international obligations with special exactness, not although, but because they undoubtedly do, to a certain extent, resemble debts of honour.

These considerations are only applications of the fundamental principle of all international law, which is the absolute and exclusive sovereignty of every nation within its own limits, including its ports and harbours. This principle is stated in the strongest language by Chief Justice Marshall in the case of the Exchange (7 Cranch, p. 136).

"The jurisdiction of the nation within its own territory is

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CH. XVI. "necessarily exclusive and absolute. It is susceptible of no "limitation not imposed by itself. Any restriction upon it "deriving validity from an external source would imply a "diminution of its sovereignty to the extent of the restric-"tion, and an investment of that sovereignty to the same "extent in the power which could impose such restriction.

"All restrictions, therefore, to the full and complete power "of a nation within its own territories must be traced up to "the consent of the nation itself. They can flow from no "other legitimate source."

No state can be supposed, by permitting a foreign ship of war to enter its harbour, to have consented that its own subjects should be able to free themselves from its own laws by going on board that ship. It may, perhaps, be inferred from such a permission that the state which gave it meant in certain cases to rely for the due observance of its laws upon the assistance and good offices of the officers of the ship, but this is quite a different matter from giving up the laws themselves. An illustration will make this plain. Two Italians, resident in Portsmouth, go on board a French ship of war in Portsmouth harbour, and one stabs the other. Conceding for the sake of argument that if the French captain chose to carry off the offender to France, the Mayor of Portsmouth ought not to try to prevent him by force from so doing, and that the local police ought not to enter the ship in order to execute a warrant for the offender's apprehension, it by no means follows that if the French captain gave up the offender we should hesitate to try him at Winchester. Such a trial would I apprehend be justified upon the ground that the murdered man and the murderer both owed a local allegiance to our laws whilst they were on board the French ship although the intervention of the French captain accidentally happened to be necessary to enable us to try the offender.

It may be asked whether these principles would extend to the case of a fugitive slave taken on board a ship of war on the high seas, and brought into the territorial waters of the state from which he had escaped. I think that they would not. The privilege of a ship of war in foreign territorial

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waters, whatever may be its precise extent, would seem to extend to all persons on board the ship and under the control of the commanding officer at the time when the ship enters the territorial waters. Fugitive slaves taken on board the ship on the high seas or elsewhere and brought into the territorial waters of the state from which they have escaped, would seem to be included under this rule.

The rule rests upon the following grounds :—

The essence of the privilege of ships of war in foreign territorial waters is, that the commanding officer is permitted to exercise freely, and without interference on board his ship, the authority which, by the law of his own country he has over the ship's company.

This permission is tacitly given by the very fact that the ship of war is allowed to enter foreign territorial waters.

It implies an undertaking on the part of the local sovereign to abstain from all interference between the commanding officer and the ship's company brought by him into the territorial waters, for if there were no such undertaking the privilege itself might be rendered illusory by the institution of inquiries on the result of which the commanding officer's authority over the ship's company would depend.

It might be argued that this rule would not extend to a fugitive slave in the circumstance supposed, because the slave does not cease to be his owner's property by being received on board a ship of war on the high seas, and because property brought by a foreign ship of war into the country where the owner is should be restored to him.

The answer to this argument is that property in slaves is essentially local, that as soon as the slave reaches the high seas he becomes free as regards every one, except his owners and countrymen if they can catch him, that as soon as he is taken on board a British ship on the high seas he comes under the protection of the law of England, and that the privilege of the ship prevents his title to that protection from being examined into by the local authority so long, at all events, as he remains on board the ship.

Whether this rule may be subject to an exception in the case of natives of the country detained against their will on



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a foreign ship of war is a moot point which it is unnecessary to discuss.

I now pass to the consideration of the second set of obligations referred to above.

In considering them it is necessary to premise that if international law and the law of England are opposed to each other in this matter, if by international law it is the duty of the commanding officer to deliver up a slave to the local authorities, demanding, in accordance with the law of the country, that he should be delivered up, and if by the law of England the slave acquires, by the mere fact of his presence on board the ship, a legal right to the captain's protection, it would clearly be the captain's duty to obey the law of England, and to leave the local authorities to take their remedy by diplomatic means, by reprisals, or by war as they might think proper against the British nation for the international wrong inflicted upon them.

In order, therefore, to test the question as to the nature and extent of the second set of obligations above-mentioned, those, namely, of the commanding officer on the one hand, and of a slave on the other, the following question must be answered:—

If a slave got on board a British ship of war in foreign territorial waters, and if, in compliance with a demand made in accordance with the local law by the local authorities, the commanding officer delivered up the slave and compelled him to return to slavery, would the slave (if he afterwards reached England) have a right to recover damages from the commanding officer in an action for assault and false imprisonment?

I am disposed to think, though not without some hesitation, that the answer must depend on the question whether the deck of a ship of war in foreign territorial waters is or is not regarded by the law of England as being to all intents and purposes part of the soil of England? that if that question is answered in the affirmative, the slave would have such a right of action, and that if it is answered in the negative he would not.

My hesitation arises from a doubt whether the commanding

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officer might not at all events justify the expulsion of the slave from his ship on the ground that as a mere stranger and trespasser he had no right to be there, and that the captain could not be responsible for the consequence of his removal.

Upon this two observations occur. First, to take this ground, is to evade the real question. There is no substantial difference between delivering a man up to slavery and compelling him to leave a ship under such circumstances that the inevitable consequence of such expulsion must be his return to slavery.

Secondly, it seems very doubtful, to say the least, whether the right of a commanding officer or even of the owner of a house or land to remove a trespasser by force from his property extends to cases in which serious personal injury would be caused to the trespasser by such removal, and in which no personal injury or danger would be caused to the proprietor by the trespasser's presence.

The captain of a steamship plying between England and America would have no right to throw overboard a person who had secreted himself on board in order to steal a passage, and it would be to say the least very doubtful whether it would not be the captain's duty to supply him with the bare necessaries of life, of course at a reasonable price and if a sufficient supply for the purpose were available. If a furious mob chased a man whom they wished to ill-use or murder into a barrack square which they were afraid to enter, the right of the officer in command to turn him out as a trespasser would be to say the least exceedingly doubtful. If in a flood a trespasser took refuge in another man's house the owner would surely have no right to put him by force into the water, and in the same way if a slave on the deck of a British man-of-war has by the law of England all the rights which he would possess in the streets of London, I should doubt the commanding officer's right to deprive him of them by forcing him to leave the ship, unless, indeed, his presence there was dangerous to the crew, as might be the case if the ship were short of provisions or the slave had the plague.

Hence the question as to the slave's right to remain on



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board the ship, and to sue the commanding officer for damages for compelling him to return to slavery appears, if not absolutely to depend upon, at all events to be closely connected with the question, Whether by the law of England the deck of a British ship of war in foreign territorial waters is to every intent part of the soil of England?

I am of opinion that this question must be answered in the negative, first because no authority can be found for an answer in the affirmative, and next because it can be shown that such an answer would involve monstrous consequences.

The best illustration of this will be found by reference to the case of crimes. If the proposition in question were law it would follow that in the case of the Italian murdering an Italian on board a French ship in Portsmouth harbour the court at Winchester would have no jurisdiction, for an English court cannot try a foreigner for a crime committed in France. Again, suppose that whilst a British ship was in a French harbour two French workmen employed on board were to quarrel, and one was to kill the other. What would be the duty of the captain? Clearly his first duty would be to place the offender in arrest, but having done so, would it be incumbent on him to carry him to England to be tried, or might he deliver him up to the French authorities? There can be no doubt that the latter would be the only rational course. It might, indeed, be the only one which would not cause a failure of justice, for if the witnesses were Frenchmen (which might easily happen) the captain could not carry them as well as the accused person to England, nor could he take their evidence to be used at the English trial. If, however, an English ship of war is English ground to every intent, a crime committed on board such a ship is a crime committed in England, and must be tried by English law in an English court. The man must accordingly be kept in custody till he can be brought before such a court, and this might be attended with the greatest possible inconvenience.

Take again the case of an ordinary criminal who takes refuge on board a ship of war. How is he to be dealt with?

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To say that he is not to be delivered up to the local authorities at all is an intolerable conclusion. But if he is to be delivered up, and if a British ship of war is strictly and for all purposes British territory, he can be delivered up only according to the procedure prescribed in the Extradition Acts and under the provisions of an extradition treaty. The Extradition Acts (33 & 34 Vic. c. 52, and 36 & 37 Vic. c. 60) not only do not make any provision for such a case, but they prescribe a course of procedure which could not possibly be observed by the commanding officer of a ship of war. For instance, the prisoner is to be taken before a magistrate, and an opportunity is to be afforded to him of applying for a writ of habeas corpus. Besides, there are many countries with which we have no extradition treaties, and in such cases, if the doctrine that a British ship is British ground is carried out strictly no extradition at all could take place, and Her Majesty's ships would be degraded to the position of asylums for criminals.

These consequences appear to me to reduce the supposed principle to an absurdity. But if it fails what is there to interfere with the operation of the ordinary law of the place upon the natives of the country, except the practical difficulty of enforcing it? The inference is that a slave delivered up by a British commanding officer to the local authorities on a demand made by them in accordance with the local law would, if he afterwards reached England, have no right to recover damages against the commanding officer for assault and false imprisonment.

The case of R. *v.* Lesley (Bell, *C. C.* 220) appears to support this view of the subject. In this case the captain of an English merchant vessel was indicted for assault and false imprisonment in having received certain prisoners on board his ship in Chilian waters and carried them against their will to Liverpool. It was held that the defendant's conduct in Chilian waters constituted no offence, but that as soon as the prisoners were detained against their will on the high seas an offence was committed. The principle upon which the former part of the decision proceeded was thus stated by Lord Chief Justice Erle. "We assume that the Govern-

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CH. XVI. "ment could justify all that it did within its own territory, "and we think it follows that the defendant can justify all "that he did there as agent for the Government and under "its authority."

The ship concerned in this instance was a merchant vessel, but if the commanding officer of one of Her Majesty's ships chose to act as the agent of the government of the country, why should he not be entitled to the same protection as the master of the merchant vessel? The only ground on which the two cases could be distinguished would be the principle that a man-of-war is for all purposes part of the soil of England, and I have shown that this principle would lead to consequences which refute it.

If this view is correct the law of England would seem to correspond with the law of France, if M. Theodore Ortolan is accepted as an authority on that subject. No one rates so highly as M. Ortolan the ex-territorial character of ships of war, yet in the fourteenth chapter of his work he deals with the subject just discussed as follows:—

"Lorsque le navire de guerre est dans un port ou dans les "eaux territoriales d'un état étranger il est véritablement "dans un espace soumis à la propriété ou à la souveraineté "de cet état, que si en considération de son caractère de "navire de guerre y jouit d'une franchise illimitée cette "franchise ne peut pas être invoquée comme un droit per- "sonnel par les étrangers réfugiés à son bord; que s'il est "vrai que ces étrangers sont à bord, il est vrai aussi qu'ils "sont encore dans le port ou dans les eaux territoriales de "l'état dont ils ont encouru la justice repressive; on conclura "de toutes ces observations tout en maintenant l'inviolabilité "du navire de guerre sur lequel les autorités locales n'ont "aucune prise, que l'étranger qui y est refugié n'est pas "absolument dans la même situation que s'il était refugié sur "le territoire de l'état auquel appartient ce navire, qu'il "ne peut reclamer en sa faveur l'emploi des mêmes règles "et des mêmes formes que s'il était sur ce territoire; "qu'il faut distinguer ce cas de celui de la véritable "expulsion du territoire ou de l'extradition proprement "dite. En un mot qu'il est de toute necessité que le

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"commandant ait une certaine latitude d'appréciation, "et un pouvoir de se décider et d'ordonner lui-même "immédiatement."[1]

Upon the whole, the conclusion at which I arrive is that whatever may be the precise extent of the privilege accorded by international law or usage to ships of war in foreign territorial waters, it is generally speaking the duty of the commanding officers of such ships to deliver up to the local authorities persons who have broken the local law and taken refuge on board, and that the law of England does not forbid the discharge of this duty. This is the general rule. I do not know that any one disputes it in cases of ordinary laws. The real question is, whether a special exception is to be made in the case of persons who break the laws relating to slavery in countries where slavery is established by law. I do not say that this should not be done, but if it is done it should be done openly and avowedly as an act of power, as an invasion on moral grounds of the sovereignty of independent nations. I do not see how it can be justified as an exercise of a legal or quasi-legal right.

The last set of obligations to be considered are the respective rights and duties of the slave-owners and the commanding officers of ships of war in the territorial waters of the state of which the slave-owners are subjects. The question here is whether a slave-owner could sue the commanding officer of a ship of war for harbouring his slave if he refused to deliver him up to the owner? On this point it is unnecessary to enter at length. The case of [2] Forbes *v.* Cochrane seems to imply that such an action would lie, as the judgment in favour of the defendant in that case proceeded on the ground that the ship in which the slaves were received was not in Spanish waters at the time when they were received; but questions of great difficulty and delicacy might arise as to the degree of assistance which a commanding officer is bound to give to a slave-owner seeking to enforce such a right. I am disposed to doubt whether the commanding officer might not lawfully refuse to discuss the subject with any one

[1] *Dipl. de la Mer.* i. 298, 299.

[2] 2 *B.* & *C.* 448.

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except the local authorities, and refuse to permit the slave-owner to enter his ship on such an occasion. I cannot see that the officers or men would be under any obligation either to assist the owner if he did come on board in the hateful task of removing the slave, or to prevent the slave from defending himself. The commission of scenes of actual violence on the deck of a man-of-war by private persons seeking to establish private rights, would not only be most unseemly in itself, but would be altogether opposed to the objects for which privileges (whatever their extent may be) are granted to such ships.

The most important observation which arises upon this part of the subject is that if instructions based upon the recommendations made in the report should be issued to commanding officers, an officer who acted upon them in good faith would be liable to no proceedings by any slave-owner, as his conduct would fall expressly within the principle of Buron *v.* Denman, and the other cases which decide that no action lies against a public officer by a foreigner for acts done by the public officer as acts of state and under the orders of his own government.

To sum up the conclusions at which I have arrived I think—

(1.) That commanding officers of British ships of war in territorial waters are under an obligation, imposed by international law, to deliver up fugitive slaves who have taken refuge on board their ships when required to do so by the local authorities, in accordance with the local law.

(2.) That the law of England does not forbid them to discharge this obligation.

(3.) That it is doubtful whether by refusing to discharge it they might not incur a personal responsibility to the owner of the slave.

(4.) That the privilege of ex-territoriality (whatever may be its exact nature and extent) is really irrelevant to the subject.

I am conscious that this view of the matter must, in some cases, lead to consequences from which every humane person must revolt. When we reflect upon the atrocious cruelties

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which have at different times and in different countries been sanctioned by law, and which in some countries are still so sanctioned, it must be admitted that if naval officers are directed to respect and give effect to the local law in every part of the world in which they may be, they will at times have to facilitate the commission of cruel and wicked acts.

To deliver up a slave bearing on his or even on her body the marks of the chain and the lash, and to do so with a full conviction that the consequence will be his or her torture, violation, or death, is an act of which it is difficult indeed to think with calmness, especially when by the supposition the agent bears the Queen's commission, and the scene is the deck of a British man-of-war.

However it is by no means true that an act cannot be sanctioned by international law because it is wicked and cruel, for international law, whatever may be its value, is imperfect, and is concerned with imperfect institutions. It is impossible to exaggerate the wickedness and cruelty inseparable from war, yet war is the ultimate sanction on which international law depends. In the great case of Campbell *v.* Hall (20 *St. Tr.* 323) Lord Mansfield said, that upon conquering a country the king "has power to refuse a capitulation. If he refuses and "puts to the sword or extirpates the inhabitants of a coun-"try the lands are his." International law, therefore, may sanction acts more cruel than slavery itself. With every respect for the opinion of those who are able to arrive at a more agreeable conclusion, it seems to me that the fundamental principles of international law, when consistently applied, require the commanding officers of ships of war in foreign territorial waters to refuse protection in all cases whatever to those who break the local law, and to deliver up, on a lawful demand, political refugees, the victims of religious persecution, and slaves who have received or expect from their owners the treatment which a vicious brute would experience from a cruel master. I prefer the explicit admission of these consequences, revolting as they are, to what presents itself to my mind as an attempt to evade them by applying the legal fiction of ex-territoriality to a purpose for which it was not designed, and I join in the recommendations

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of the report, because I regard them as a proposal that the British nation should deliberately take in this matter the course which it regards as just and expedient, although it is opposed to international law as it stands, and aims at its improvement. It is impossible to foresee the results which might follow from adopting the legal fiction of ex-territoriality in its full extent, but it is easy to imagine cases in which it might be in the highest degree injurious to the interests of this country.

THE FOREIGN JURISDICTION ACTS.—I now come to consider the effect of the Foreign Jurisdiction Acts, a subject of great curiosity, but very little known.

The acts in question are 6 & 7 Vic. c. 94 (1843), 29 & 30 Vic. c. 87 (1866), 38 & 39 Vic. c. 85 (1875), 41 & 42 Vic. c. 67 (1878).

The effect of these acts is to give the Queen in Council power to legislate by Orders in Council for her subjects in many places outside of her own dominions. The act of 1843 begins by reciting that the Queen has, "by treaty, "capitulation, grant, usage, sufferance, and other lawful means, "power and jurisdiction within divers countries and places out "of Her Majesty's dominions;" and it goes on to enact that in all such cases she may exercise such power in the same manner in all respects as if the places where the power exists were Crown Colonies. In other words, her power of legislation is unlimited, for the vague limitation which was supposed to exist—that laws made for a Crown Colony must not be repugnant to the common law of England—was repealed as regards orders under the Foreign Jurisdiction Acts by 41 & 42 Vic. c. 67, s. 4, which applied to them the provisions of the Colonial Laws Validity Act, 1865 (18 & 19 Vic. c. 63), which removes (s. 3) that and some other objections to the validity of Colonial Laws.

The act of 1866 (29 & 30 Vic. c. 87) enables Her Majesty to assign to any British court out of the United Kingdom jurisdiction over offences committed against any order made under the act of 1843.

In the years 1872 and 1875, acts were passed for the protection of the Pacific Islanders from kidnapping. The first of

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these acts (35 & 36 Vic. c. 19, s. 9) makes the kidnapping of any native of the Pacific Islands felony, and renders offenders liable to be tried and punished for the offence in any of the [1] Australian colonies. It contains many other provisions intended to prevent the offence. The act of 1875 (38 & 39 Vic. c. 51, s. 6) authorizes Her Majesty to exercise "power "and jurisdiction over her subjects within any islands and "places in the Pacific Ocean not being within Her Majesty's "dominions nor within the jurisdiction of any civilized "power," and to make a High Commissioner for the islands and create a court of justice having jurisdiction over British subjects there.

The [2] act of 1878 gives Her Majesty power to legislate for her subjects in any place where they are resident or resort "which is not subject to any government from whom "Her Majesty might obtain power and jurisdiction by "treaty or" any of the other means mentioned in the act of 1843, and [3] also for all British subjects in any vessel within 100 miles of the coasts of China or Japan. This must, I presume, mean any vessel other than a British ship, as all persons on board any British ship are already subject to the criminal law of England as already explained. The Foreign Jurisdiction Act of 1843 also authorizes the sending of persons charged with offences either for trial or for punishment to British colonies, and for taking the evidence of witnesses on the spot to be transmitted to the court by which any such prisoner is to be tried.

A variety of Orders in Council have been made under the authority of these acts for regulating the proceedings to be taken before various courts to which they apply. I may mention in particular the orders which apply to the courts in China, the courts in various parts of the Turkish Empire, particularly in the courts at Constantinople and in Egypt, and the order relating to the Western Pacific Islands dated

[1] New South Wales, New Zealand, Queensland, South Australia, Tasmania, Victoria, and Western Australia. By the 38 & 39 Vic. c. 51, s. 8, it is enacted that "the term Australasian colonies," in the act of 1872 "shall mean and "include the colony of Fiji." Surely "mean and include" must be wrong. If "Australasian colonies" means Fiji, it is idle to say that it includes Fiji; and if it includes Fiji, it must mean something else besides.

[2] 41 & 42 Vic. c. 67, s. 5. [3] *Ib.* s. 6.

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August 13, 1877. It would be difficult to give an account of the contents of these orders sufficiently detailed to be of value in a moderate compass. Generally speaking, the object of the first and second of the three orders mentioned is to give the various courts authority to try and sentence offenders as nearly as may be according to the laws of England, forwarding them for trial in cases of a specially serious kind,—in the case of the courts of China and Japan, to Hong Kong; in the case of the courts of Constantinople and Egypt, to Malta; or, if they are natives of India, to Bombay. The courts, however, have power to pass heavy sentences. [1] The judge of the Supreme Court at Shanghai may pass sentence of death, which however must not be carried out without the consent of the minister in China or in Japan, as the case may be. [2] The Supreme Court at Constantinople and the court of Egypt may sentence up to twenty years' imprisonment and £500 fine. In cases of murder they may order sentence of death to be recorded, and the matter must be reported to a Secretary of State for Foreign Affairs, who is to say what punishment is actually to be imposed. The punishment actually imposed is not to exceed twenty years' imprisonment.

The Order in Council relating to the Western Pacific is a remarkable document. It applies to the numerous groups of [3] islands in the Western Pacific Ocean which lie in a kind of crescent round Fiji. The substance of the order as far as regards criminal matters is that [4] the High Commissioner for the Western Pacific, the judges of the Supreme Court of Fiji (the Chief Justice is the only judge mentioned in the *Colonial Office List*), and certain Deputy Commissioners, appointed to act for particular districts, are to form the High Commissioner's Court. They are to try all

[1] China and Japan Order, 1865, s. 69.

[2] Order for Courts of the Dominions of the Porte, 268, 269.

[3] They are enumerated in s. 5 of the order:—1. The Friendly Islands, Navigators' Islands, Union Islands, Phœnix Islands, Ellice Islands, Gilbert Islands, Minshull Islands, Caroline Islands, Solomon Islands, Santa Cruz Islands. 2. The Island of Rotumah. 3. New Guinea, eastward of longitude 143°. 4. New Britain and New Ireland. 5. Louisiade Archipelago. 6. All other islands in the Western Pacific Ocean not within the limits of British colonies or within the jurisdiction of any civilized power. 7. The waters within three miles of every island above mentioned.

[4] At present Sir A. Gordon, Governor of New Zealand (*Colonial Office List*, 1882).

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offences[1] according to the criminal law of England for the time being. The trial being in serious cases by a judge and two assessors. [2] The Judicial Commissioner (*i.e.* the Chief Justice of the Supreme Court of Fiji, or any other judge of that court) may sentence to any punishment authorized by the law of England. The High Commissioner and the Deputy Commissioners may sentence up to twelve months' imprisonment and £50 fine. [3] They have also powers of prohibition and deportation. [4] The procedure is very like that of the Indian courts of session. [5] In particular it provides elaborately for the interrogation of the accused. [6] Sentences are to be reported to, and if they exceed a year's imprisonment or impose a penalty of £50 are to be confirmed by, the High Commissioner, who has extensive powers both as to making orders of a legislative kind and as to the remission of punishment.

[7] There are provisions in certain cases for an appeal to the Supreme Court either generally or on a point of law.

The importance and curiosity of these orders lies in the fact that they show how wide is the extent over which English criminal law is in force, and under how great a variety of circumstances it is administered.

## IV.—ACTS OF STATE.

One other topic connected with the extent of the criminal law may be here discussed, though I must repeat that in discussing it, I state only what at present occurs to me, with the view of aiding any judicial consideration of the subject which may hereafter take place, but without expressing any final conclusion. The question to which I refer is, Whether the criminal law applies to what have sometimes been described as acts of State?

In order to consider this question properly it is necessary in the first place to explain it. I understand by an act of State an act injurious to the person or to the property of some person who is not at the time of that act a subject of Her Majesty; which act is done by any representative of Her

[1] Order, ss. 23 and 23. [2] S. 27. [3] Ss. 25. 26. [4] S. 28. [5] S. 31. [6] S. 47. [7] S. 54.

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CH. XVI. Majesty's authority, civil or military, and is either previously sanctioned or subsequently ratified by Her Majesty. Such acts are by no means very rare, and they may, and often do, involve destruction of property and loss of life to a considerable extent.

When an act of this sort is an act of open war, duly proclaimed, there can be no doubt at all that it does not amount to a crime. However unjust a war might be, and however cruelly it might be carried on, there can be no question that the acts done in such a war by the orders of military and naval commanders do not fall under the notice of the ordinary criminal law. If, for instance, the least favourable account of the conduct of Napoleon in ordering the Turkish prisoners to be put to death at Jaffa in March, 1799, be accepted as true, and if Napoleon had been an English general, I do not think that either he or those who carried out his orders could have been convicted of murder. The older definitions of murder expressly say that it is the killing of a person "within the "King's peace," but an open enemy is not within the King's peace, and though a murder committed out of England may be tried in England, I do not think that this alters the nature of the offence itself. If England were invaded, and if, for military reasons, unarmed prisoners after resistance had ceased were to be put to death by an English general, I do not think that a court of law would inquire whether his conduct was proper or not. As soon as it appeared that what was done was an act of war the matter would be at an end. It is impossible to cite cases or explicit decisions in favour of so clear a proposition. There have been almost innumerable wars in our history, and on some occasions great severities have been practised, but I think that no single instance of a prosecution for any act done as a military measure can be mentioned. The prerogative of the Crown to declare war is undoubted, and the very essence of war is that it is a state of things in which each party does the other all the harm they possibly can. The so-called laws of war are mere practices usually observed between contending armies, but they impose, at most, moral and not legal duties.

The difficulty arises when acts which are in their nature

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warlike are done in time of peace. For instance, Copenhagen was bombarded, and the Danes were compelled to deliver up their fleet in September, 1807, without any declaration of war. [1]"Eighteen hundred houses were consumed, whole "streets were levelled with the ground, and 1,500 of the "inhabitants lost their lives." The battle of Navarino was a somewhat similar act; and the same may be said of the recent bombardment of the forts of Alexandria. In no one of these cases was there a war solemnly proclaimed between this country and the country subjected to hostile attack. Cases may easily be put in which warlike measures might be taken on a much smaller scale. For instance, during the American Civil War, it happened on several occasions that a Confederate and a Federal vessel of war lay side by side in an English harbour. When one of the two sailed, orders were given to the other to remain where she was for twenty-four hours, in order to prevent a fight in the immediate neighbourhood of the coast. Suppose that those orders had been disregarded, and that an English ship of war had proceeded to enforce them by firing into the ship trying to leave the harbour, and that lives had been lost. Suppose, also, that the captain of the British ship had been indicted for murder, how would a court of law deal with the case?

Many other cases might be put, but these are enough to show the sense in which I use the expression, "act of State," and the manner in which an act of State may involve consequences which, if wilfully brought about by a private person, would or might be criminal.

I think that if such acts are done by public authority, or, having been done, are ratified by public authority, they fall outside the sphere of the criminal law. I think, for instance, that, if Sir Edward Codrington had been indicted for the murder of Turks killed by the fire of his ship at the battle of Navarino, he would have been entitled to be acquitted as soon as it appeared either that he acted under orders, or that his conduct had been approved.

I do not know that the principle has ever been tested by a criminal prosecution, but it has been repeatedly affirmed in

[1] Alison, xi. 261.

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CH. XVI. civil cases; and if a man is not even liable civilly for an act of State, it would seem to follow *a fortiori* that he cannot be liable criminally.

The leading case on this subject is [1] Buron *v.* Denman. This was an action against Captain Denman, a captain in the navy, for burning certain barracoons on the West Coast of Africa, and releasing the slaves contained in them. His conduct in so doing was approved by a letter written by Mr. Stephen, then Under Secretary of State for the Colonies, by the direction of Lord John Russell, then Secretary of State. It was held that the owner of the slaves could recover no damages for his loss, as the effect of the ratification of Captain Denman's act was to convert what he had done into an act of State, for which no action would lie. It is surely impossible to suppose that if life had been lost in effecting this object, [2] which might easily have happened, Captain Denman would have been liable to be hanged for that which was held not even to amount to an actionable wrong? The principle is that the acts of a sovereign State are final, and can be called in question only by war, or by an appeal to the justice of the State itself. They cannot be examined into by the courts of the State which does them.

This principle has been asserted and acted upon in many later cases. One of the most pointed is [3] The Secretary of State for India *v.* Kamachee Baye Sahiba. In this case the Rajah of Tanjore, having died without issue male, the East India Company seized the Raj on the ground that the dignity was extinct for want of a male heir, and that the property lapsed to the British Government. The Judicial Committee of the Privy Council held on a full examination of the facts that the property claimed by the Rajah's widow "had been "seized by the British Government, acting as a sovereign "power, through its delegate, the East India Company, and "that the act so done, with its consequences, was an act of

[1] 2 *Ex.* 167.

[2] "On one occasion, at the request of Prince Manna, the defendant with "his own hand fired two rockets, which burned the barracoon at Kamasura. "The defendant also set fire to the village of Chicore, by which the plaintiff's "barracoons in that place were destroyed."—2 *Ex.* 176.

[3] 13 Moore, *P. C. C.* 22; see especially p. 86.

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× 97. Confiscation of land in Oudh ?





"State over which the Supreme Court of Madras had no "jurisdiction." . . . "Even if a wrong had been done, it "is a wrong for which no municipal court can afford a "remedy."

In order to avoid misconception it is necessary to observe that the doctrine as to acts of State can apply only to acts which affect foreigners, and which are done by the orders or with the ratification of the sovereign. As between the sovereign and his subjects there can be no such thing as an act of State. Courts of law are established for the express purpose of limiting public authority in its conduct towards individuals. If one British subject puts another to death or destroys his property by the express command of the King, that command is no protection to the person who executes it unless it is in itself lawful, and it is the duty of the proper courts of justice to determine whether it is lawful or not. On this ground the courts were prepared to examine into the legality of the acts done under Governor Eyre's authority in the suppression of the insurrection in Jamaica. The acts affected British subjects only. But as between British subjects and foreigners, the orders of the Crown justify what they command so far as British courts of justice are concerned. In regard to civil rights this, as I have shown, has been established by express and solemn decisions; and it is impossible to suppose that a man should be a criminal when he is not even a wrongdoer.

## [1] V.—EXTRADITION.

The discussion of the limits of time, person, and place imposed on our own criminal law naturally leads to the discussion of the question how far the law of our own country recognises and aids the criminal law of other countries. To a certain extent it does so by providing for the arrest in our own dominions of persons who have committed crimes in foreign countries, and for delivering them up to foreign officers of justice for conveyance to the country demanding them. The law upon this subject is interesting, amongst other things,

[1] *Dig. Crim. Proc.* ch. xviii. arts. 141-146.



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on account of the striking illustration it affords of the principles stated in the earlier part of this chapter as to the relation between international law and the laws of particular nations. Various writers on international law have expressed their views on the subject, but no two nations follow the same practice, and it has in fact been found necessary to provide in each case special laws relating to the subject. These differ from each other widely in a variety of ways, and clearly show that the case of extradition is one in which all nations are to a greater or less extent interested in the legislation of each, but in which no one law is common to or binding upon all.

The law of England upon extradition is extremely modern, and lies in a very short compass:—[1] There are only two English cases in which it was asserted, though even in those cases it was not decided that a power of delivering up a person suspected of crime to a foreign nation demanding his surrender exists at common law. These are East India Company *v.* Campbell (1 Ve. Sen. 246), and Mure *v.* Kay (4 Taunt. 34). In Mure *v.* Kay the question arose upon the pleadings in an action for false imprisonment, part of which had been in Scotland, and Mr. Justice Heath observed, rather by way of illustration than because it was in any way necessary to the case, "By the comity of nations the country in which "the criminal has been found has aided the police of the "country against which the crime was committed in bringing "the criminal to punishment," and he mentioned a case "in Lord Loughborough's time" in which "it was held"—he does not say where or by whom—that the crew of a Dutch ship who had mastered the vessel and brought her into Deal might be sent to Holland. This faint trace of evidence of any such power existing by the common law has been entirely superseded by subsequent legislation.

"The history of the subject in England," [2] says Mr. Clark, "begins with the treaties made with the United States in "October, 1842, and with France in 1843." These treaties were carried into effect by 6 & 7 Vic. c. 75, relating to France,

[1] Clarke on *Extradition*, second edition, p. 24-25.
[2] *Ib.* p. 109.

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and 6 & 7 Vic. c. 76, relating to the United States. The acts entirely failed of their effect. [1] Between 1843 and 1865 the French obtained the extradition of one prisoner only, though they made upwards of twenty demands, for the most part during the earlier years of the period. Extraditions to America were a little less uncommon.

The present law is contained entirely in two acts of Parliament, namely, the Extradition Acts, 1870 and 1873 (33 & 34 Vic. c. 52, and 36 & 37 Vic. c. 60).

[2] The general scheme of the first of these acts (for the second is only an amending act) is as follows:—

(1.) It provides in substance that the queen shall have power, by order in council, to apply the provisions of the act to such conventions or treaties as may be made with any foreign state for the surrender of criminals. The act may be applied as a whole or with such conditions, qualifications, and exceptions as may be deemed expedient (s. 2).

(2.) The application of the act is to be made by an order in council, to be laid before Parliament within six weeks of its being made or of the next meeting of Parliament. The order is conclusive evidence that the arrangement made complies with the terms of the act, and its validity is not liable to be questioned in any legal proceedings whatever (ss. 2 & 5).

(3.) The effect of the provisions of the act is that "fugitive criminals"—that is to say, persons either suspected or

[1] Clarke, pp. 117, 122, 135.

[2] The act of 1870 is singularly ill arranged. It nowhere enacts in terms that persons charged with certain offences may be surrendered. This, which is the leading object of the act, is effected in the following roundabout way. S. 6 enacts that "where this act applies in the case of any foreign state, "every '*fugitive criminal* of that state' who is in England shall be liable to "be apprehended and surrendered." S. 26 defines, a "fugitive criminal" to mean a person accused of an "extradition crime." An "extradition crime" is defined by the same section to mean a crime which if committed in England would be a crime described in the first schedule, and this schedule states what the crimes are. The whole act has thus to be searched through before the meaning of its leading enactment can be ascertained, and that section introduces the subject in the way of a hint. The section (3) which says that in certain cases suspected persons are not to be surrendered precedes the section (6) which lays down or rather gives the first hint of the principle which determines when they are to be surrendered. The exception precedes the rule. Moreover the act is so drawn that on a first reading it produces on the mind the impression that it is entirely devoted to details of procedure. The most important provision of all is put in a schedule.



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CH. XVI. convicted of having committed certain crimes in any foreign country to which the act applies—may be arrested and surrendered to the authorities of that country upon the production of such evidence against them (subject to some modifications) as would have justified their committal for trial on a similar charge in England.

(4.) The crimes for which such a surrender may be made are called extradition crimes. By the act of 1873 the following offences, or any of them, may by any convention be made extradition crimes, namely, offences against any one of the [1] five Consolidation Acts of 1861, offences against the law relating to bankruptcy, kidnapping and false imprisonment, perjury and subornation of perjury (36 & 37 Vic. c. 60, s. 8, and schedule). The schedule of the act of 1870 mentions only nineteen offences which may be made extradition crimes, but fifteen of these are offences against the Consolidation Acts. The others are, piracy by the law of nations, sinking ships, certain assaults on board ship, and conspiracy to make a revolt upon a ship. Moreover, forgery at common law would be included in the schedule to the act of 1870, though it is not within the Forgery Act of 1861. If, as is probably the case, there are any statutory forgeries subsequent to the Forgery Act, they also would be included in the words of the schedule of the act of 1870.

The result is that almost any offence may be made an extradition crime; for instance, a common assault, or the most paltry acts of mischief to property. Practically the extradition treaties are confined to crimes of a serious kind.

It is important to observe that when the extradition of an offender suspected of a crime is demanded, the definition upon which he is delivered up differs from the definition upon which he is tried. For instance, if the French government demanded the extradition of a Frenchman for obtaining goods by false pretences in France, they must give such evidence as would justify his committal for that offence in England. Now by the law of England the goods to be obtained must, in order to constitute the offence, be such goods as are at common

[1] 24 & 25 Vic. cc. 96 (larceny), 97 (malicious injury to property), 98 (forgery), 99 (coinage offences), 100 (offences upon the person).

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law the subject of larceny. To obtain sporting dogs by false pretences, for instance, is not an offence within the statute, because such dogs were not the subject of larceny at common law. Extradition, therefore, could not be granted in respect of such an offence supposing it to be a crime in France. This principle may act either favourably or unfavourably to an accused person. Suppose, for instance, extradition to France were demanded on a charge of murder, and the evidence was that the person against whom the charge was made had killed a man in a duel. It would be of no avail for him to argue that [1] such an act was not murder by the law of France. That would be a question for the French courts. To kill a man in a duel is undoubtedly murder by the law of England, and this is enough to justify the extradition of a person claimed by the French on the grounds of his having committed murder.

The general rule as to extradition is qualified by three exceptions.

First, no person is to be surrendered if the offence in respect of which his surrender is required is one of a political character, or if he proves at any stage of the proceedings described below that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character.

Secondly, no person is to be surrendered unless provision is made by the law of the state to which he is to be surrendered or by arrangement (I suppose this means with the British Government) that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried in that foreign state for any offence committed prior to his surrender other than the extradition crime proved by the facts on which his surrender is demanded.

Thirdly, a fugitive criminal who, when demanded has been accused of or is undergoing punishment for some offence committed within English jurisdiction, is not to be surrendered

[1] For many years past it has been held to be "*meurtre*" within Article 296 of the *Code Pénal*, but between 1810 and 1833 it was held not to be a crime at all. This, however, does not affect the illustration. [2] S. 3.

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CH. XVI. until he has been discharged or has undergone his punishment.

The last of these exceptions calls for no remark, but the first raises a question of importance and difficulty which as yet has never been raised in a court of justice. The second calls for some remark on other grounds.

The question raised upon the first exception is what is the meaning of the expression "an offence . . . . of a political "character?" There are three senses which might naturally be given to the expression standing alone. The first and most obvious sense is an offence consisting in an attack upon the political order of things established in the country where it is committed. High treason, riots for political purposes, crimes like the offences defined by the Treason-Felony Act of 1848, seditious libels and conspiracies, are instances of offences of this class. It is, however, difficult to interpret the expression in this sense, because none of the crimes referred to are extradition crimes. As therefore they are not within [1] the rule, it seems difficult to suppose that the exception was intended to apply to them.

The second sense in which the expression "political offence" can be used is any offence committed in order to obtain any political object. The exception thus interpreted would cover all crimes committed under the orders of any secret political society, such for instance as assassination, arson, robbery, or forgery. It is monstrous to suppose that this interpretation can be the true one. To take an illustration which can hardly give offence in the present day, it would have protected the wretch Fieschi, whose offence consisted in shooting down many persons in the streets of Paris in an attempt to murder Louis Philippe.

The third meaning which may be given to the words, and which I take to be the true one, is somewhat more complicated than either of those I have described. An act often falls under several different definitions. For instance, if a civil war were to take place, it would be high treason by levying war against the queen. Every case in which a man was shot in action would be murder; whenever a house was

[1] See *note* [2], p. 67, *supra*.

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burnt for military purposes, arson would be committed; to take cattle, &c., by requisition would be robbery. According to the common use of language, however, all such acts would be political offences, because they would be incidents in carrying on a civil war. I think, therefore, that the expression in the Extradition Act ought (unless some better interpretation of it can be suggested) to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes if those crimes were incidental to and formed a part of political disturbances. I do not wish to enter into details beforehand on a subject which might at any moment come under judicial consideration, and which, whenever it does so, will probably involve questions as delicate as they are important, but the suggestions made above arise upon the face of the enactment.

The second exception to the general rule is not likely, I think, to give rise to any legal question of difficulty. It is simply an expression of the extreme and, in my opinion, ill-founded jealousy entertained by English sentiment as to the administration of justice in foreign countries. It might work thus. A in England is claimed by France for theft, and his extradition is granted. He is tried, convicted, and sentenced. During his imprisonment it is discovered that some years before committing theft he committed a cruel murder. We insist that the French shall engage not to try him for the murder until he has been either landed or had an opportunity of landing in England. What good do we get by this? The truth is that the exception is based upon a notion that persons charged with having committed crimes in foreign countries are, if not usually, at least frequently, patriotic people prosecuted for attempting to procure reforms by illegal means. My own feeling is that there ought to be no special presumption in favour of political criminals, and that, at all events, if a man commits a political offence, say in 1880, and in 1881 commits a robbery and flies for it to England, he ought to be given up unconditionally.

Sympathy with political offenders is, I think, carried too far, when, to avoid the possibility that a man's extradition may be demanded in order that he may be tried for a political

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CH. XVI. offence, we make it a condition of his surrender that he shall not be tried for any previous offence whatever, except the one for which he was surrendered. Besides, the case of political offenders might easily be provided for specially if it were thought necessary to do so.[1]

I now pass to the procedure by which the extradition of fugitive criminals is under the acts to be effected. The first step in it may be taken in either of two ways. A requisition must in all cases be made by some person recognised as a diplomatic representative of the state requiring extradition to [2] a Secretary of State (in practice the Home Secretary). The Secretary of State may signify the requisition to one of the Bow Street magistrates, and direct him to issue a warrant for the apprehension of the fugitive criminal. [3] The magistrate on the receipt of the order, and on such evidence as would, in his opinion, justify the issue of the warrant if the crime had been committed in England, may issue his warrant.

On the other hand, any justice of the peace may issue a warrant for the apprehension of any fugitive criminal "on "such information or complaint, and on such evidence as "would, in the opinion of the person issuing the warrant, "justify the issue of a warrant if the crime had been com-"mitted" within his local jurisdiction in the United Kingdom. If this course is taken the justice who issues the warrant must send a report of the fact, together with the evidence and information and complaint, or certified copies of them, to the Secretary of State, who, if he thinks fit, may order

[1] This matter is discussed at length and the conclusion indicated in the text is adopted in the report of the Commission on Extradition published in 1878. The commissioners were Lord Chief Justice Cockburn (who drew the report), Lord Selborne, Lord Blackburn, Mr. Russell Gurney, Lord Justice Baggallay, Lord Justice Brett, Lord Justice (then Mr.) Thesiger, Sir John Rose, myself, Sir W. Harcourt, and Mr. McCullagh Torrens. Mr. Torrens dissented from the report of the rest of the commissioners on this point.

[2] S. 7. In the act the words "a Secretary of State" are defined to mean "one of her Majesty's principal Secretaries of State." What other meaning could they possibly have, and how does the definition differ from the word defined? Is there any use in saying "a dog" means in this act one of the animals commonly called by the name of dog. The expression "a police "magistrate" is defined to mean "a chief magistrate of the Metropolitan "police courts, or one of the other magistrates of the Metropolitan police-"court at Bow Street." Here the definition was necessary, if the expression "a police magistrate" was to be frequently used in the body of the act, but it would have been simpler and nearly as short to say what was meant in plain words.

[3] S. 8, 1.

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the warrant to be cancelled, and the person apprehended to be discharged.

The justice is also, when the fugitive criminal is brought before him, to issue a further warrant, under which he is to be taken before a Bow Street magistrate. The Bow Street magistrate is to discharge the fugitive criminal unless within what the magistrate regards as a reasonable time he receives from the Secretary of State an order stating that a requisition has been made for the surrender of the criminal. [1] In the meantime (apparently) he is to proceed to hear the case in precisely the same manner, and with the same powers, as if the prisoner were charged with an indictable offence committed in England. He is also to receive any evidence tendered to show that the offence is of a political character, or is not an extradition crime. If he thinks the evidence sufficient to justify a committal according to the law of England, and [2] "if the foreign warrant authorising the "arrest of such criminal is duly authenticated," the prisoner is to be committed to some prison in Middlesex, where he is to remain for at least fifteen days, in order to give him an opportunity to move for a writ of habeas corpus. He is also to be informed that he has a right to move for such a writ. [3] After the expiration of fifteen days, or after the decision of the court on a return to the writ of habeas corpus or after such further period as may be allowed by the Secretary of State, the Secretary of State may, by a warrant under his hand, order the fugitive criminal (unless he has been released upon the habeas corpus) to be surrendered to any person duly authorised to receive him, and such person may convey him in custody to the country requiring his extradition. [4] If he is not surrendered and conveyed out of the kingdom within two months he may be discharged by a judge upon an application made for that purpose.

Provision is made by ss. 14 and 15 for the proof of depositions or statements on oath taken in a foreign state and of foreign warrants, either by the production of the original, duly authenticated, or by the production of a copy, duly authenticated.

[1] S. 9. [2] S. 10. [3] S. 11. [4] S. 12.

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These are the important parts of the Extradition Acts. They apply, with some modifications, to all British possessions, and to every part of the United Kingdom, the Channel Islands, and the Isle of Man. The terms of the acts do not forbid the extradition of British subjects for crimes committed abroad, but in many, if not all, of the treaties it is provided that no fugitive criminal shall be surrendered by the country to which he belongs.

[1] Extradition treaties have been made with the following nations, the German Empire, Belgium, Italy, Denmark, Brazil, Sweden and Norway, Austria, the United States, France, Holland, Switzerland, Hayti, Honduras, and Spain. There is no treaty with Russia, Greece, or Turkey, nor with any South American State except those mentioned.

[2] In the Session of 1881 an act (44 & 45 Vic. c. 69) was passed called the Fugitive Offenders Act, intended to facilitate the apprehension and return of fugitive offenders from any one part to any other part of the Queen's dominions. It is unnecessary to notice its provisions in detail; they are merely administrative, and involve no principle of any interest.

[1] *Note* in Chitty's *Statutes to Extradition Act*, vol. ii. p. 1041, and see Appendix to Clarke on *Extradition*, 1874.
[2] *Dig. Crim. Proc.* ch. xix. arts. 147-163.

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# CHAPTER XVII.

## OF CRIMES IN GENERAL AND OF PUNISHMENTS.

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THE substantive law relating to the definition and punishment of offences is divided, as I have already said, into two great branches, namely, the law relating to criminal responsibility and the law relating to the definition of crimes. The law of criminal procedure consists of a body of regulations intended to procure the punishment of certain specified acts, and its merits depend entirely on the degree to which, and the expense of all kinds at which it attains those objects. With the substantive criminal law it is otherwise. It relates to actions which, if there were no criminal law at all, would be judged of by the public at large much as they are judged of at present. If murder, theft, and rape were not punished by law, the words would still be in use, and would be applied to the same or nearly the same actions. The same or nearly the same distinctions would be recognized between murder and manslaughter, robbery and theft, rape and seduction. In short, there is a moral as well as a legal classification of crimes, and the merits and defects of legal definitions cannot be understood unless the moral view of the subject is understood. Law and morals are not and cannot be made co-extensive, or even completely harmonious. Law may be intended to supplement or to correct morality. There may in some cases be an inevitable conflict between them, but whatever may be their relation, it is essential to a just criticism of the law to understand what may be called the natural distribution of the class of actions to which it applies.

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For this purpose it will be necessary to say a few words of law in general, and of morals in general. By law, I mean what Austin meant by the word, namely, a system of commands addressed by the sovereign of the state to his subjects, imposing duties and enforced by punishments. By morals I mean a system of rules of conduct imposed in part by the opinion of others and in part by each man's own opinion of his own actions, which is what I understand by the word conscience. The sanction of morality as such is the approbation or disapprobation of others and of ourselves. Moral rules are not so determinate as legal rules, but the sanction by which they are enforced is more certain, as men cannot escape from their own opinion of themselves, nor from their desire of the approbation or fear of the disapprobation of others, nor can they flatter themselves that they are mistaken in the facts from which their estimate of themselves and their own conduct proceeds. When I speak either of law or of morals, I refer to the laws and the moral sentiments which as a fact do actually exist in this country at this time, not of those which may exist hereafter, or may have existed heretofore, or which, in my own opinion or in the opinion of others, ought to exist hereafter.

The first point then to be considered is the nature of the popular and the legal conception of crime in general, their relation to each other and the inference which the existence of that relation suggests as to the nature and objects of punishments.

The great difference between the legal and the popular or moral meaning of the word crime is that whereas the only perfectly definite meaning which a lawyer can attach to the word is that of an act or omission punished by law, the popular or moral conception adds to this the notion of moral guilt of a specially deep and degrading kind. By a criminal, people in general understand not only a person who is liable to be punished, but a person who ought to be punished because he has done something at once wicked and obviously injurious in a high degree to the commonest interests of society. Perhaps the most interesting question connected with the whole subject is how far these views respectively ought to regulate legislation on the subject of crimes,

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"ought" meaning in this instance how far it is for the good of those whose good is considered in legislation that the view in question should be adopted, and "good" meaning the end which the legislator has in view in his legislation. In other words, the question is, what ought to be the relation between criminal law and moral good and evil as understood by the person who imposes the law?

The answer to this question will vary according to circumstances. The first circumstance affecting it is the relation between the legislator and the persons for whom the laws are made. There is a great difference between a small number of Englishmen legislating for India and a comparatively large number of Englishmen legislating for England. There is also a great difference between a dictator like Napoleon, placed in such circumstances that he can practically impose his own will on a great nation, or at least interpret to that nation their own permanent wishes in a way which will continue for ages to be accepted as a practically final interpretation of them, and an English minister who thinks that it would add to the popularity and stability of his government to pass a penal code through Parliament.

When the legislator is a ruler, properly so called, when the word denotes a single person or a small body of persons, enabled by circumstances to impose his or their will on others, the ruler will, of course, be guided in doing so by his own conceptions of the effect which he wishes to produce upon his subjects, and of the extent to which circumstances enable him to produce that effect by legislation. The problem for him, therefore, is, What ought to be the relation of his conception of right and wrong to the laws which he proposes to enact? How far ought he to aim at sanctioning, and how far ought he to aim at correcting, the moral conceptions of those for whom he legislates?

In these islands, where the legislature tends to represent directly the will of a large proportion of the community, it is unnecessary to distinguish between the morality of the legislature and that of the persons legislated for, for the two may be considered as practically identical, so that the question in this case will be the comparatively simple one, In what

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CH. XVII. relation ought criminal law to stand to morality when the effective majority of a great nation legislates for the whole of it, and when there are no other differences of moral standard or sentiment than those which inevitably result from individual differences of opinion and unrestricted discussion on religion and morals?

The answer to this question is not quite simple. In the first place criminal law must, from the nature of the case, be far narrower than morality. In no age or nation, at all events, in no age or nation which has any similarity to our own, has the attempt been made to treat every moral defect as a crime. In different ages of the world injuries to individuals, to God, to the gods, or to the community, have been treated as crimes, but I think that in all cases the idea of crime has involved the idea of some definite, gross, undeniable injury to some one. In our own country this is now, and has been from the earliest times, perfectly well-established. No temper of mind, no habit of life, however pernicious, has ever been treated as a crime, unless it displayed itself in some definite overt act. It never entered into the head of any English legislator to enact, or of any English court, to hold, that a man could be indicted and punished for ingratitude, for hardheartedness, for the absence of natural affection, for habitual idleness, for avarice, sensuality, pride, or, in a word, for any vice whatever as such. Even for purposes of ecclesiastical censure some definite act of immorality was required. Sinful thoughts and dispositions of mind might be the subject of confession and of penance, but they were never punished in this country by ecclesiastical criminal proceedings.

The reasons for imposing this great leading restriction upon the sphere of criminal law are obvious. If it were not so restricted it would be utterly intolerable; all mankind would be criminals, and most of their lives would be passed in trying and punishing each other for offences which could never be proved.

Criminal law, then, must be confined within narrow limits, and can be applied only to definite overt acts or omissions capable of being distinctly proved, which acts or omis-

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sions inflict definite evils, either on specific persons or on the community at large. It is within these limits only that there can be any relation at all between criminal law and morality.

Some modern writers of eminence on this subject have been in the habit of regarding criminal law as being entirely independent of morality. According to this view the one object of criminal law in each case to which it applies is to deter people by threats from doing certain acts. If murder is to be prevented the threat is death. If the cultivation of tobacco is to be prevented, the threat is fine and forfeiture; but in every case the only question is as to the deterrent effect of the punishment, which is regarded as profit; and the pain caused by the infliction of the punishment, which is regarded as loss or expense. [1] Bentham (if I am not mistaken) says that if a fine of a shilling was as efficient in preventing murder as the punishment of death, a fine of one shilling would be the proper punishment for murder, and anything further would be unjustifiable cruelty.

It is possible that by giving an unnaturally wide meaning to common words this statement might be so explained that most people would agree with it. If, for instance, a fine of a shilling were, for some reason, generally recognised as embodying the common feeling of hatred against assassins, and moral indignation at assassination, as fully as the infliction of a shameful death, Bentham's statement might be true; but to discuss so unnatural a supposition would be waste of time. Probably, however, Bentham's meaning was that if murderers in general feared a fine as much as death, they ought, upon conviction, to be fined instead of being put to death, although putting them to death would be more in accordance with the moral sentiments of the community at large than fining them.

If this was his meaning I dissent from it, being of opinion that if in all cases criminal law were regarded only as a direct appeal to the fears of persons likely to commit crimes, it would be deprived of a large part of its efficiency, for it

[1] I quote from memory, not having thought it worth while to verify the reference.

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operates not only on the fears of criminals, but upon the habitual sentiments of those who are not criminals. Great part of the general detestation of crime which happily prevails amongst the decent part of the community in all civilized countries arises from the fact that the commission of offences is associated in all such communities with the solemn and deliberate infliction of punishment wherever crime is proved.

The relation between criminal law and morality is not in all cases the same. The two may harmonize; there may be a conflict between them, or they may be independent. In all common cases they do, and, in my opinion, wherever and so far as it is possible, they ought, to harmonize with, and support one another.

In some uncommon but highly important cases there is a possibility that they may to a certain extent come into conflict, inasmuch as a minority of the nation more or less influential and extensive may disapprove morally of the objects which the criminal law is intended to promote, and may regard as virtuous actions what it treats as crimes. There is a third class of cases in which the criminal law is supported by moral sentiment, in so far as moral sentiment recognises obedience to the law as a duty, but no further. This is where it enjoins or forbids acts, which if no law existed in relation to them would be regarded as matters of indifference. The laws which [1] forbid the cultivation of tobacco, and which require marriages to be celebrated at certain times and places only, are instances of legislation of this kind. A consideration of these three classes of laws creating offences will, I think, throw considerable light not only upon the subject of criminal responsibility, in other words upon the question what excuses ought to be admitted for acts falling within the definition of crimes, but also upon the whole question of the principles which ought to regulate legal punishments.

First I will consider the normal case, that in which law and morals are in harmony, and ought to and usually do support each other. This is true of all the gross offences which consist of instances of turbulence, force, or fraud. Whatever may be the nature or extent of the differences which exist as to the

[1] See 1 & 2 Will. 4, c. 13.

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nature of morals, no one in this country regards murder, rape, arson, robbery, theft, or the like, with any feeling but detestation. I do not think it admits of any doubt that law and morals powerfully support and greatly intensify each other in this matter. Everything which is regarded as enhancing the moral guilt of a particular offence is recognised as a reason for increasing the severity of the punishment awarded to it. On the other hand, the sentence of the law is to the moral sentiment of the public in relation to any offence what a seal is to hot wax. It converts into a permanent final judgment what might otherwise be a transient sentiment. The mere general suspicion or knowledge that a man has done something dishonest may never be brought to a point, and the disapprobation excited by it may in time pass away, but the fact that he has been convicted and punished as a thief stamps a mark upon him for life. In short, the infliction of punishment by law gives definite expression and a solemn ratification and justification to the hatred which is excited by the commission of the offence, and which constitutes the moral or popular as distinguished from the conscientious sanction of that part of morality which is also sanctioned by the criminal law. The criminal law thus proceeds upon the principle that it is morally right to hate criminals, and it confirms and justifies that sentiment by inflicting upon criminals punishments which express it.

I think that whatever effect the administration of criminal justice has in preventing the commission of crimes is due as much to this circumstance as to any definite fear entertained by offenders of undergoing specific punishment. If this is doubted, let any one ask himself to what extent a man would be deterred from theft by the knowledge that by committing it he was exposed, say, to one chance in fifty of catching an illness which would inflict upon him the same amount of confinement, inconvenience, and money loss as six months' imprisonment and hard labour. In other words, how many people would be deterred from stealing by the chance of catching a bad fever? I am also of opinion that this close alliance between criminal law and moral sentiment is in all ways healthy and advantageous to the community. I



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think it highly desirable that criminals should be hated, that the punishments inflicted upon them should be so contrived as to give expression to that hatred, and to justify it so far as the public provision of means for expressing and gratifying a healthy natural sentiment can justify and encourage it.

These views are regarded by many persons as being wicked, because it is supposed that we never ought to hate, or wish to be revenged upon, any one. The doctrine that hatred and vengeance are wicked in themselves appears to me to contradict plain facts, and to be unsupported by any argument deserving of attention. Love and hatred, gratitude for benefits, and the desire of vengeance for injuries, imply each other as much as convex and concave. Butler vindicated resentment which cannot be distinguished from revenge and hatred except by name, and Bentham included the pleasures of malevolence amongst the fifteen which, as he said, constitute all our motives of action. The unqualified manner in which they have been denounced is in itself a proof that they are deeply rooted in human nature. No doubt they are peculiarly liable to abuse, and in some states of society are commonly in excess of what is desirable, and so require restraint rather than excitement, but unqualified denunciations of them are as ill-judged as unqualified denunciations of sexual passion. The forms in which deliberate anger and righteous disapprobation are expressed, and the execution of criminal justice is the most emphatic of such forms, stand to the one set of passions in the same relation in which marriage stands to the other. I also think that in the present state of public feeling, at all events amongst the classes which principally influence legislation, there is more ground to fear defect than excess in these passions. Whatever may have been the case in periods of greater energy, less knowledge, and less sensibility than ours, it is now far more likely that people should witness acts of grievous cruelty, deliberate fraud, and lawless turbulence, with too little hatred and too little desire for deliberate measured revenge than that they should feel too much.

The expression and gratification of these feelings is how-

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ever only one of the objects for which legal punishments are inflicted. Another object is the direct prevention of crime, either by fear, or by disabling or even destroying the offender, and this which is I think commonly put forward as the only proper object of legal punishments is beyond all question distinct from the one just mentioned and of coordinate importance with it. The two objects are in no degree inconsistent with each other, on the contrary they go hand in hand, and may be regarded respectively as the secondary and the primary effects of the administration of criminal justice. The only practical result in the actual administration of justice of admitting each as a separate ground for punishment is that when a discretion as to the punishment of an offence is placed in the judge's hands, as it is in almost all cases by our law, the judge in the exercise of that discretion ought to have regard to the moral guilt of the offence which he is to punish as well as to its specific public danger. In criminal legislation the distinction is of greater importance, as one of the arguments in favour of exemplary punishments (death, flogging, and the like) is that they emphatically justify and gratify the public desire for vengeance upon such offenders.

The views expressed above are exposed to an objection which may be regarded as the converse of the one which I have just tried to answer. Many persons, who would not say that hatred and punishments founded on it are wicked, would say that both the feeling itself and the conduct which it suggests are irrational, because men and human conduct are as much the creatures of circumstance as things, and that it is therefore as irrational to desire to be revenged upon a man for committing murder with a pistol as to desire to be revenged on the pistol with which the man commits murder. The truth of the premiss of this argument I neither assert nor deny. It is certainly true that human conduct may be predicted to a great extent. It is natural to believe that an omniscient observer of it might predict not only every act, but every modification of every thought and feeling, of every human being born or to be born; but this is not inconsistent with the belief that each individual man is an



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unknown something,—that as such he is other and more than a combination of the parts which we can see and touch, —and that his conduct depends upon the quality of the unknown something which he is.

However this may be, the conclusion drawn from the premiss of the argument just stated does not appear to follow from it. There is nothing to show that if all conduct could be predicted praise and blame would cease to exist. If, notwithstanding the doctrine of philosophical necessity, love and hatred are as powerful as ever, and not less powerful in those who are most firmly convinced of that doctrine than in other persons, it follows that there is no real inconsistency between that doctrine and those passions, however the apparent inconsistency, if any, is to be explained. If the doctrine in question should ever be so completely established as to account for the whole of human life (and no one will assert that this has as yet been done), it will account for love and hatred as well as for other things, and will no more disturb them than other things are disturbed by being accounted for. Till it does so account for them, it is incomplete. Human life and philosophical explanations of it move in different planes till the explanation has become so complete as not to interfere with the thing to be explained. When they coincide, they cannot affect each other. One test of the truth of a philosophical explanation of human conduct is its complete harmony with human feeling.

I am, however, unable to see even an apparent conflict between the theory of philosophical necessity and the fact that men love and hate each other, and I think that the supposed difficulty arises from want of attention to the grounds on which love and hatred respectively are founded. They depend upon sympathy and antipathy; not upon theories as to the freedom of the will and the contingency or necessity of future events. Human beings love and hate each other because every man can mentally compare his neighbour's actions, thoughts, and feelings with his own. If there were any ground for ascribing intention, will, and consciousness to inanimate matter, we should approve of or condemn its behaviour in proportion as we were able to understand and

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sympathise with it, however accurately we might be able to predict it. If the pistol had the same knowledge and will as the murderer, the mere fact that he used it as a tool would not prevent the friends of the murdered man from hating it. This appears from the imperfect sympathy and antipathy which we feel towards the lower animals, the quasi-praise and quasi-blame which we award to the fidelity and spirit of a dog and the cruelty of a cat.

It is in reference to the grosser class of crimes, those in which law and morals are always in harmony, that the subject of excuses for conduct *primâ facie* criminal most frequently comes under consideration, and it will be found that whatever is recognised by the law of this country as an excuse for crime is something which deprives the act inquired into of its moral enormity, though it is by no means true that whatever deprives conduct of its moral enormity is a legal excuse for crime. Full proof of this will be given in the following chapter.

The second class of offences which illustrate the relation between criminal law and morals are those in which there is a possibility of a conflict between the two. This class consists principally of political and religious offences. As regards political offences, it is obviously impossible that any government should exist at all which did not protect itself by law from open attacks on its existence or on its peace. Some of these offences, and above all high treason, have usually been stigmatised by legal writers as being the most heinous of all crimes. In modern times there has been an inclination to look upon them in a different light, instances having, or being supposed to have, occurred in which resistance to constituted authority has not only succeeded permanently, but has also been generally recognised as having introduced a better state of things than that which it destroyed or forcibly altered. Instances in the history of many countries must present themselves to the recollection of every one. It is, perhaps, less commonly remembered that almost innumerable instances might be given of political offences, involving every kind of moral guilt, presumptuous lawless turbulence, indifference to every interest except the gratification of a

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CH. XVII. desire to seize political power, and in many cases to gratify, at all hazards, personal vanity, to say nothing of personal hatred, cupidity, or other passions. Even in the case of revolutions which have succeeded, and which, speaking broadly, may be described as having been beneficial, mischiefs of a terrible kind have followed from the fact that they were effected by force, and that they did constitute triumphs by unlawful violence over constituted authority. It was a true instinct which led the Parliament in the seventeenth century to condescend almost to quibble in order to keep the law on their side, and the evil effects of the temporary anarchy which the Civil War produced left deep traces in our later history. The same might be said of the American and the French Revolutions. The theories asserted by the successful parties were essentially as absurd as any theory put forward on the other side, and their success in each case filled the successful party with conceit and nonsense. The doctrines of non-resistance and of the divine right of kings are of course easily refuted, but the counter doctrines of the sovereignty of the people and the rights of man may be refuted just as easily; and so indeed may all ethical doctrines which claim absolute truth. If, however, it is alleged that armed resistance to constituted authorities is almost always most injurious, and that even in the extreme cases in which it is necessary it produces all sorts of evil results—especially evil moral results, the assertion is strictly true; and I do not know that those who maintained the divine right of kings, and the sinfulness of resistance in all cases, really meant more than to give a theoretical justification for this statement. It must also be remembered that the rebel must, by the very fact of his rebellion, condemn and stigmatise as intolerably bad the institutions against which he rebels. He is thus the declared enemy of all who regard those institutions as being, at the very least, tolerably good. He puts himself in armed opposition to their strongest convictions and most energetic feelings, and thus naturally earns their moral condemnation. A man who regards England and its institutions with deep affection and profound respect, notwithstanding their faults, must naturally look on the domestic enemies of either as a deadly and wicked enemy.

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My own opinion is, that the cases in which armed resistance to English authority have been either morally innocent, or in the long run advantageous to the community, have been rare exceptions, and that, in the immense majority of cases, rebellions are both wicked and mischievous. The law must of course treat them as being so in all cases, and the possibility of a conflict on this subject between law and morals is an incident inseparable from the conditions under which we live.

In the earlier part of this work I have given the history of legal punishments, and have shown how two changes of the greatest importance have taken place in respect to them, namely, a change from severity to leniency; and a change from a system, which, except in cases of misdemeanour, left no discretion at all to judges, to a system under which unlimited discretion is left to judges in all cases except those which are still liable to capital punishment—practically, high treason and murder.

The questions as to the principles on which the legislature ought to act in imposing punishment upon offences, and the manner in which such punishments as penal servitude and imprisonment should be carried into execution, have been so fully discussed that it would be almost impertinent to make any remarks upon the subject here; but the subject of the discretion exercised by the judges in common cases, and by the executive government (practically, the Secretary of State for the Home Department) in capital cases, appears to me to be little understood.

As to this, it must be remembered that it is practically impossible to lay down an inflexible rule by which the same punishment must in every case be inflicted in respect of every crime falling within a given definition, because the degrees of moral guilt and public danger involved in offences which bear the same name and fall under the same definition must of necessity vary. There must therefore be a discretion in all cases as to the punishment to be inflicted. This discretion must, from the nature of the case, be vested either in the judge who tries the case, or in the executive government, or in the two acting together.

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From the earliest period of our history to the present day, the discretion in misdemeanour at common law has been vested in the judge. With few exceptions, as, for instance, misprision of treason, the court has always had a discretion to inflict as light a sentence as it chose in such cases. In statutory misdemeanours, the penalty was sometimes fixed, but generally not.

In cases of felony the judge, till the reign of George III., had no discretion at all. The steps by which power was given to him first to commute the punishment of death after passing sentence; afterwards to abstain from passing sentence of death at all; and finally to exercise a discretion unlimited in the direction of lenity have been stated above. The cases which still continue to be capital—practically, murder and treason—supply the only instances worth noticing in which the judge has no discretion. The discretion in such cases is vested in the Secretary of State. It was never intended that capital punishment should be inflicted whenever sentence of death was passed. Even when the criminal law was most severe, the power of pardon was always regarded as supplementary to it, and as supplying that power of mitigating sentences of death which the words of the law refused. The strongest and best marked instance of this occurred in what was known as the Recorder's report, which, down to the end of the reign of William IV., was made after every sitting at the Old Bailey to the king in council, the king being always personally present. The list of persons capitally convicted was on these occasions carefully gone through, and the question who was and who was not to be executed was considered and decided.

This practice was discontinued at the beginning of the present reign, partly because the number of capital offences was so much reduced that there was no longer any occasion for it, partly because it would have been indecent and practically impossible to discuss with a woman the details of many crimes then capital.

Notwithstanding this change, the power of pardon (in the exercise of which Her Majesty is advised by the Secretary of State for the Home Department) still remains unaltered,

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and in respect of capital sentences it answers the purposes fulfilled in other cases by the discretionary power entrusted to the judges. The fact that the punishment of death is not inflicted in every case in which sentence of death is passed proves nothing more than that murder, as well as other crimes, has its degrees, and that the extreme punishment which the law awards ought not to be carried out in all cases. I think that improvements might be made in the definition of the offence which would diminish the proportion of cases in which an interference with the law would be necessary, but some cases will always occur in which the ends of justice would be answered by a lighter sentence, and though no one is more strongly opposed than I am to the abolition of capital punishments, I am convinced that in regard to capital cases the judge should have a discretion analogous to that which he has in cases not capital. [1] The grounds on which sentence of death in cases of murder are remitted are so well known, that in my opinion there would be no insuperable difficulty in specifying them by statute, and enabling a judge if he was of opinion that any one of them existed in a given case to pass, instead of sentence of death, sentence for a long term of penal servitude.

These considerations also apply to a complaint frequently made of the inequality between the sentences passed by

[1] The following statement may throw some light on this subject. From the beginning of 1879 to the end of the summer circuit of 1881 I sentenced ten persons to death. Of these, four were executed,—three for deliberately cutting the throats of women of whom they were jealous, the fourth for murdering his companion by beating out his brains with a stake, in order to rob him. The other six had their sentences commuted for the following reasons:—four (three tried upon one indictment) because the means by which they caused the death of the person murdered were neither intended, nor in themselves likely, to cause death. In these cases the prisoners would, under an improved definition of murder, have been convicted of manslaughter. One because after his conviction it appeared probable that he had received from the murdered man provocation enough to reduce the offence to manslaughter, and one (a woman who strangled with a garter her bastard child of two years of age) because she was subject to epileptic fits which rendered her frequently unconscious and had permanently impaired her powers, though she was probably not insane at the moment. I had not the least doubt when I passed sentence of death as to the cases in which it would be carried out, and the cases in which it would be commuted. If I had had a discretion in the matter, I should have passed a secondary sentence in every case (one perhaps excepted) in which the sentence was commuted.

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CH. XVII. different judges for similar offences. The only way in which such a difference could be avoided would be by narrowing the discretion of the judges, and this could be done only by reintroducing the system of absolute and minimum punishments, abolished in part in the year [1] 1846, and in part by more recent legislation.

I must however observe further, that in my opinion the difference between sentences (which must exist to some extent) is not nearly so great as those who derive their notions upon the subject from reading reports of trials in the newspapers would suppose. [2] Newspaper reports are necessarily much condensed, and they generally omit many points which weigh with the judge in determining what sentence to pass. A person in the habit of being present at trials would, unless I am mistaken, soon discover that he could foretell pretty accurately the sentence which would be passed in any case which he had watched.

No one, I think, could fail to be struck with the way in which a definition apparently simple covers crimes utterly dissimilar, and deserving, on every ground, of widely different punishment. This is peculiarly true in cases in which the offence consists in the infliction of personal injuries. Every circumstance must be known in such cases before anything approaching to a real judgment on the offence can be formed, especially when the two elements of moral guilt and public danger are taken into account. To give illustrations on the subject would occupy more space than I can afford; but I may just observe that a drunken brawl between two or three people coming out of a publichouse, ending in the emptying of the pockets of one of the party in a manner differing little from rough horseplay, and the very worst case of highway robbery with violence, would constitute the same offence.

[1] 9 & 10 Vic. c. 24.

[2] For instance, I remember great complaints being made of the undue lenity of a sentence passed upon a man for manslaughter, who appeared, from the newspaper reports, to have killed his wife by a kick in the neck when she fell to the ground in attempting to escape from his drunken violence. In fact, though this was literally true, the statement gave a wholly false impression of the crime. The kick which caused the death was not given in anger, but by a careless stumble, and the jury, unwilling that the man should escape altogether, convicted him upon the view that his conduct amounted to culpable negligence.

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Arson, again, may be the worst private crime that a man can commit. It may be little more than half-childish mischief.

My other observation is that, in my opinion, the importance of the moral side of punishment, the importance that is of the expression which it gives to a proper hostility to criminals, has of late years been much underestimated. The extreme severity of the old law has been succeeded by a sentiment which appears to me to be based upon the notion that the passions of hatred and revenge are in themselves wrong; and that therefore revenge should be eliminated from law as being simply bad.

It is useless to argue upon questions of sentiment. All that any one can do is to avow the sentiments which he holds, and denounce those which he dislikes. I have explained my own views. Those which commonly prevail upon the subject appear to me to be based on a conception of human life which refuses to believe that there are in the world many bad men who are the natural enemies of inoffensive men, just as beasts of prey are the enemies of all men.

My own experience is that that there are in the world a considerable number of extremely wicked people, disposed, when opportunity offers, to get what they want by force or fraud, with complete indifference to the interests of others, and in ways which are inconsistent with the existence of civilised society. Such persons, I think, ought in extreme cases to be destroyed.

The view which I take of the subject would involve the increased use of physical pain, by flogging or otherwise, by way of a secondary punishment. It should, I think, be capable of being employed at the discretion of the judge in all cases in which the offence involves cruelty in the way of inflicting pain, or in which the offender's motive is lust. In each of these cases the infliction of pain is what Bentham called a characteristic punishment. The man who cruelly inflicts pain on another is made to feel what it is like. The man who gratifies his own passions at the expense of a cruel and humiliating insult inflicted on another is himself shamefully and painfully humiliated. This principle is recognised in a partial and unsatisfactory way in reference to robbery with violence, and attempts to strangle with intent

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 to commit a crime. I think it should be extended in the manner stated. It seems absurd that if a man attempting to ravish a woman squeezes her throat to prevent her from crying out he should be liable to be flogged, but that he should not be liable to be flogged if he puts one hand over her mouth and with the other beats her about the head with a heavy stone.

I think, too, that the punishment of flogging should be made more severe. At present it is little, if at all, more serious than a birching at a public school.

Crime is no doubt far less important than it formerly was, and the means now available for disposing of criminals, otherwise than by putting them to death, are both more available and more effectual than they formerly were. In the days of Coke it would have been impossible practically to set up convict establishments like Dartmoor or Portland, and the expense of establishing either police or prisons adequate to the wants of the country would have been regarded as exceedingly burdensome, besides which the subject of the management of prisons was not understood. Hence, unless a criminal was hanged, there was no way of disposing of him. Large numbers of criminals accordingly were hanged whose offences indicated no great moral depravity. The disgust excited by this indiscriminate cruelty ought not to blind us to the fact that there is a kind and degree of wickedness which ought to be regarded as altogether unpardonable, just as there may be political offences which make it clear that the safety of particular institutions is inconsistent with the continued life of particular persons. Let any one read carefully such stories as those of Thurtell, Rush, Palmer, or other wretches of the same order, and ask himself under what circumstances or in what sort of society they could be trusted, and he will, I think, find it hard to deny that to allow such men to live, when their true character was known, would be like leaving wolves alive in a civilised country. Or take such a case as that of the reign of Louis Philippe. He was so sickened and horrorstruck by the reign of terror, that he shrank from vindicating his own power at the expense of the lives of his enemies. If he had been less scrupulous on this matter, and in particular if he

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had put to death Louis Napoleon for his attempt at Boulogne, the Orleans family might still have been reigning in France. Great and indiscriminate severity in the law no doubt defeats itself, but temperate, discriminating, calculated severity is, within limits, effective, and I am not without hopes that in time the public may be brought to understand and to act upon this sentiment; though at present a tenderness prevails upon the subject which seems to me misplaced and exaggerated. It cannot, however, be denied that it springs from very deep roots, and that no considerable change in it can be expected unless the views current on several matters of deep importance should be greatly modified in what must at present be called an unpopular direction.

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## CHAPTER XVIII.

### CRIMINAL RESPONSIBILITY.

CH. XVIII.

HAVING in the last chapter made some observations upon crime in general and punishments to be inflicted in respect of it, I now come to the subject of criminal responsibility. The general rule is, that people are responsible for their actions, but to this there are several exceptions of great importance and interest.

In considering this matter it will be necessary to depart from the method which I have hitherto followed of tracing out historically the growth of institutions and practices, and so explaining both their origin and their present form. The result in this case is more interesting and important than the process by which it was arrived at, and the result can be both described and criticised with less reference to the process than is possible in regard to other parts of the law.

The maxim, "Actus non facit reum nisi mens sit rea," is sometimes said to be the fundamental maxim of the whole criminal law; but I think that, like many other [1] Latin

[1] The authority for this maxim is Coke's *Third Institute*, fo. 6, where it is cited with a marginal note "Regula" in the course of his account of the Statute of Treasons. I do not know where he quotes it from. It does not occur, nor have I found anything like it, in the fiftieth book of the *Digest*, either in Title XVI., "De Verborum Significatione," or in Title XVII., "Regulæ "Juris." It occurs, however, in the *Leges Henrici Primi*, v. 28 (Thorpe, i. 511), "Reum non facit nisi mens rea." Coke uses it in reference to the words of the Act 25 Edw. 3, c. 2: "So as there must be a compassing or imagination, "for an act done per infortunium, without compassing, intent, or imagina-"tion, is not within this Act, as it appears by the express words thereof, '*Et* "'*actus non facit reum nisi mens sit rea.*' And if it be not within the words "of this Act, then," &c. It seems to me that legal maxims in general are little more than pert headings of chapters. They are rather minims than maxims, for they give not a particularly great but a particularly small amount of information. As often as not, the exceptions and qualifications to them are more important than the so-called rules.

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sentences supposed to form part of the Roman law, the maxim not only looks more instructive than it really is, but suggests fallacies which it does not precisely state.

It is frequently though ignorantly supposed to mean that there cannot be such a thing as legal guilt where there is no moral guilt, which is obviously untrue, as there is always a possibility of a conflict between law and morals.

It also suggests the notion that there is some state of mind called a "mens rea," the absence of which, on any particular occasion, deprives what would otherwise be a crime of its criminal character. This also is untrue. There is no one such state of mind, as any one may convince himself by considering the definitions of dissimilar crimes. A pointsman falls asleep, and thereby causes a railway accident and the death of a passenger: he is guilty of manslaughter. He deliberately and by elaborate devices produces the same result: he is guilty of murder. If in each case there is a "mens rea," as the maxim seems to imply, "mens rea" must be a name for two states of mind, not merely differing from but opposed to each other, for what two states of mind can resemble each other less than indolence and an active desire to kill?

The truth is that the maxim about "mens rea" means no more than that the definition of all or nearly all crimes contains not only an outward and visible element, but a mental element, varying according to the different nature of different crimes. Thus, in reference to murder, the "mens rea" is any state of mind which comes within the description of malice aforethought. In reference to theft the "mens rea" is an intention to deprive the owner of his property permanently, fraudulently, and without claim of right. In reference to forgery the "mens rea" is anything which can be described as an intent to defraud. Hence the only means of arriving at a full comprehension of the expression "mens rea" is by a detailed examination of the definitions of particular crimes, and therefore the expression itself is unmeaning.

There is, however, some room for generalisation upon the question, What are the general mental conditions of

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criminal responsibility? Before attempting to answer it, some observations must be made as to its meaning.

In the first place, then, I understand the question to be one which relates not to some abstract or imaginary system of law, but to the positive law of the country in reference to which it is asked, and in this case to the law of England. General theories as to what ought to be the conditions of criminal responsibility may not be useless, but they must depend on the tastes of those who form them, and they cannot, so far as I can see, be said in any distinct sense to be either true or false. If the question be asked with reference to any definite body of law, it can, of course, be answered with a greater or less degree of confidence and accuracy, though even in this case there must be some degree of vagueness, especially when the system referred to is the law of England, because with us the theory is nowhere explicitly laid down, but must be extracted from various sources of different degrees of authority, and susceptible of different interpretations.

In the second place, I understand by responsibility nothing more than actual liability to legal punishment. It is common to discuss this subject as if the law itself depended upon the result of discussions as to the freedom of the will, the origin of moral distinctions, and the nature of conscience. Such discussions cannot be altogether avoided, but in legal inquiries they ought to be noticed principally in order to show that the law does not really depend upon them.

In the third place, I understand by morality, and right and wrong, the positive morality of our own time and country; that which, as a fact, is generally regarded as right or wrong by people of average education and sensibility. No doubt there are moral differences of the deepest importance between large classes of educated people. Systems of morality may be based upon theories of life not only different from but contradictory to each other. Loyola and Bentham, for example, would have admired very different kinds of people. Such differences colour the whole of human life, but I do not think they greatly affect the administration of criminal justice.

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These remarks being premised, it may, I think, be said in general that in order that an act may by the law of England be criminal, the following conditions must be fulfilled :—

1. The act must be done by a person of competent age.
2. The act must be voluntary, and the person who does it must also be free from certain forms of compulsion.
3. The act must be intentional.
4. Knowledge in various degrees according to the nature of different offences must accompany it.
5. In many cases either malice, fraud, or negligence enters into the definition of offences.
6. Each of these general conditions (except the condition as to age) may be affected by the insanity of the offender.

Crimes by omission are exceptional, and the points in which they differ from crimes by act will be noticed incidentally. The rest of the chapter will be employed in considering these topics in detail in the order stated.

AGE.—The age at which a person becomes competent to commit a crime must necessarily be fixed in an arbitrary manner. What constitutes maturity is a question of degree, and the age at which it is reached differs from person to person and from country to country. According to the French *Code Pénal*, [1] "Lorsque l'accusé aura moins de "seize ans, s'il est decidé qu'il a agi *sans discernement*, il "sera acquitté." If he has acted "*avec discernement*" his punishment is to be mitigated according to a fixed scale. There is no age at which a child is absolutely exempt from punishment. By the [2] Criminal Code of the German Empire a person cannot be criminally prosecuted for any offence committed before he has completed his twelfth year. From twelve to eighteen he may be acquitted if when he committed the offence he did not [3] possess the intelligence requisite to know that it was punishable. By English law children

[1] Art. 66-67.
[2] *Strafgesetzbuch*, 52.
[3] 56. "Die zur Erkenntniss ihrer Strafbarkeit erforderliche Einsicht nicht "besass."



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under seven are absolutely exempt from punishment,[1] and from seven to fourteen there is a presumption that they are not possessed of the degree of knowledge essential to criminality, though this presumption may be rebutted by proof to the contrary. Like most other presumptions of law, this rule is practically inoperative, or at all events operates seldom and capriciously. My own opinion is that the age of complete irresponsibility should be raised, say to twelve (except in the case of a few specially atrocious crimes), and that it should be succeeded by complete responsibility. If it was found that the child had committed the offence either by reason of the parent's influence or on account of his negligence, the parent might be deprived of his parental rights and the child sent to a reformatory or otherwise disposed of. In all cases where a child under the age of responsibility commits a crime, the parents might be made civilly responsible for the injury caused by it. Legal punishment at such an early age can rarely, if ever, be required for the protection of society. The punishment of a child of immature age can hardly fail to do harm to the offender to an extent altogether out of proportion to any good which it can possibly do to any one. After the period of complete irresponsibility, the period of complete responsibility ought to follow at once. There is no fear that judges will not give sufficient weight to the offender's age in mitigation of punishment, and in this as in many other cases the practically unlimited power of mitigating punishment which our law confides to the judges makes it possible to find a

[1] There are some refinements (of little importance) about infants between fourteen and twenty-one, who are said to be incapable of misdemeanours by non-feasance.—1 *Russ. Cr.* 108. Though the law is now well established, it is difficult to say how old it is. It appears to have been somewhat doubtful at the end of the fifteenth century. In the 3 Hen. 7, *i.e.* in 1488, the following curious entry occurs in the Year-books: "Le recorder de London "monstre coment un enfant entre lage de x ans et xii ans fuit Endite "de mort, et il fut apose (questioned) de ceo, et il dit que il garda barbitz (*i.e.* "sheep—brebis) oue cestui que est mort et les happa a varians per q̄ il luy "ferist en le gule, et puis en le test, et issint en divers lieux del corps tanque "que il fuit morte, et donques il trahist le corps en le corne et les justices "pour son tendre age et pour ceo que il narroit le mat̄ pleinmn̄t respit̄ le "jugement, et plus. justiz dis. q̄ fuit dign̄ mort."—FitzHerbert, *Corone*, 51, 3 Hen. 7, 12. In the same year occurs the following: "Nota enf. "de ix ans occist aut̄ et fuit ajuge que il serra pend quia malicia supplet æta-"tem, mes unc. ils respit lexecution q̄ puit aū son pardon."—FitzHerbert, *Corone*, 57, 3 Hen. 7, 1.

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practical solution for many questions which present great theoretical difficulties.



VOLUNTARY ACTIONS BY A PERSON FREE FROM COMPULSION.—In order that an act may be criminal it must be a voluntary act done by a person free from certain forms of compulsion. In explaining this proposition (which may appear to some persons to be tautological) the following terms must be considered: "action," "voluntary," "free," "compulsion." In considering them I will do my best to avoid the interminable controversies which have been connected with them, and I will confine myself to such observations as seem indispensable in explaining the reason and the limits of some of the matters of excuse which are recognised by the law of England.

Matters of excuse are exceptions to the general rule that people are responsible for actions falling within the definition of crimes. The great difficulty of understanding some of these exceptions, and especially of understanding the law relating to madness, is that an exception is necessarily a negation, and that it is practically impossible to understand a negation unless the positive rule, the application of which it excludes, is previously understood. In order to understand properly the meaning of compulsion and of insanity, it is necessary to have a distinct conception of what is meant by freedom and sanity; in other words, a distinct conception of normal voluntary action unaffected by disease.

An action then is a motion or more commonly a group of related motions of different parts of the body. Actions may be either involuntary or voluntary, and an involuntary action may be further subdivided according as it is or is not accompanied by consciousness. Instances of involuntary actions are to be found not only in such motions as the beating of the heart and the heaving of the chest, but in many conscious acts—coughing, for instance, the motions which a man makes to save himself from falling, and an infinite number of others. Many acts are involuntary and unconscious, though as far as others are concerned they have all the effects of conscious acts, as, for instance, the struggles of a person



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in a fit of epilepsy. The classification of such actions belongs more properly to physiology than to law. For legal purposes it is enough to say that no involuntary action, whatever effects it may produce, amounts to a crime by the law of England. I do not know indeed that it has ever been suggested that a person who in his sleep set fire to a house or caused the death of another would be guilty of arson or murder. The only case of involuntary action which, so far as I know, has ever been even expressly referred to as not being criminal is the case in which one person's body is used by another as a tool or weapon. [1] It has been thought worth while to say that if A by pushing B against C pushes C over a precipice A and not B is guilty of pushing C over the precipice.

Such being the nature of an action, a voluntary action is a motion or group of motions accompanied or preceded by volition and directed towards some object. Every such action, comprises the following elements—knowledge, motive, choice, volition, intention; and thoughts, feelings, and motions, adapted to execute the intention. These elements occur in the order in which I have enumerated them. Suppose a person about to act. His knowledge of the world in which he lives and of his own powers assures him that he can if he likes do any one or more of a certain number of things, each of which will affect him in a certain definite way, desirable or undesirable. He can speak or be silent. He can sit or stand. He can read or write. He can keep quiet or change his position to a greater or less extent and by a variety of different means. The reasons for and against these various courses are the motives. They are taken into consideration and compared together in the act of choice, which means no more than the comparison of motives. Choice leads to determination to take some particular course, and this determination issues in a volition, a kind of crisis of which every one is conscious, but which it is impossible to describe otherwise than by naming it, and as to the precise nature and origin of which many views have been entertained which I need not here discuss. The direction of conduct

[1] 1 Hale, *P. C.* 434.

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towards the object chosen is called the intention or aim (for the metaphor involved in the word is obviously taken from aiming with a bow and arrow). Finally there take place a series of bodily motions and trains of thought and feeling fitted to the execution of the intention.

Whatever controversies there may be as to the nature of human beings and as to the freedom of the will, I do not think that there can be any question that this is a substantially correct account of normal voluntary action. It would be difficult to attach any meaning to the expression "voluntary action" if either motive or choice, or a volition, or an intention, or actions directed towards its execution were absent, though they may not always be equally well marked. If the motives all act in one direction, and if the only choice is between abstinence from all action and some one definite act, the stages of deliberation and choice may be instantaneous; but if those stages are altogether excluded, the action becomes involuntary. A man who is able to escape from a pressing danger by instantly mounting a horse and galloping away is not likely to be conscious of deliberation or choice, but he does deliberate and does choose. A man who stumbles forward to save himself from falling acts mechanically and cannot be called a voluntary agent in doing so. In the same way if there is no intention, if the movements of the body are not combined or directed to any definite end, there may be action, but it is not voluntary action. A man receiving news by which he was much excited might show his excitement by a variety of bodily movements, as, for instance, by the muscular motions which change the expression of the face, but the question whether they were or were not voluntary would depend on the further question whether they were intentional. A groan or a sob would usually be involuntary. Words spoken expressive of pain or pleasure could hardly be otherwise than intentional if they conveyed a distinct connected meaning.

The importance of rightly understanding the nature of voluntary actions consists in the light which it throws on the nature of compulsion, and so on the law relating to it, and on the reasons on which it is founded. With this view the

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first point to be observed is that there is no opposition between voluntary action and action under compulsion. The opposite to voluntary action is involuntary action, but the very strongest forms of compulsion do not exclude voluntary action. A criminal walking to execution is under compulsion if any man can be said to be so, but his motions are just as much voluntary actions as if he was going to leave his place of confinement and regain his liberty. He walks to his death because he prefers it to being carried. This is choice, though it is a choice between extreme evils. Greater force of character indeed may be and generally is shown when a person acts under compulsion than when it is absent. It requires more of an effort to walk to the gallows to be hung than to walk out of prison to be free.

These illustrations show the meaning of compulsion. A man is under compulsion when he is reduced to a choice of evils, when he is so situated that in order to escape what he dislikes most he must do something which he dislikes less, though he may dislike extremely what he determines to do.

The same illustrations show the true meaning of freedom. Freedom is opposed to compulsion as voluntary is to involuntary. A man is free when he can do what he likes; in other words, when he is not compelled to do what he dislikes. This is a negative definition, and if closely examined freedom will be found to be essentially a negative word, and indeed an unmeaning word unless it is connected with other words showing who is free from what. To say that a man is free in general is to say nothing definite. To say that he is free from prison, free from slavery, free from oppression, free from vice, free from pain, free from passion, free from prejudice, is to assert that he is not in prison, not a slave, not oppressed, not vicious, not in pain, not under the influence of passion or prejudice; but whether a man is free or under compulsion he is equally a voluntary agent, and choice and volition equally enter into and regulate all his voluntary actions.

Like other words describing mental states, freedom and compulsion are indefinite. It is impossible to draw a distinct line showing where the one begins and the other ends, for

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a man may be so situated, that all the courses open to him are rather disagreeable, but that there is no overpowering reason for choosing any one. In such a case he would certainly be described as free to choose. The foregoing explanations, however, show that in cases of voluntary action compulsion is a narrow exception and freedom the general rule. A man is compelled, when he is under the influence of some motive, at once powerful and terrible, and this is seldom the case. On the other hand, the word "free," which applies to the bulk of human conduct, has no positive meaning. It denotes nothing more than voluntary action not prompted by motives which can be described as compulsory.

This view of the subject explains the moral difference between acts done freely and acts done under compulsion. When a man acts freely in the sense which I attach to the word, he is by the supposition not exposed to any motive at once terrible and exceedingly powerful. His conduct will therefore depend upon the action and reaction upon each other of ordinary motives on the one hand and his individual character on the other. Now ordinary motives have a different effect upon different people. A man who, under the influence of ordinary motives, lies or steals or robs or murders is a bad man; a man who, under the influence of ordinary motives, abstains from such conduct, is so far a good man. In other words, the difference between men of good character and men of bad character is shown in that part of their conduct which is free. When men are put under compulsion, when they are subjected to motives at once terrible and exceedingly powerful, the great majority of them will act in the same way. Accordingly the fact that any given man does so act proves nothing as to his character, except that he is not an extraordinary man.

I cannot leave this subject without explaining in a very few words the sense which I attach to the word "will." It is often used as being synonymous with the act of volition, as the proper name of the internal crisis which precedes or accompanies voluntary action. This meaning of the word is narrow and special. A more important and commoner way

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of using the word "will" is to use it as if it denoted a man, so to speak, within the man, a being capable of freedom or restraint, virtue and vice, independent action or inactivity on its own account and apart from other mental and bodily functions.

This way of thinking and speaking appears to me radically false. When I speak of "will," I mean by the word either the particular act of volition which I have already described, and which is a stage in voluntary action; or a permanent judgment of the reason that some particular course of conduct is desirable, coupled with an intention to pursue it, which issues from time to time in a greater or less number of particular volitions. For instance, a man's will is to write a book or to take a journey. That is, he judges upon the whole that it will be well for him to write the book or take the journey, and he means to do it; but in order to execute his will in this sense of the word innumerable particular volitions are necessary. This is, I believe, in accordance with the common use of language by common people. "He had his will," "What's your will?" the use of the word "a will," for a testament, are illustrations. The chief practical importance of the remark in reference to the present subject is that it explains what is meant by strength and weakness of will, and what is the meaning of the assertion that the will can be weakened by madness. By the assertion that a man has a strong will I mean that he distinctly knows what he permanently wants and means to do, and habitually acts with reference to such knowledge, that his motives and intentions do not change from day to day, and are not immediately altered by the discovery of difficulties in the way of their accomplishment. Obviously this state of mind implies a power of attending to what is remote and of judging of particular matters by general rules. In other words, a strong will and clear and firm intellect are so closely related to each other that it is almost impossible for the intellect to be seriously disarranged or weakened without a corresponding effect on the will.

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I now proceed to consider what are the forms of compulsion which do and do not, according to the law of England, amount to a legal excuse for what would otherwise be a crime. The following are the only forms of compulsion, which, so far as I know, can come under legal consideration:—

1. Compulsion by a husband over a wife.
2. Compulsion by threats of injury to person or property.
3. Compulsion by necessity.

Some forms of madness have some resemblance to compulsion, though I think the resemblance is superficial, but I propose to consider the relation of madness to crime separately.

Of the three forms of compulsion above mentioned, I may observe generally that hardly any branch of the law of England is more meagre or less satisfactory than the law on this subject. As regards marital compulsion the law is at once vague and bad as far as it goes. It is as follows: [1]"If a "married woman commits a theft or receives stolen goods, "knowing them to be stolen, in the presence of her husband, "she is presumed to have acted under his coercion, and such "coercion excuses her act; but this presumption may be re-"butted if the circumstances of the case show that in point "of fact she was not coerced. It is uncertain how far this "principle applies to felonies in general.

"It does not apply to high treason or murder.

"It probably does not apply to robbery.

"It applies to uttering counterfeit coin.

"It seems to apply to misdemeanours generally."

It is hardly necessary to point out or indeed to observe upon the defects of this rule. It admits indeed of no defence, but I think it is capable of a historical explanation. [2]When the early authorities upon the subject are considered, it will be found that the modern rule is not distinctly laid down by any writer of authority before Hale (except indeed by Lord Bacon, whose statement of the law is curt, and goes far beyond the authorities on which it professes to be based); that Hale misquotes and misunderstands several of his authorities, and bases his own statement on com-

[1] See my *Digest*, p. 17, art. 30.
[2] See my *Digest*, note ii. p. 332, in which the authorities are examined.

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paratively modern practice; and that that modern practice probably grew up because the judges wished to give to married women some sort of rough equivalent for the benefit of clergy enjoyed by their husbands.

As the law stands it produces this result. A husband and wife of mature age, and their daughter of fifteen, commit a theft. It is proved that the girl acted under actual threats used by her father. Nothing appears as to the wife's part in the matter except that her husband was present when she committed the offence. The wife must be acquitted on account of the presumed coercion of her husband; the daughter must be convicted, notwithstanding the actual coercion of her father.

2. Compulsion by threats of injury to person or property is recognised as an excuse for crime only, as I believe, in cases in which the compulsion is applied by a body of rebels or rioters, and in which the offender takes a subordinate part in the offence.

There is very little authority upon this subject, and it is remarkable that there should so seldom be occasion to consider it. In the course of nearly thirty years' experience at the bar and on the bench, during which I have paid special attention to the administration of the criminal law, I never knew or heard of the defence of compulsion being made except in the case of married women, and I have not been able to find more than [1] two reported cases which bear upon it. One of them is the case of a man compelled by threats of death to join the rebel army in 1745. The other, the case of persons compelled (I suppose by threats of personal violence) to take a formal part in breaking threshing machines by a mob of rioters so employed.

These cases both fall within the principle on the subject stated by [2] Hale that in regard to compulsion and fear "there "is to be observed a difference between the times of war or

[1] R. *v.* M'Growther, 18 *St. Tr.* 394; R. *v.* Crutchley, 5 *C. & P.* 133. See my *Digest*, art. 31, p. 18.

[2] 1 *P. C.* ch. viii. p. 49. In Blackstone's *Commentaries*, book iv. ch. 2, there is a passage on this subject which sets Blackstone's weakness in all matters of speculation in a light as clear as that in which the whole chapter sets his literary skill.

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"public insurrection and rebellion, and times of peace," because, in the former, "a person is under so great a power "that he cannot resist or avoid." As to times of peace, says Hale, "if a man be menaced with death unless he will "commit an act of treason, murder, or robbery, the fear of "death will not excuse him if he commit the fact, for the "law hath provided a sufficient remedy against such fears by "applying himself to the courts and officers of justice for a "writ *de securitate pacis.*" It must, I think, be owned that this reasoning is weak, for in most of the cases in which threats of death or bodily harm would be used to compel a person to commit a crime, there would be no time or opportunity to resort to the protection of the law.

Whatever may be thought of the reasoning of Hale, I think that the principle which he lays down may be defended on grounds of expediency.

Criminal law is itself a system of compulsion on the widest scale. It is a collection of threats of injury to life, liberty, and property if people do commit crimes. Are such threats to be withdrawn as soon as they are encountered by opposing threats? The law says to a man intending to commit murder, If you do it I will hang you. Is the law to withdraw its threat if some one else says, If you do not do it I will shoot you?

Surely it is at the moment when temptation to crime is strongest that the law should speak most clearly and emphatically to the contrary. It is, of course, a misfortune for a man that he should be placed between two fires, but it would be a much greater misfortune for society at large if criminals could confer impunity upon their agents by threatening them with death or violence if they refused to execute their commands. If impunity could be so secured a wide door would be opened to collusion, and encouragement would be given to associations of malefactors, secret or otherwise. No doubt the moral guilt of a person who commits a crime under compulsion is less than that of a person who commits it freely, but any effect which is thought proper may be given to this circumstance by a proportional mitigation of the offender's punishment.

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These reasons lead me to think that compulsion by threats ought in no case whatever to be admitted as an excuse for crime, though it may and ought to operate in mitigation of punishment in most though not in all cases. If a man chooses to expose and still more if he chooses to submit himself to illegal compulsion, it may not operate even in mitigation of punishment. It would surely be monstrous to mitigate the punishment of a murderer on the ground that he was a member of a secret society by which he would have been assassinated if he had not committed murder.

As to the distinction drawn by Hale between times of war and times of peace, I doubt whether it is required, though both the moral guilt and the social and political danger of an offence are certainly at a minimum when it consists only in reluctant submission to the orders of what is in fact a usurped public authority. Practically, for the reasons mentioned, the subject is one of little importance, though it has considerable theoretical interest.

3. Compulsion by necessity is one of the curiosities of law, and so far as I am aware is a subject on which the law of England is so vague that, if cases raising the question should ever occur the judges would practically be able to lay down any rule which they considered expedient. The old instance of the two drowning men on a plank large enough to support one only, and that of shipwrecked persons in a boat unable to carry them all, are the standing illustrations of this principle. It is enough to say that should such a case arise, it is impossible to suppose that the survivors would be subjected to legal punishment. In an [1] American case in which sailors threw passengers overboard to lighten a boat it was held that the sailors ought to have been thrown overboard first unless they were required to work the boat, and that at all events the particular persons to be sacrificed ought to have been decided on [2] "by ballot." Such a view appears to me to be over refined. Self-sacrifice may or may not be a moral duty, but it seems hard to make it a legal duty, and

[1] Commonwealth *v.* Holma, 1 Wall Jr. 1.

[2] I suppose this means by lot. There is something almost grotesque in the notion of a right to vote in such a case.

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it is impossible to state its limits or the principle on which they can be determined. Suppose one of the party in the boat had a revolver and was able to use it, and refused either to draw lots or to allow himself or his wife or daughter to be made to do so or to be thrown overboard, could any one deny that he was acting in self-defence and the defence of his nearest relations, and would he violate any legal duty in so doing? I do not know that it is possible to say more on this subject than was said by [1] Lord Mansfield in the case of R. *v.* Stratton and others, who were tried for deposing Lord Pigot from the Government of Madras, and defended themselves on the ground that his conduct had been of such a nature that it was necessary for them to do so in the interests of the Madras Presidency. "As to the civil necessity" (he had been speaking of natural necessity, meaning self-defence and the like), "none can happen in corporations, societies, "and bodies of men deriving their authority under the crown "and therefore subordinate: no case ever did exist in Eng- "land, no case ever can exist, because there is a regular "government to which they can apply, they have a superior "at hand, and therefore I cannot be warranted to put to you "any case of civil necessity that justifies illegal acts, because "the case not existing, nor being supposed to exist, there is "no authority in the law books nor any adjudged case upon "it. Imagination may suggest, you may suggest so extra- "ordinary a case as would justify a man by force overturning 'a magistrate and beginning a new government all by force. "I mean in India, where there is no superior nigh them to "apply to: in England it cannot happen; but in India you "may suppose a possible case, but in that case it must be "imminent extreme necessity; there must be no other "remedy to apply to for redress; it must be very imminent, "it must be very extreme, and in the whole they do they "must appear clearly to do it with a view of preserving "the society and themselves—with a view of preserving the "whole." In short, it is just possible to imagine cases in which the expediency of breaking the law is so overwhelmingly great that people may be justified in breaking it, but

[1] 21 *St. Tr.* 1224.

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these cases cannot be defined beforehand, and must be adjudicated upon by a jury afterwards, the jury not being themselves under the pressure of the motives which influenced the alleged offenders. I see no good in trying to make the law more definite than this, and there would I think be danger in attempting to do so. There is no fear that people will be too ready to obey the ordinary law. There is great fear that they would be too ready to avail themselves of exceptions which they might suppose to apply to their circumstances.

These considerations apply also to the case of a choice of evils. Suppose a ship so situated that the only possible way of avoiding a collision with another ship, which must probably sink one or both of them, is by running down a small boat. Or suppose that in delivering a woman it is necessary to sacrifice the child's life to save the mother, I apprehend that in neither of these cases would an offence be committed. It would, however, be necessary to show that the discretion used was used fairly. I should think for instance that if, in order to procure an heir, the mother's life was sacrificed to the unborn child's, the parties concerned might be guilty of murder.

INTENTION.—I have already pointed out the place which intention occupies in voluntary action. It is the result of deliberation upon motives, and is the object aimed at by the action caused or accompanied by the act of volition. Though this appears to me to be the proper and accurate meaning of the word it is frequently used and understood as being synonymous with motives. It is very common to say that a man's intentions were good when it is meant that his motives were good, and to argue that his intention was not what it really was, because the motive which led him to act as he did was the prevailing feeling in his mind at the time when he acted rather than the desire to produce the particular result which his conduct was intended to produce. This confusion of ideas not unfrequently leads to failures of justice. That it is a confusion may be shown by illustrations. A puts a loaded pistol to B's temple and shoots B through the head deliberately, and knowing

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that the pistol is loaded and that the wound must certainly be mortal. It is obvious that in every such case the intention of A must be to kill B. On the other hand, the act in itself throws no light whatever on A's motives for killing B. They may have been infinitely various. They may have varied from day to day. They may have been mixed in all imaginable degrees. The motive may have been a desire for revenge, or a desire for plunder, or a wish on A's part to defend himself against an attack by B, or a desire to kill an enemy in battle, or to put a man already mortally wounded out of his agony. In all these cases the intention is the same, but the motives are different, and in all the intention may remain unchanged from first to last whilst the motives may vary from moment to moment.

This account of the nature of intention explains the common maxim which is sometimes stated as if it were a positive rule of law, that a man must be held to intend the natural consequences of his act. I do not think the rule in question is really a rule of law, further or otherwise than as it is a rule of common sense. The only possible way of discovering a man's intention is by looking at what he actually did, and by considering what must have appeared to him at the time the natural consequence of his conduct.

The maxim, however, is valuable as conveying a warning against two common fallacies, namely, the confusion between motive and intention, and the tendency to deny an immediate intention because of the existence, real or supposed, of some ulterior intention. For instance, it will often be argued that a prisoner ought to be acquitted of wounding a policeman with intent to do him grievous bodily harm, because his intention was not to hurt the policeman, but only to escape from his pursuit. This particular argument was so common that to inflict grievous bodily harm with intent to resist lawful apprehension is now a specific statutory offence; but, if the difference between motive and intention were properly understood, it would be seen that when a man stabs a police constable in order to escape, the wish to resist lawful apprehension is the motive, and stabbing the policeman the intention, and nothing can be more illogical than to argue that a

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man did not entertain a given intention because he had a motive for entertaining it. The supposition that the presence of an ulterior intention takes away the primary immediate intention is a fallacy of the same sort. It is well illustrated by a case reported in the [1]*State Trials*, in which Woodbourne and Coke were indicted under the Coventry Act for wounding Crispe "with intent to maim and disfigure" him. Woodbourne, at Coke's instigation, struck Crispe about the head and face with a billhook seven distinct blows. Coke (who it has been said was "a disgrace to the profession of the law") defended himself on the ground that he intended Woodbourne to kill Crispe, and not to disfigure him; but the judge who tried the case (Lord Chief Justice King) pointed out to the jury that the instrument used (a billhook) was "in its own nature proper to cut and disfigure; and if the "intention was to murder you are to consider whether the "means made use of to effect and accomplish that murder "and the consequence of those means were not in the in- "tention and design of the party; whether every blow and "cut and the consequences thereof were not intended, as "well as the end for which it is alleged the blows and cuts "were given."

Intention enters into the definition of crimes in two different ways. In a large number of cases the intention necessary to constitute the crime is specified in the definition of the crime. Thus, wounding with intent to do grievous bodily harm, forgery with an intent to defraud, abduction with intent to marry or defile are crimes. What has to be said on this subject will be said more conveniently in those parts of the work which deal with the definitions of particular crimes.

There is, however, a second and more general way in which intention is an element of crime. Intention, as I have already pointed out, is an element of voluntary action, and as all crimes (except crimes of omission) must be voluntary actions, intention is a constituent element of all criminal acts. It would be a mistake to suppose that in

[1] R. *v.* Woodbourne and Coke, 16 *St. Tr.* 54. But see the case of R. *v.* Williams, 1 Leach, 529, in which a doubt is expressed as to R. *v.* Woodbourne.

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order that an act may amount to a crime the offender must intend to commit the crime to which his act amounts, but he must in all cases intend to do the act which constitutes the crime. For instance, there are cases in which a person may commit murder, without intending to commit murder, but no case in which he can commit murder without intending to do the act which makes him a murderer. Suppose, for instance, a robber fires a pistol at the person robbed, intending only to wound him, and does actually kill him, he is guilty of murder, though he had no intention to commit murder, but he cannot be guilty unless he intended to fire the pistol. If a man recklessly and wantonly throws a lighted match into a haystack, careless whether it takes fire or no, and so burns down the stack, he would be guilty of arson, but if he did not intend to throw the lighted match on to the haystack I do not think he would be guilty of any offence at all unless death was caused, in which case he would be guilty of manslaughter.

Though intention is essential to criminal acts, it is not so with regard to all criminal [1] omissions. Crimes by omission are not common, but in the great majority of cases the omission to be criminal must be intentional. In the few cases in which an unintentional omission is criminal the crime itself must from the nature of the case be committed unintentionally. In such cases the mental element of

[1] In the Draft Criminal Code by the Commissioners of 1879, which substantially re-enacted the existing law, the following crimes by omission were punished :—S. 78 (*b*), not giving information of high treason. S. 111, not fighting pirates. S. 115, disobeying the lawful order of a court, &c. SS. 117, 118, not assisting when required in the apprehension of offenders or the suppression of crime. S, 130, nuisance by omitting to the public injury to discharge a duty. Homicide by omission to discharge a duty. SS. 185, 186, omission to make preparation for the birth of a child. (These provisions were new.) S. 193 (*f*), wilful omission to discharge a duty whereby passengers on a railway are injured or put in danger. S. 194 (*e*), culpable neglect, having the same result. SS. 388 (*f*), 389, same as the two last, except that they relate to injuries to carriages, &c. S. 201, negligent injury to the person. SS. 223, 224, 225, neglect of duties to children. S. 282, fraudulent omissions from accounts. S. 412, omissions by bankrupts to discharge their duties towards trustees and creditors. In nearly all these cases the neglect to be criminal must be intentional. The only common exceptions are nuisances by neglect (these are rather civil than criminal cases), homicide by neglect, the infliction of personal injury by neglect (by the present law this is criminal only in cases of neglect by railway servants, and causing injury by furious driving), neglect of certain duties to children.



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CH. XVIII. criminality is the absence of due attention to the discharge of duties imposed by law.

KNOWLEDGE.—Some degree of knowledge is essential to the criminality both of acts and of criminal omissions, but it is impossible to frame any general proposition upon the subject which will state precisely and accurately the degree and kind of knowledge which is necessary for this purpose, because they vary in different crimes.

In many cases there is no difficulty because the definition of the crime itself states explicitly what is required. Thus for instance the receipt of stolen goods, knowing them to be stolen; the passing of counterfeit coin, knowing it to be counterfeit; are offences in which the mental element is as explicitly and intelligibly stated as the outward visible element. It is more difficult to say what kind and degree of knowledge is necessary in the cases of crimes which are not so defined as to avoid the difficulty.

The subject of knowledge is generally considered under the head of knowledge of law and knowledge of fact.

As regards knowledge of law the rule is that ignorance of the law is no excuse for breaking it, a doctrine which is sometimes stated under the form of a maxim that every one is conclusively presumed to know the law—a statement which to my mind resembles a forged release to a forged bond. The only qualification upon this doctrine with which I am acquainted is that ignorance of the law may in some cases be relevant as negativing the existence of some specific criminal [1] intention. Thus, for instance, a claim of right is

[1] A curious case on this subject was decided very lately. A ship sailed from Sydney in Nov. 1871, to the Pacific Ocean. In 1872 an Act called the Kidnapping Act (35 & 36 Vic. c. 19) passed, requiring such ships to have licenses for native labourers on board. The captain did not hear of the Act till 1873, and in the meantime did not comply with its provisions. In delivering the judgment of the Court of Appeal, Baggallay, L. J., said, "before "a continuous act or proceeding, not originally unlawful, can be treated as "unlawful by reason of the passing of an Act of Parliament by which it is "in terms made so, a reasonable time must be allowed for its discontinuance; "and though ignorance of the law may, of itself, be no excuse for the "master of a vessel who may act in contravention of it, such ignorance "may nevertheless be taken into account when it becomes necessary to con-"sider the circumstances under which the act or proceeding alleged to be un-"lawful was continued, and when and how it was discontinued, with a view to "determine whether a reasonable time had elapsed without its being discon-"tinued."—*Burns v. Nowell*, L. R. 5 Q. B. D. 454. The nature of the case was such that the passage quoted was not essential to its decision.

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inconsistent with an intent to steal, and in order to show that property was taken under a claim of right it may be shown that the taker was ignorant of the law. If for instance the heir-at-law of a deceased man were to appropriate his ancestor's personalty, under a mistaken notion that it belonged to him as heir, this would not be theft, and the heir's ignorance of law would be a relevant fact.

The question as to knowledge of fact is much more intricate. It may, I think, be considered under the following heads.

1. The degree of general knowledge usually presumed in criminality, and the effect of a want of it.

2. The effect of ignorance or mistake as to particular matters of fact connected with an offence.

1. The degree of general knowledge usually presumed in criminal cases may be inferred from the law as to madness, which will be more fully considered hereafter. It appears to contain two elements, first, a capacity of knowing the nature and consequence of the act done, and next, a capacity of knowing the common notions of morality current in England on the subject of crime. I say a "capacity of knowing," instead of knowledge, because if a man has the ordinary means of knowing certain obvious things, and does not choose to use them, or if he chooses to differ with mankind at large on the subject of the moral quality of particular acts, regarding as virtuous actions what they look upon as crimes, he must take the consequences. Such a presumption differs widely from the presumption that every one knows the law, for it is true in every or almost every case. Every one knows or has the means of knowing, that it is extremely dangerous to life to explode a barrel of powder in a crowded street, and that murder, theft, robbery, forgery, and fraud are generally regarded as wicked actions, whereas hardly any one except a professional lawyer is acquainted with the definitions of crimes and the punishments provided for them. This matter however will be more conveniently inquired into in connection with the subject of the effect of madness upon criminality, for madness is the only cause which is recognised by law as capable of producing such incapacity as is described.



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2. The effect of ignorance or mistake as to particular matters of fact connected with an alleged offence is a matter which varies according to the definitions of particular offences.

Where the definition of a crime clearly describes the nature of its constituent mental elements there is little difficulty in seeing how far ignorance excludes their presence. 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. It is obvious that some mistakes of fact as to any particular case are and that others are not consistent with such an intention. For instance, a man in the dark takes a watch from a table believing it to be a gold watch belonging to A, whereas, in truth, it is a silver watch belonging to B. Here there is a double mistake, but if the taker's intention was to appropriate fraudulently and without claim of right the watch which he took, whatever it might be made of and whoever might be its owner, he is a thief, notwithstanding his mistakes. Suppose, however, that the taker believed in good faith that the watch which he took was his own, his mistake would take the case out of the definition of theft, for such a taking could hardly be fraudulent, and it would in all probability be a taking with a claim of right. A third case is possible. Suppose the taker supposed the watch to be his own; and believed it to be a watch on which the person from whom it was taken had a lien, and that he took it with the fraudulent intention of defeating the lien and knowing that he had no right to do so; suppose finally that the watch turned out not to be his own, but another belonging to the person from whom he took it. It has been said, though I do not think it has been positively decided, that it is theft for the owner to take his own goods with intent to defeat a lien upon them, but in the case suggested there would be a further question, namely, whether the taker would be entitled to be placed in the same position as if the watch had been his and to have the benefit of any doubt as to the law which may exist on the point? This is a question on which I had rather not give an extra-judicial opinion.

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It has considerable analogy to a case lately decided of [1] R. *v.* Prince in which a man was tried for the abduction of a girl under sixteen years of age, and defended himself on the ground that she told him that she was seventeen and that from her appearance he believed her. The jury found that he did in fact honestly believe that she was seventeen, but he was convicted and his conviction was affirmed on the ground (as I understand the judgment of the majority of the Court) that upon the whole it appeared probable that the legislature intended persons abducting young girls to act at their peril. In a case of [2] R. *v.* Bishop, the defendant was tried before me upon an indictment under 8 & 9 Vic. c. 100, s. 44, which makes it a misdemeanour for any person to receive two or more lunatics into any house not duly licensed as an asylum under the act. It was proved that the defendant did receive more than two lunatics into an unlicensed house for the purpose of being treated as lunatics are treated in an asylum, but that she honestly and on reasonable grounds believed that the persons so received were not lunatics, but persons afflicted with hysterical and other disorders approaching to lunacy. I held, and the Court for Crown Cases Reserved upheld my holding, that it was immaterial whether the defendant knew that her patients were lunatics or not, as the legislature intended persons keeping such establishments to receive patients at their peril. This appeared from the general scope of the act, and from the nature of the evils to be avoided, and I am not aware of any other way in which it is possible to determine whether the word "knowingly" is or is not to be implied in the definition of a crime in which it is not expressed.

It will be found upon examination of the list of crimes known to the law of England that there are very few upon which any real difficulty as to criminal knowledge can arise. The only common ones with which I am acquainted are bigamy and certain offences against the person. In regard to bigamy it is a moot point whether, if a person marries within seven years after the death of his or her wife or husband, honestly believing on good grounds that the other

[1] L.R. 2 C.C.R. 154.

[2] L.R. 5 Q.B.D. 259.

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party to the marriage is dead, he is or is not guilty of bigamy if the other party is in fact alive. [1]There are decisions both ways on the subject.

With regard to offences against the person the question of mistake arises when a person uses violence towards another under a mistaken belief in facts which would justify his violence. It would be foreign to the purpose of this work to go minutely into all the questions which may arise on this subject,[2] and what I have to say upon it will be said more appropriately in connection with the subject of offences against the persons of individuals.

MALICE.—The three words "malice," "fraud," and "negligence," enter into the definition of a large number of crimes, and it is proper to notice them here because they are the names of states of mind. Each is a somewhat vague and popular word, and the word "malice" has in reference to particular crimes acquired by degrees a technical meaning differing widely from its [3]popular meaning. The meaning of the word "fraud," as used in criminal law, is I think simpler and more definite than that of the word "malice," but it requires some explanation. The same may be said of "negligence."

All these three words have one feature in common. They are vague general terms introduced into the law without much perception of their vagueness, and gradually reduced to a greater or less degree of certainty in reference to particular

[1] In R. *v.* Gibbons, 12 Cox, 237, it was held to be bigamy. In R. *v.* Moore, 13 Cox, 544, the opposite view was taken.

[2] In the Draft Code published as an appendix to the Report of the Criminal Code Commissioners, sections 25-70 go into this subject and others connected with it with extreme and indeed, in my judgment, somewhat unnecessary minuteness. In the main they codify the existing law, but they suggest certain alterations and extensions which are marginally noted. I do not think that any statement of the law so complete and so carefully considered can be found elsewhere. I hope there is no impropriety in my saying that Lord Blackburn took the leading part in the drafting and settlement of this part of the Draft Code. It should be observed, however, that the sections as they stand decide a large number of questions which are still doubtful at common law.

[3] In Todd's edition of Johnson's *Dictionary*, "Malice" is thus defined: "1. Badness of design; deliberate mischief. 2. Ill intention to any one; "desire of hurting." In Webster the definition is: "Extreme enmity of heart or "malevolence; a disposition to injure others without cause from mere personal "gratification or from a spirit of revenge; unprovoked malignity or spite." The French word "malice" is defined by M. Littré, "Inclination à mal faire."

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offences, by a series of judicial decisions. In practice this has no doubt saved trouble to the legislature, and it has resulted in the establishment by the judges of a number of rules of various degrees of merit. The nature of the process, and the vagueness of the words themselves, are best exemplified by translating "malice" into its English equivalent, "wickedness." A "malicious libel" then becomes "a wicked little book," or perhaps "a wicked written attack on character." The vagueness of such a definition is too obvious to reqnire illustration. It was veiled to a certain extent from people in general by the tacit assumption that "malice" and "libel" were terms of art, the meaning of which was known by lawyers. This has now become true by slow degrees, and in consequence of innumerable decisions, but it was far indeed from the truth when the words were first used.

The words "malice," "malicious," and "maliciously," occur principally in reference to three crimes or classes of crimes. 1. Murder is killing "with malice aforethought." 2. "Malice" is said to be of the essence of a libel. 3. The 24 & 25 Vic. c. 97, "an act to consolidate and amend the law relating "to malicious injuries to property," introduces the word, "maliciously" into the definition of [1] nearly every crime which it defines. The word occurs in some other definitions of crimes, but these are the most important and characteristic. A comparison of the different meanings which the word bears in these different connections, will explain what I have said on the subject.

[2] In reference to murder, "malice" (the word "aforethought" is practically unmeaning), means any one of the following states of mind, preceding or co-existing with the act or omission by which death is caused:—

(*a*) An intention to cause the death of, or grievous bodily harm to any person, whether such person is the person actually killed or not.

(*b*) Knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to some person, whether such person is the person actually killed or

[1] The exceptions are ss. 36, 47, 50, 52, 53, 54.
[2] See my *Digest*, art. 223, and note xiv. p. 354.

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not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

(*c*) An intent to commit any felony whatever.

(*d*) An intent to oppose by force any officer of justice on his way to, in, or returning from the execution of the duty of arresting, keeping in custody, or imprisoning any person whom he is lawfully entitled to arrest, keep in custody, or imprison, or the duty of keeping the peace, or dispersing an unlawful assembly, provided that the offender has notice that the person killed is such an officer so employed.

[1]In reference to libel, the word malicious means no more than the intentional publication of defamatory matter, not excused on certain definite grounds, as, for instance (in certain cases), by the truth of the matter published, or in certain other cases, by an honest belief in the truth of the matter published.

In reference to malicious mischief, and other offences (*e.g.* malicious wounding, under 24 & 25 Vic. c. 100 s. 20), "malice" means nothing more than doing the act intentionally without lawful justification or excuse.

The result is that the word seldom if ever bears its natural sense (except it may be in some of the rules as to libel), and that if the law were codified it might with great advantage be altogether omitted from the criminal law. This course was taken both in the Indian Penal Code, and in the Draft Criminal Code of 1879.

It may be worth while to notice the reason why the word "malice" is unsuitable for the purpose to which it has been applied. It is that in its simple and natural meaning it has reference to the motives which prompt a man's conduct, and not to his intentions or actions. A "malicious" act, according to the common use of language, is an act of which the motive is a [2]wicked pleasure in giving pain. To make motive the test of criminality is always popular, because it tends to

[1] See my *Digest*, ch. xxxvii. p. 184-193, and note xvi. p. 374.

[2] Pleasure in giving pain may be virtuous, as for instance when a fraud is exposed, or when a man who deserves it is made to look ridiculous. Such pleasure would not, I think, be called malicious or wicked in the common use of language.

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bring law into harmony with popular feeling, but it is open to the following conclusive objections:—

First, one great object of criminal law is to prevent certain acts which are injurious to society. But the mischief of an act depends upon the intention, not upon the motives of the agent. If a man intentionally burns down a house, or intentionally wounds the owner, the injury to the owner and the danger to others is equally great, whether the offender's motive was or was not one in which the public in general would be inclined to sympathise.

Secondly, for the reasons already given, it is impossible to determine with any approach to precision, what were a man's motives for any given act. They are always mixed, and they generally vary.

Thirdly, lawyers are so fully sensible of these considerations that when the word "malice" is embodied in the definition of a crime the natural consequence of using the word is always evaded by legal fictions. Malice is divided into "express" and "constructive" or "implied" malice, or, as it is sometimes, called, "malice in law" and "malice in fact." The effect of this fiction is that bad motives are by a rule of law imputed where intentional misconduct not prompted by bad motives is proved. It would obviously be simpler and more truthful to punish the misconduct irrespectively of the motive.

FRAUD.—There has always been a great reluctance amongst lawyers to attempt to define fraud, and this is not unnatural when we consider the number of different kinds of conduct to which the word is applied in connection with different branches of law, and especially in connection with the equitable branch of it. I shall not attempt to construct a definition which will meet every case which might be suggested, but there is little danger in saying that whenever the words "fraud" or "intent to defraud" or "fraudulently" occur in the definition of a crime two elements at least are essential to the commission of the crime: namely, first, deceit or an intention to deceive or in some cases mere secrecy; and, secondly, either actual injury or possible injury or an intent to expose some person either to actual injury or to a risk

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of possible injury by means of that deceit or secrecy. This intent, I may add, is very seldom the only or the principal intention entertained by the fraudulent person, whose principal object in nearly every case is his own advantage. The injurious deception is usually intended only as a means to an end, though this, as I have already explained, does not prevent it from being intentional.

The only practical difficulty that I have ever noticed in applying the law upon this subject arises from forgetfulness of this fact or from attempts to confuse the minds of juries by refusing to remember it. The argument is this—

"Dr. Dodd had no intent to defraud when he raised money "on a security to which he forged Lord Chesterfield's name, "because he had every reason to believe that he would be "able to raise funds wherewith to redeem the security before "it became due and because he fully intended to do so." The obvious answer is that he did intentionally put the holder of the security in a worse position than that in which he would have stood if he had not been deceived, the position namely of having advanced money to Dr. Dodd without any security at all, and in this way he did defraud him by inducing him to take a risk which he would not have taken had he known the truth.

A practically conclusive test as to the fraudulent character of a deception for criminal purposes is this: Did the author of the deceit derive any advantage from it which he could not have had if the truth had been known? If so, it is hardly possible that that advantage should not have had an equivalent in loss, or risk of loss, to some one else; and if so, there was fraud. In practice people hardly ever intentionally deceive each other in matters of business for a purpose which is not fraudulent.

NEGLIGENCE.—The meaning of negligence, in the common use of language, is very general and indefinite. It is practically synonymous with heedlessness or carelessness, not taking notice of matters relevant to the business in hand, of which notice might and ought to have been taken. This meaning is no doubt included in the legal sense of the word,

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but in reference to criminal law the word has also the wider meaning of omitting, for whatever reason, to discharge a legal duty. It is far less frequently used in defining crimes than the words "malice" and "fraud;" for, as I have already observed, crimes by action are much commoner than crimes by omission. In reference to manslaughter by negligence (the only form of a crime by omission which is at all common), the legal and popular meanings of the word are nearly identical as far as the popular meaning goes; but in order that negligence may be culpable it must be of such a nature that the jury think that a person who caused death by it ought to be punished; in other words, it must be of such a nature that the person guilty of it might and ought to have known that neglect in that particular would, or probably might, cause appreciable positive danger to life or health, and whether this was so or not must depend upon the circumstances of each particular case.

Cases, however, may be put in which manslaughter by negligence would be committed though no carelessness had occurred. Suppose, for instance, a fatal railway accident was caused by an intentional omission on the part of a railway servant to do something which he maintained it was not his legal duty to do. If it was shown to have been his duty, he would be guilty of manslaughter by negligence, though he was not careless but mistaken.

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# CHAPTER XIX.

## [1] RELATION OF MADNESS TO CRIME.

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I APPROACH the discussion of this subject with considerable distrust of my own power of dealing with it satisfactorily, as it cannot be treated fully without a degree of medical knowledge to which I have no pretensions. Moreover, the subject has excited a controversy between the medical and the legal professions in [2] which many things have been said which would, I think, have been better unsaid. Cruelty,

[1] The following are the medical works most frequently referred to in this chapter:—

1. *Mental Pathology and Therapeutics*, by W. Griesinger, M.D. Translated from the German. Second Edition, by C. Lockhart Robinson, M.D., and James Rutherford, M.D. London, 1868. Referred to as Gr.

2. *A Manual of Psychological Medicine*, by John Charles Bucknill, M.D., and by Daniel Hack Tuke, M.D. Third Edition. London, 1874. Referred to as B. and T.

3. *The Pathology of Mind*, by Henry Maudsley, M.D. Third Edition. London, 1879.

4. *The Physiology of Mind*, by Henry Maudsley, M.D. Third Edition. London, 1876.

5. *Responsibility in Mental Disease*, by Henry Maudsley, M.D. Fourth Edition. London, 1881.

I have read and considered many other works on the same subject which I need not specially mention. They all say much the same things in different ways. I have not thought it necessary to refer to works on metaphysics or philosophy. Any one interested in such studies will be able to supply such references; others would get no good from them.

[2] To give a single instance of this, the latest and one of the ablest medical writers on this subject, Dr. Maudsley (in his *Responsibility in Mental Disease*, Preface, p. vii.), speaks of "the scorn and indignation felt by those who observe "with impatience the obstinate prejudice with which English judges hold to "an absurd dictum, which has long been discredited by medical science, has "been condemned in the severest terms by judicial authority in America, and "has been abandoned in other countries." This is a single specimen of numerous passages in which Dr. Maudsley expresses in various forms the intense hatred, contempt, and disgust with which he regards English judges. For one thing, he quotes with apparent approval a German author who calls us judicial murderers. From Dr. Maudsley, such language is worth a word of notice, for no one can doubt his professional eminence or general ability.

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ignorance, prejudice, and the like, are freely ascribed to the law and to those who administer it, on the grounds that it is said not to keep pace with the discoveries of science and to deny facts medically ascertained. The heat and vehemence with which such charges are made makes a perfectly impartial discussion of the whole matter difficult. It is hard for any one not to resent attacks upon a small body of which he is himself a member, such attacks being often harsh and rude, and almost always connected with if not founded upon misconceptions. The interest and possibly the importance of the task is, however, upon a par with its difficulty, and it certainly should be said, in extenuation of the violent language which medical writers frequently use upon this matter, that they are sometimes treated in courts of justice, even by judges, in a manner which, I think, they are entitled to resent. Sarcasm and ridicule are out of place on the bench in almost all conceivable cases, but particularly when they are directed against a gentleman and a man of science who, under circumstances which in themselves are often found trying to the coolest nerves, is attempting to state unfamiliar and in many cases unwelcome doctrines, to which he attaches high importance.

I think that what can truly be said of the law, as it stands, is this. The different legal authorities upon the subject have been right in holding that the mere existence of madness ought not to be an excuse for crime, unless it produces in fact one or the other of certain consequences. I also think that the principle which they have laid down will be found, when properly understood and applied, to cover every case which ought to be covered by it. But the terms in which it is expressed are too narrow when taken in their most obvious and literal sense, and when the circumstances under which the principle was laid down are forgotten. Medical men, on the other hand, have contended in substance that every person who suffered in any degree under a disease of which the nature is most obscure, whilst the symptoms vary infinitely, should be free in all cases from legal punishment. The subject is one of the greatest difficulty, and it is most imperfectly understood by medical men

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as well as by lawyers. I think the lawyers were, and are, right in admitting with great suspicion and reluctance excuses put forward for what on the face of them are horrible crimes, especially as some medical theories seem to go to the length of maintaining that all crime is of the nature of disease, and that the very existence of criminal law is a relic of barbarism.

I must say that the provisions of the existing law have, as it seems to me, been greatly, though perhaps not unnaturally, misunderstood by medical men, who cannot be expected either to appreciate the different degrees of authority to be ascribed to different judicial declarations of the law, or to understand the rules for their interpretation, or to recognize the limitations under which they are made, or to appreciate the fact that when made they cannot be altered at will. It is perfectly true that the law relating to insanity, like the definitions of murder and theft, is "judge-made law," that is to say, it consists of judicial decisions; but it is a popular error to suppose that, because there is a sense in which judicial decisions make the law and in which judicial decisions may amend the law when made, the judges, individually or collectively, can, from time to time, alter the law according to their own views as to what it ought to be. If a point not previously decided is raised before a proper tribunal by a set of circumstances which require its decision, an addition is made to the law, but it is made by adding to, adapting, or explaining previous decisions, and very rarely indeed by overruling them. Moreover, to read judicial decisions correctly is an art in itself, to be acquired only by long professional practice, nor can any one even begin to do so before he has familiarized himself with several rules well known to lawyers, but in my experience altogether unknown to medical men.

If controversy were my object, it would be easy to show that hardly any one of the medical critics of the law understands what he criticizes so far even as to be able to quote correctly the authorities on which he relies; but controversy is endless and unfruitful, and I will therefore content myself with stating my own views, and leaving others, if they think proper, to compare them with the various medical theories on the subject.

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One leading principle which should never be lost sight of, as it runs through the whole subject, is that judges when directing juries have to do exclusively with this question,—Is this person responsible, in the sense of being liable, by the law of England as it is, to be punished for the act which he has done? Medical writers, for the most part, use the word "responsible" as if it had some definite meaning other than and apart from this. Dr. Maudsley does so, for instance, throughout the work to which I have referred, but he never explains precisely what he means by responsibility. I suppose he means justly responsible, liable to punishment by the law which ought to be in force, but if this is his meaning, he confounds "is" and "ought to be," which is the pitfall into which nearly every critic of the law who is not a lawyer is sure to fall. He [1] says, for instance, "Under the present system, the "judge does actually withdraw from the consideration of the "jury some of the essential facts, by laying down authori-"tatively a rule of law which prejudges them. The medical "men testify to facts of their observation in a matter in "which they alone have adequate opportunities of observation; "the judge, instead of submitting these facts to a jury for "them to come to a verdict upon, repudiates them by the "authority of a so-called rule of law, which is not rightly "law, but is really false inference founded on insufficient "observation."

The sense of the passage quoted is, that independently of all law there are conditions of mind called responsibility and irresponsibility; that from insufficient observation the judges have falsely inferred that irresponsibility is, as a fact, inconsistent with knowledge that a given act is wrong; and that the judges habitually trespass on the province of the jury by withdrawing from their consideration the fact that physicians assert that knowledge that an act is wrong is consistent with irresponsibility.

Apart from the question whether the law is as Dr. Maudsley supposes it to be, all that a judge directing a jury ever does or can understand by responsibility or irresponsibility is, that the person referred to is or is not liable, according to the

[1] *Responsibility in Mental Disease*, p. 102.

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existing law of England, to be punished. If the law was that madness is in no case an excuse for crime, all madmen would be responsible, and the judge would properly refuse to permit evidence to be given to the contrary. Similarly if the law is that every man who does an act which he knows to be wrong is liable to be punished for it, the judge withdraws from the jury no fact which they ought to consider, as being relevant to the question before them, when he prevents a medical witness from saying that many men who know that what they do is wrong ought, nevertheless, not to be punished. Such a physician would in substance say that the law is wrong and that the jury ought to break it, and this would make the jury the judges of the law. To allow a physician to give evidence to show that a man who is legally responsible is not morally responsible is admitting evidence which can have no other effect than to persuade juries to break the law.

I think that in dealing with matters so obscure and difficult the two great professions of law and medicine ought rather to feel for each other's difficulties than to speak harshly of each other's shortcomings. If it is true, as I think it is, that the law of England on this subject is insufficiently expressed, it is no less true that medical knowledge relating to insanity is fragmentary, not well arranged, and, to say the very least, quite as incomplete as the law. If the law is reproached with cruelty to lunatics, the medical profession was till very recent times open to the same reproach in a far greater degree. If their due importance is not attached by lawyers to the more delicate and obscure forms of disease of the brain, it must be observed that medical men have but recently brought them to light, and are by no means unanimous as to their nature and effects.

With these introductory observations I will proceed to discuss the matter in hand.

In dealing with this subject the following questions occur:—

What is the meaning of the word mind? What is a sane and what an insane mind? How far, and in what cases, does the fact that a person is insane relieve him, by the law

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of England, from responsibility for what would otherwise be a crime? How far is that law reasonable?

Difficult and remote from law as some of these inquiries may be, it is impossible to deal with the subject at all without entering to some extent upon each of them.

1. What is the meaning of the word mind?

The question whether men are, as has been said, "intelligences with organs," or collections of organs of which thought, feeling, and will are some of the functions, is, of all controversies, the most important, but it is one on which it is unnecessary to say anything in this place; for whichever view may be true it is certain that no definite assertions leading to practical results, and capable of being tested by experiment can be made about the mind unless the word is used as a general name for all the operations commonly called mental, namely, sensation or feeling, intellect, emotion, volition. These operations may be traced in every complete voluntary action, and they occur in the order stated. For instance, a merchant has reason to believe that particular goods will rise in price, and makes a contract for the purchase of a quantity of them on certain terms. If this is analysed the following steps will appear:—First, the facts must be learnt. They will probably be learnt from correspondence, from conversation, from reading the newspapers, &c. These operations are carried on by the senses and the intellect. The information thus obtained excites the emotion of hope of gain, which presents itself in the form of one amongst various motives towards a volition or determination, which ultimately issues in action. It will be found that every imaginable case of voluntary action may be exhibited in this form, though the processes of sensation and intellect may have preceded the emotion so long as to be almost forgotten. An emotion (anger, love, fear, &c.) may be roused by associations connected with the perceptions and acts of intelligence in which it originated, by links at once uncertain and obscure, and may prompt to volition and action after the lapse of years.

This account of the mind corresponds, step by step, with the elements of voluntary action enumerated in the last



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chapter, and as all crimes are voluntary actions, and all voluntary actions are affected by each of the different elements which go to make up the mind, the relations of sanity and insanity to crime must show themselves either in the senses, or the intellect, or the emotions, or in volition, or in more than one of them, or to put the same thing in other words, sanity and insanity must apply to knowledge, motive, will, or more than one of these.

The next question is, What are sanity and insanity?

The answer is, that sanity exists when the brain and the nervous system are in such a condition that the mental functions of feeling and knowing, emotion, and willing, can be performed in their regular and usual manner. Insanity means a state in which one or more of the above-named mental functions is performed in an abnormal manner or not performed at all by reason of some disease of the brain or nervous system.

That the brain and the nervous system are the organs by which all mental operations are conducted is now well established and generally admitted. When a man either feels, knows, believes, remembers, is conscious of motives, deliberates, wills, or carries out his determination, his brain and his nerves do something definite, though what that something is, what parts of the brain are specially connected with particular mental functions, by which part a man remembers, by which he imagines, by which he conceives, and how any part of the brain acts when any of these operations is performed, no one knows. All that can be affirmed is, that one set of nerves carry to the brain a variety of impressions of external objects and occurrences, that these impressions excite emotions which affect many parts of the body in various ways, and which in particular affect the brain; that the brain in some manner deals with the impressions, whether of perception or of emotion which it receives, during which process the man is conscious of what we describe as emotion, motive, deliberation, and choice; and that at the moment when the man is conscious of volition some discharge from the brain, through a different set of nerves from those which convey impressions to it, acts

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on the various parts of the body in such a manner as to cause those groups of bodily motions which we call voluntary actions.

The brain, being an organ of extreme delicacy and inexpressible intricacy is liable to a great variety of diseases, some of which prevent the mental functions from being performed in the usual and healthy manner though others do not. Those which do are the causes of insanity. In the present state of our knowledge, the progress of the disease and the connection between particular states of the brain and particular anomalies of conduct cannot be traced out, but a general connection between the disease and the mental symptoms can be distinctly proved, and the mental symptoms themselves can be classified and described. Some general idea of the nature of the disease of insanity is absolutely essential to anything like an appreciation of the state of the law upon the subject. I have attempted to draw such a sketch, and I must say a few words as to the manner in which I have done so. My only apology for writing at all upon the subject is that I cannot otherwise make my view of the law intelligible.

I have read a variety of medical works on madness, but I have found the greatest difficulty in discovering in any of them the information of which I stood in need; namely, a definite account of the course of symptoms collectively constituting the disease. Most of the authors whose works I have read insist at a length which in the present day I should have supposed was unnecessary on the proposition that insanity is a disease, but hardly any of them describe it as a disease is described. They all, or almost all, describe a number of states of mind which do not appear to have any necessary or obvious connection with each other. These they classify in ways which are ultimately admitted to be more or less unsatisfactory. Total insanity, partial insanity, impulsive insanity, moral insanity, pyromania, kleptomania, and many other such expressions occur; but in the absence of any general account of the whole subject, showing what is the common cause of which all these symptoms are effects, and how they respectively proceed from it, these expressions are like adjectives connected with an unintelligible



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CH. XIX. substantive. To say that a strong and causeless desire to set a house on fire is pyromania, and that a state of continuous passionate excitement, in which all the ordinary connection of ideas is broken up, and a man behaves as if he were drunk or transported with intense anger, is mania as opposed to melancholia, is to substitute words for thoughts. It is like telling a man that a whale and a monkey are both mammals, when you do not explain what mammal means. Dr. Maudsley criticizes at some length various ways which have been suggested of classifying insanity, and I think would agree with these remarks, for [1] he says, after noticing a scheme of the late M. Morel's :—"Instead, then, of seizing upon a "prominent mental symptom, such as an impulse to suicide, "homicide, theft, incendiarism, which may be met with in a "particular case, and thereupon making such pathological "entities as suicidal mania, homicidal mania, kleptomania, and "pyromania, which have no existence as distinct diseases, the "aim of the inquirer should be to observe carefully all the "bodily and mental features, and to trace patiently in them "the evolution of the cause. Given a case of insanity in "which homicidal impulse is displayed, he will observe with "what other symptoms the impulse is associated, will there-"upon refer the case to the natural group to which it belongs, "and set forth its relations to its cause; so he will present "an accurate picture of a real disease, instead of conceal-"ing inadequate observation under a pretentious name, "and offering the semblance of knowledge by the creation "of what can be described only as a morbid metaphysical "entity."

I have sought in vain for what appeared on the face of it to be "an accurate picture" of insanity as "a real disease" in many medical works full of all sorts of curious information, and no doubt well suited for the special purposes for which they were written. One work, however, appeared to me to contain such a picture, though on a scale which made it necessary

[1] *Responsibility, &c.*, p. 80. Dr. Maudsley, as this passage shows, can be hard upon medical men as well as lawyers. His writings are full of passion and vehemence about everything and everybody, but notwithstanding this weakness they are very able.

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to reduce it greatly in order to produce such a sketch of the ordinary course of the malady as I was in want of. The work to which I refer is *Mental Pathology and Therapeutics*, by [1] Dr. Griesinger, which I am told is regarded as a work of the highest authority. I thought that to take an account of the subject from a single author, illustrating his statements by occasional references to others, was the course which in the hands of an unprofessional person was most likely to be useful.

[2] In the first place then, the causes of madness are numerous. There may be a constitutional predisposition to it, either hereditary or congenital. The brain may be affected directly as by physical injury to the head, or sudden mental shock, long continued annoyance, excessive fatigue, drunkenness, or vicious habits. [3] Many diseases affect the brain either directly or by their secondary effects. Apoplexy, paralysis, and epilepsy, are examples of the former. [4] Childbirth and its consequences, [5] hysteria, [6] disorders of the stomach, bladder, and liver, [7] rheumatism in some cases, [8] consumption and [9] syphilis, may all in various ways affect the brain. For one or other of these or similar reasons the brain becomes diseased. The disease may consist in simple irritation, or in disturbance, either by way of excess, or defect in the natural supply of blood, [10] or in minute alterations in the substance of the brain capable of being observed after death by microscopical examination, or in injuries of a more extensive nature visible upon inspection to a skilled eye or sometimes in [11] atrophy of the organ itself.

[1] I quote from an English translation by Dr. C. Lockhart Robinson and Dr. James Rutherford, published by the Sydenham Society, London, 1867.

[2] Gr. 127, 132; B. and T. 57-110.

[3] B. and T. 337-339. [4] B. and T. 350. [5] B. and T. 346.

[6] B. and T. 327. [7] B. and T. 377. [8] B. and T. 382.

[9] B. and T. 386.

[10] B. and T. pp. 613-640. The authors give an account of the state of knowledge on the subject in 1874, together with many plates showing the nature of the alterations. They say (p. 613):—"It may be broadly "stated that morbid changes can be found in every insane brain if the "investigation is thoroughly worked out."

[11] B. and T. 518. The authors give a table (p. 520) showing the results of a comparison in sixty-three cases between the actual size of the brain and the cavity of the skull, which before atrophy is presumably filled. It appears from this that in one case fifteen ounces had disappeared from a skull in which there was room for fifty-two and a half ounces. This is nearly one-third.

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[1] Griesinger, writing in 1861, when much less use than at present had been made of the microscope for the examination of the brains of madmen, remarks that in many cases "the "cranial cavity and its entire contents 'presented' after death "'altogether normal relations.'" He observes, however, that this does not prove the absence in such cases of disease of the brain, as the same is often observed in regard to nervous disorders. However, [2] "it must in the present state of science "be assumed that the symptoms very often depend upon "simple nervous irritation of the brain, or upon disorders of "nutrition which are as yet unknown." He adds also, that [3] "the microscope may probably reveal important changes," and he makes this striking observation, "What must we expect to "find in the brain of one who dies during sleep? And yet "sleep is a change in the psychical functions" (involving their total suspension), "even more decided than is observed "in any form of mental disease."

Such are the diseases of which the different forms of mental disturbance, known collectively as insanity, are the symptoms, though the specific nature and the manner of the connection between the two are unknown. I now pass to these symptoms.

In treating of the forms of mental disease, [4] Griesinger observes, "The analysis of observations leads us to conclude "that there are two grand groups or fundamental states of "mental anomalies, which represent the two most essential "varieties of insanity. In the one, the insanity consists in "the morbid production, governing, and persistence of emo-"tions and emotional states, under the influence of which the "whole mental life suffers according to their nature and form. "In the other, the insanity consists in disorders of the in-"tellect and will which do not (any longer) proceed from a "ruling emotional state, but exhibit without profound emo-"tional excitement, an independent tranquil, false mode of "thought, and of will (usually with the predominant character "of mental weakness). Observation shows further that in "the great majority of cases, those conditions which form the

[1] Gr. 409. [2] Gr. 432. [3] Gr. 412.
[4] Book iii. For the passage quoted see p. 207.

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"first leading group precede those of the second group, that "the latter appear generally as consequences and termina-"tions of the first when the cerebral affection has not been "cured."

Griesinger divides the emotions for the purposes of his work into two classes; those which tend to depression, and those which tend to excitement. To these two classes of emotions correspond two forms of mental disease, the principal seat of each of which is in the feelings, namely, melancholia and mania; melancholia being the condition in which disease of the brain causes a depressed painful condition of the emotions; mania, the condition in which disease of the brain causes an excited vehement state of the emotions, tending to morbid energy and restlessness.

[1] "Observation shows that the immense majority of mental "diseases commence with a state of profound emotional per-"version of a depressing and sorrowful character," though, there are exceptions.

This depressed condition has various forms. The mildest is hypochondriasis, which seems to consist in exaggerated impressions as to diseases under which the patient suffers or supposes himself to suffer. At first [2] "an undefined yet vivid "feeling of illness torments and annoys the patient in an obscure sort of manner," by degrees he comes to believe himself to be suffering under all sorts of diseases. He grows dejected, thoughtful, undecided. Fixing his thoughts on his supposed complaints, he becomes absent and forgetful, and the direction of his attention to supposed disorders often actually brings them on to a greater or less extent.[3]

[4] "Melancholia" which seems to be the same thing as melancholy, except that it is caused by disease of the brain, and not by external circumstances, may exist apart from hypochondria, and without reference to any misapprehension about disease. In such cases the mental pain consists in [5] "a "profound feeling of *ill being*, of inability to do anything, "of suppression of the physical powers, of depression "and sadness, and of total abasement of self-conscious-

[1] Gr. 210. [2] Gr. 211. [3] Gr. 211-222.
[4] Gr. 223-46. [5] Gr. 223.

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"ness." (I do not quite understand this last expression, unless it means general low spirits.) The patient ceases to take pleasure in anything. He comes to hate his former friends and to be indifferent or averse to what used to give him pleasure. Sometimes a general impression occurs that something has happened which without disturbing his perceptions deprives them of their reality. [1] "It appears to me," said such a person, "that everything around me is precisely "as it used to be although there must have been changes. "Everything around me wears the old aspect, everything "appears as it was, and yet there must have been great "changes." After a time this state of mind passes into one in which the patient feels as if he were living in a dream, though he sees things as they are. There are states between sleeping and waking in which some people have for a short time the same sort of feeling.

The patient is conscious of the change, and it fills him with distress, but he feels that he cannot help it, however much he struggles against it, and hence come ideas of being subject to some external power, or to a demoniacal influence. This is accompanied by inactivity, doubt and irresolution, incapacity of decision and absence of will. The patient is sometimes always discontented, in other cases he is in a state of complete apathetic indifference.

At this point delusions present themselves suggested by the state of feeling described. The patient [2] "feels that he "is in a state of anxiety of mind exactly similar to that "which a criminal is likely to experience after the per-"petration of some misdeed, and so he believes that he too "has committed some crime." . . . "Sometimes he feels him-"self the prey of some undefined torment, and imagines "himself encompassed with enemies. Soon he actually con-"siders himself persecuted, surrounded by foes, the subject "of mysterious plots and watched by spies." A religious man believes himself to be hopelessly doomed to everlasting damnation. A man specially attached to his family believes them to be dead or to have deserted him. A man specially intent upon property, believes himself to be reduced to

[1] Gr. 224. [2] Gr. 227.

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beggary, and these delusions may vary at different times. [1] Their common character however is "that of passive suffer- "ing, of being controlled and overpowered." Griesinger regards such delusions as being in the nature of attempts at explanations of the state of distress in which disease places the patient, though it seems from his account of the matter that they are, if the expression is permissible, involuntary attempts proceeding from the association of ideas and becoming fixed in the mind when they have gained a certain amount of stability. They would seem in short to resemble those dreams which are suggested by a real noise or some actual sensation.

There are three forms into which this sort of madness may pass. [2] The first form is when the patient's mind is fixed so exclusively upon his sufferings and their supposed causes that life becomes a sort of permanent nightmare. [3] "The patient lives in an imaginary world. So far as he "is concerned all reality has disappeared. The sufferer "is unable to exert his will, and therefore feels the im- "possibility of freeing himself from the terrors which threaten "him."

All external impressions are transformed so that he sees them as in a dream, and when the patients begin to recover "they are astounded as if they were just waking up. They "then compare their actual state to a dreadful dream and "their convalescence to an awakening therefrom."

[4] The second form is one in which the painful emotions already described give rise to impulses and suggestions to the will of a terrible character. Finding life dismal and horrible, the patient wishes to kill himself, and this desire which under the circumstances cannot perhaps be otherwise than natural is often stimulated by hallucinations (or false impressions on the senses) of various kinds. He will hear for instance a voice regarded as the voice of God saying, "Slay thyself, slay thyself."

[5] In other cases the desire to destroy may be a desire to destroy other persons or even inanimate things, a desire

[1] Gr. 228. [2] Gr. 246. [3] Gr. 247-252.
[4] Gr. 252-261. [5] Gr. 261-271.

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which occasionally leads people to set fire to houses, in which case it has been called ([1] according to Griesinger very improperly) pyromania. The feeling of intense melancholy and general dissatisfaction with all things may suggest such desires in innumerable ways. For instance, since all is bad is it not merciful to deliver children by violence from the miseries of life? Since the patient is a wretch unworthy to live, why not kill some one else in order to get himself hung for it? The world being accursed by reason of its horrible guilt is it not necessary to offer up some one as an expiatory sacrifice? Such thoughts when dwelt upon lead the patient to look upon the proposed act with longing and with a feeling that it will bring him relief and comfort, and in point of fact [2] according to Dr. Griesinger he dces gain ease and calm by giving way to such impulses. A lady who was much tempted to the commission of crimes under this form of disease said [2] "that every act of violence whether "in word or deed perpetrated on her children or those "around her afforded her considerable relief."

One of the most singular and, in a legal point of view, most interesting of all the facts connected with insanity must be mentioned here. There appears to be no doubt that impulses of this kind occasionally arise without warning and without being preceded, so far as can be ascertained, by any other symptoms of mental disease in persons [3] "in the "actual or at least apparent enjoyment of perfect health." Some cases are [4] recorded in which people, apparently quite sane and under no suffering which could explain their conduct, have suddenly committed or attempted to commit suicide. In other cases [5] "individuals hitherto perfectly sane "and in the full possession of their intellects are suddenly "and without any assignable cause seized with the most "anxious and painful emotions, and with a homicidal im-"pulse as inexplicable to themselves as to others." Such impulses sometimes affect cheerful affectionate people, and at other times those who are gloomy and misanthropical.

[6] Cases are not very uncommon in which such impulses

[1] Gr. 270. [2] Gr. 263. [3] Gr. 263.
[4] Gr. 259. [5] Gr. 264. [6] Gr. 266-267.

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have been recognised by those who felt them as horrible unnatural temptations, and in which they have been successfully resisted, sometimes with and sometimes without the aid of medical advice. In many cases these impulses are accompanied by [1] disturbances of the general health, which may in some cases be connected with brain disease, although in the particular instance it cannot be shown that any brain disease was present.

[2] The third and last form of melancholia perhaps lies outside of what can be regarded as madness. It occurs when a depressed state of mind caused by disease becomes chronic, and produces eccentricity of character and conduct which the sufferer understands and justifies on grounds involving no departure from ordinary motives or reasons. Such persons might be described as malicious, wilful, foolishly obstinate, wrong-headed, and the like. No one can have lived long in the world without knowing some of them. Their conduct perpetually suggests that there is about them some slight turn towards madness, but no one would confine them in a madhouse or regard them as irresponsible if (perhaps I should say unless) they were to commit crimes.

Having given the account of melancholia or mental depression caused by disease, of which the foregoing is an abstract, Dr. Griesinger proceeds to describe mania, the characteristic of which is that it is a state, caused by disease, of unnatural excitement of feeling and also of will. Melancholia is closely connected with mania, and often passes into it, as has been already pointed out. Indeed it must be obvious to every one that a person who is much depressed and is a prey to melancholy delusions may easily rebel against his misery and pass from a state of depression to a state of fury. [3] "The "more the motive power of the soul is excited by mental "pain, and the more general and persistent the manner in "which this is done, and the more vague and permanent the "excitement, the less are we inclined to regard this con-"dition as one of melancholia, and the nearer does it approach "to mania. It is useless and impossible to describe here

[1] Female irregularities, for instance.

[2] Gr. 271.

[3] Gr. 271.

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CH. XIX. "all the intermediate forms through which this transition "from melancholia passes into maniacal excitement."

[1] The approach of mania displays itself by great restlessness, loquacity, accompanied with morbid activity of thought, "with the increased muscular activity and impulse to exhibit it in actions; new ideas, and new sensations arise, "which at first plunge the patient into a state of astonishment and fear, but speedily end by gaining the complete "mastery." This state of mind may at first be concealed, but gradually becomes obvious to every one. Other functions of the body are disturbed at the same time, such as the digestion and the circulation of the blood. The essence of the disease is morbid excitement, [2] "with restless, impetuous, "and violent desires and actions. The desire for ceaseless "action and movement, the necessity of immediately exhibiting in action all that passes within the mind impels "the patient sometimes merely to harmless movements as "in dancing, speaking, singing, shrieking, laughing, weeping, and sometimes to restless and objectless employment, "which would attempt, according to the caprice of the "moment, suddenly and impatiently to alter everything "around; sometimes to destroy everything, animate or inanimate,—a tendency which may increase to outbreaks of "the blindest fury and rage."

This excitement is sometimes [3] "sorrowful, anxious, sour, "angry, defiant, or savage," and at other times "cheerful, "gay, merry, and frivolous," and these different tempers alternate with each other. [4] The effect of mania upon the intellect is to increase the rapidity and quantity of thought. "In its most moderate degrees this relation appears as an "exaggeration of the normal faculty of thought. The increased development and rapid transmission of ideas call "forth a crowd of long-forgotten remembrances in new and "vivid forms." But generally there is "a restless and "constant succession of isolated ideas which have no intimate "relation with each other, being merely connected by accidental external incidents, and as they pass through the "consciousness with great rapidity, and constantly change

[1] Gr. 279. [2] Gr. 280. [3] Gr. 281. [4] Gr. 283.

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"their combinations, are very transitory and superficial, or "of a very fragmentary character. Also owing to the "extreme rapidity with which they succeed each other, they "are very imperfectly developed." [1] Hence the principal effect of mania upon the intelligence is incoherence arising from precipitation of thought. Sometimes the general feeling of elevation and exuberance of mental action produces illusions which would account for it. [2] "The exaggerated idea "of freedom and power must have a foundation; there must "be something in the *ego* which corresponds to it; the *ego* "must for the moment become another, and this change can "only be expressed by an image which any momentary "thought may create. The patient may call himself Napoleon, "the Messiah, God, in short any great person. He may "believe that he is intimately acquainted with all the sciences, "or offer to those around him all the treasures of the world."

In acute mania, however, none of these ideas remain fixed, [3] "the delirious conceptions have no time to develop "and fix themselves by attracting other similar ideas." The senses as well as the will and the intellect are often disturbed by mania, though they more frequently take the form of false interpretations of real [4] perceptions than that of altogether groundless perceptions. "The patient for instance "takes a stranger for an old acquaintance, or when he hears "any noise thinks that some one is calling him."

Though mania is usually a stage in a course of disease of which melancholia is the earlier stage, short attacks of it sometimes occur in persons who are already labouring under other diseases affecting the mind. [5] "In epileptics it is "not uncommon to observe attacks of mania which are "often characterised by a high degree of blind fury and "ferocity."

[6] Mania may be incompletely developed, in which case the patient shows unnatural activity and restlessness, adopts strange eccentric projects, and is apt to be exceedingly vain, cunning, and intriguing, but does not manifest either definite marks of disease of the brain or positive disturbance of the

[1] Gr. 284. [2] Gr. 285. [3] Gr. 286.
[4] Gr. 287. [5] Gr. 289. [6] Gr. 299.

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CH. XIX. intellect. This state may be the first step towards mania proper, or it may continue for a length of time.

[1] The earlier forms of madness, melancholia, and mania sometimes pass into a calmer condition of feeling, in which, however, particular delusions which in the earlier stages of the disease may have occurred to the patient in an unstable transient way become fixed in his mind and regulate his conduct. [2] If this condition becomes chronic it is accompanied by weakness of will, capricious desires, odd unmeaning habits, and forgetfulness of many sets of ideas formerly familiar. The morbid state of feeling having subsided, and having been superseded by fixed delusion "an entire or partial "external equilibrium is re-established." Madness, so to speak, has overthrown sanity, and being no longer resisted the man's mind is no longer the scene of the conflict which it had previously experienced.

The condition in which a person is the victim for a time or permanently of fixed delusions is called monomania. The word has been objected to on the ground that it suggests that the disease is much more limited in its extent than it really is, involving nothing more than isolated mistaken beliefs not capable of being dispelled by reason. It appears that this view of the disease is incorrect. Such fixed delusions proceed from a profound disturbance of all the mental powers and processes. [3] "It "may seem as if there were merely a partial destruction of "the intelligence, while in reality the essential elements of "thought, normal self-consciousness, and a correct apprecia-"tion of the special individuality and its relation to the "world are utterly perverted and destroyed." In speaking of such delusions as they exist in the chronic form of the disorder [4] Griesinger says, "The more limited the circle of "these delirious conceptions, the more do they appear on "superficial consideration to be simple and even inconsider-"able errors of judgment. But how much do such errors "even in the most favourable cases, differ from those mistakes "which in the sane proceed from deficient knowledge. A "long series of psychical disorders must precede them; they "are inwardly developed from states of emotion. The whole

[1] Gr. 303-304. [2] Gr. 326-340. [3] Gr. 307. [4] Gr. 328.

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"personality of the patient is identified with them; he can "neither cast them from him by an act of will, nor rid "himself of them by argument; and in order to the exist- "ence of the delirium in this mild form not only must that "long series of emotional states in which it grew have run "their course, but there must also remain behind a deficiency "of thought to insure its existence."

The states of emotion marked either by depression or by excitement, pass into states of general mental weakness. [1] One form of it is known as chronic monomania, in which the mind is under the influence of the chronic delusions, of monomania already described, accompanied by progressive weakness of will and forgetfulness of past knowledge. Hallucinations and illusions of all the senses are common in this disorder and react upon the other symptoms. The patient's movements, habits, and personal appearance, are also affected.

Another form of mental weakness is [2] dementia or general loss of mental power, running sometimes into childishness with greater or less loss of memory and weakness of perception, [3] and in other cases into a state of apathy, in which even language may be forgotten, and in which the patient's will is so completely enfeebled that he no longer originates any action at all. "He is frequently unable to supply his simplest "wants, and requires to be fed; he loses himself every mo- "ment in his own room, and his ignorance of danger renders it "necessary that others should protect him against accidents."

Under the head of "important complications of insanity," [4] Griesinger describes two diseases, of which insanity may be regarded as in many, perhaps in most, cases one symptom, namely, general paralysis and epilepsy. The general paralysis of the insane he says is a most fatal disease, which displays itself first by difficulty in speaking, advancing to stammering. "Whenever this is remarked in an insane person he may, "with almost absolute certainty, be considered as lost." Changes in gait follow changes of speech, and at last the patient loses all power of speech or motion. Another

[1] Gr. 324-340. [2] Gr. 340. [3] Gr. 344.
[4] Gr. 392-407; see too Maudsley, *Responsibility, &c.*, 72-76.

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CH. XIX. symptom of importance is found in the state of the eyes. "At the commencement the pupils are often regularly con-"tracted; afterwards they again enlarge, but often unequally. ". . . This irregularity of the pupils, which sometimes exists "for years before the outbreak of the malady, is not to be "considered as its first commencement; this occurs quite as "frequently in individuals who afterwards become attacked "with other forms of mental disease." Griesinger adds:— "Amongst the prodromal symptoms we occasionally observe also "certain perversions of the character and affective sentiments, "which are often extremely startling, occurring in patients who "still more freely in society pursue their usual avocations, &c.; "these may give rise to medico-legal questions which are "often very difficult to settle, especially violations of property, "sometimes proceeding from the idea that the objects in "question really belong to them, frequently also from a "momentary irresistible impulse to gratify a desire." Epilepsy is the second disease to which [1] Dr. Griesinger refers as being complicated with insanity. It often produces before the attack, and whilst it is coming on, "a confusion and ob-"scuring of the consciousness resembling drunkenness; "sometimes profound sadness; an extremely painful angry "disposition; sometimes violent hallucinations of all the "senses." During the attack the patient is unconscious, so that his acts, whatever may be their nature, cannot make him liable to legal punishment. Often after the attack "the "patient speaks incoherently for a long time, as if he were "in dementia, and the intellect does not recover its former "state for several days. Still more important, however, are "those paroxysms of mania immediately following the con-"vulsive attacks, which manifest themselves by such a degree "of blind fury and violence, such wild gesticulation, as scarcely "ever occurs in ordinary mania." According to [2] Dr. Maudsley, homicidal mania is often "masked epilepsy," the passionate impulse to kill being substituted for ordinary epileptic convulsions. "The diseased action has been transferred from "one nervous centre to another, and instead of a convulsion "of muscles the patient is seized with a convulsion of ideas."

[1] Gr. 403-406. [2] *Responsibility, &c.*, pp. 166-70.

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This account of the disease of madness may be summed up in the following short description:—

Any one or more of numerous causes may produce diseases of the brain or nervous system which interfere more or less with the feelings, the will, and the intellect of the persons affected. Commonly, the disease, if it runs its full course, affects the emotions first, and afterwards the intellect and the will. It may affect the emotions either by producing morbid depression or by producing morbid excitement of feeling. In the first, which is much the commoner of the two cases, it is called melancholia, and in the second, mania. Melancholia often passes into mania. Both melancholia and mania commonly cause delusions or false opinions as to existing facts, which suggest themselves to the mind of the sufferer as explanations of his morbid feelings. These delusions are often accompanied by hallucinations, which are deceptions of the senses. Melancholia, mania, and the delusions arising from them, often supply powerful motives to do destructive and mischievous acts; and cases occur in which an earnest and passionate desire to do such acts is the first and perhaps the only marked symptom of mental disease. It is probable that in such cases some morbid state of the brain produces a vague craving for relief by some sort of passionate action, the special form of which is determined by accidental circumstances; so that such impulses may differ in their nature and mode of operation from the motives which operate on sane and insane alike. The difference may be compared to the difference between hunger prompting a man to eat and the impulse which, when he suffers violent and sudden pain, prompts him to relieve himself by screaming.

Insanity affecting the emotions in the forms of melancholia and mania is often succeeded by insanity affecting the intellect and the will. In this stage of the disease the characteristic symptom is the existence of permanent incurable delusions, commonly called monomania. The existence of any such delusion indicates disorganisation of all the mental powers, including not only the power of thinking correctly, but the power of keeping before the mind and applying to particular cases general principles of conduct.



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CH. XIX. The last stage of insanity is one of utter feebleness, in which all the intellectual powers are so much prostrated as to reduce the sufferer to a state of imbecility.

Lastly, paralysis and epilepsy are so closely allied with insanity that insanity frequently forms a symptom of each.

In all the cases above referred to the sufferer is supposed to have been originally sane, but sanity may never be enjoyed at all. [1] This happens in cases of idiocy, a state in which the brain for one reason or another never develops itself fully, and in which a greater or less degree of mental weakness characterises the sufferer throughout the whole of his life. Idiocy may go so far that the idiot shows no intellect, no will, and none of the distinctively human emotions. In such cases he lives a life more resembling that of a very imperfect and helpless animal than that of a man. It appears that from this condition up to the condition in which a person exhibits through life intellectual and moral defects, difficult to cure, but more or less amenable to treatment, such as stupidity, wilfulness, perversity, insensibility to moral feeling, and the like, there are endless shades of weakness and incapacity. They affect the emotions and the will quite as much as the intellectual faculties.

The other medical works on the subject which I have read seem to me to say nearly the same things as are said by Dr. Griesinger, in different ways and under different arrangements. Thus, for instance, the work of Dr. Bucknill and Dr. Tuke contains an immense mass of information on every subject connected with insanity. I have carefully studied it throughout. It treats the different forms which may be assumed by madness as so many definite and distinct diseases. For instance, it gives a special account of homicidal mania, [2] kleptomania, &c., [3] and (subsequently) a special account of mania in general. I do not think, however, that it mentions any form of insanity, not referred to in the above sketch, which can be regarded as of legal importance, except what

[1] On idiocy see Gr. 347–381; B. and T. 162–187.

[2] Pp. 262-275. Kleptomania.

[3] Pp. 296-307. "Passing from the consideration of the several so-called "monomanias, or diseased manifestations of somewhat isolated propensities, "we may next consider a more general affection, viz., mania."

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the authors describe as [1] moral insanity, a form of the disease of which Dr. Maudsley also gives an account. The account which is given of this variety of insanity is, in Dr. Maudsley's words, as follows:—

"There is a disorder of mind in which, without illusion, "delusion, or hallucination, the symptoms are mainly ex- "hibited in a perversion of those mental faculties which are "usually called the active and moral powers—the feelings, "affections, propensities, temper, habits, and conduct. He "has no capacity of true moral feeling; all his impulses and "desires to which he yields without check are egoistic; his "conduct appears to be governed by immoral motives which "are cherished and obeyed without any evident desire to re- "sist them. There is an amazing moral insensibility." . . . "The reason has lost control over the passions and actions, so "that the person can neither subdue the former nor abstain "from the latter, however inconsistent they may be with the "duties and obligations of his relations in life, however dis- "astrous to himself, and however much wrong they may inflict "upon those who are the nearest and should be the dearest "to him." . . . "He has lost the deepest instinct of "organic nature, that by which an organism assimilates that "which is suited to promote its growth and well-being; and "he displays in lieu thereof perverted desires, the ways of "which are the ways of destruction. His alienated desires "betoken a real alienation of nature.

"It may be said that this description is simply the descrip- "tion of a very wicked person, and that to accept it as a "description of insanity would be to confound all distinctions "between vice or crime and madness. No doubt, as far as "symptoms only are concerned, they are much the same "whether they are the result of vice or of disease; but there "is considerable difference when we go on to inquire into "the person's previous history."

Dr. Maudsley goes on to say, as I understand him, that moral insanity may be distinguished from sane wickedness as

[1] B. and T. 248-261. See *Responsibility in Mental Disease*, 170-182; *Mental Pathology*, 318, 319; see too Ray's *Jurisprudence of Insanity*, and Prichard. Dr. Maudsley characteristically enters on the question by a quotation from Shakespeare, meaning to rebuke "the angry declamation of the vexed judge."



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follows:—He would not call a man morally insane of whom nothing else was known than that his course of life had been extremely wicked. He would reserve the expression for persons who, having previously lived a virtuous or at least an inoffensive life, suddenly began to act in the manner described after " some great moral shock or severe physical disturbance," or other ordinary cause of insanity. In such cases a distinct hereditary predisposition to insanity would be a strong reason for thinking that the case was one of insanity. He adds that the symptoms described are often succeeded by insanity of a common and unmistakable type, and concludes thus:—" Surely, " then, when a person is subject to a sufficient cause of insanity, " exhibits thereupon a great change of character, and finally " passes into acute mania or general paralysis, we cannot " fairly be asked to recognise the adequate cause of the " disease, and the intellectual disorder as disease, and at the " same time to deny the character of disease to the intermediate " symptoms."

The result of all this is that insanity produces upon the mind the following effects, which must be considered in reference to the responsibility of persons shown to have done acts which but for such effects would amount to crimes.

Insanity powerfully affects, or may affect, the knowledge by which our actions are guided; the feelings by which our actions are prompted; the will by which our actions are performed, whether the word will is taken to mean volition or a settled judgment of the reason acting as a standing control on such actions as relate to it.

The means by which these effects are produced are unnatural feelings; delusions or false opinions as to facts; hallucinations or deceptions of the senses; impulses to particular acts or classes of acts; and in some cases (it is said) a specific physical inability to recognise the difference between moral good and evil as a motive for doing good and avoiding evil.

Such, according to the authorities to whom I have referred, are the principal varieties of the group of diseases called by the general name of madness, and their principal effects so far as they bear upon legal questions. I have now to consider how far by the law of England the fact that a person is mad

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is an excuse for crimes which he may commit in that state, and how far that state of the law is reasonable.



First, then, what is the law of England as to the effect of madness upon criminality? I have stated it as follows in my [1]*Digest.* "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, or

"(*b*) From knowing that the act is [2] 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 not in "fact produce upon his mind one or other of the effects above "mentioned in reference to that act.

"ILLUSTRATIONS.

"(1.) A kills B under an insane delusion that he is breaking a jar. A's act "is not a crime.

"(2.) A kills B knowing that he is killing B, and knowing that it is wrong "to kill B, but his mind is so imbecile that he is unable to form such an "estimate of the nature and consequences of his act as a person of ordinary "intelligence would form. A's act is not a crime if the words within the first "set of brackets are law. If they are not it is.

"(3.) A kills B knowing that he is killing B, and knowing that it is illegal "to kill B, but under an insane delusion that the salvation of the human race "will be obtained by his execution for the murder of B, and that God has "commanded him (A) to produce that result by those means. A's act is a "crime if the word 'wrong' means illegal. It is not a crime if the word "wrong means morally wrong.

"(4.) A suddenly stabs B under the influence of an impulse caused by dis- "ease, and of such a nature that nothing short of the mechanical restraint "of A's hand would have prevented the stab. A's act is a crime if (*c*) is "not law. It is not a crime if (*c*) is law.

"(5.) A suddenly stabs B under the influence of an impulse caused by dis- "ease, and of such a nature that a strong motive, as for instance the fear of "his own immediate death, would have prevented the act. A's act is a crime "whether (*c*) is or is not law..

"(6.) A permits his mind to dwell upon and desire B's death; under the "influence of mental disease this desire becomes uncontrollable, and A kills "B. A's act is a crime whether (*c*) is or is not law.

"(7.) A, a patient in a lunatic asylum, who is under a delusion that his "finger is made of glass, poisons one of the attendants out of revenge for "his treatment, and it is shown that the delusion had no connection whatever "with the act. A's act is a crime."

The authorities for this statement of the law are given or referred to in Note 1, pp. 292-3, in which I state in general

[1] Art. 27. The parts inclosed in brackets [ ] are doubtful.

[2] Variously interpreted as meaning morally wrong and illegal. The word "know" is not so simple as it may appear. See below, p.

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CH. XIX. terms that "no part of the law has been made the subject of "more discussion, and few are in a less satisfactory state." It did not fall within the plan of the *Digest* to enter fully upon the discussion of the subject. This task I must now undertake.

The first observation which arises upon it is that, although some of the terms in which the law is expressed are well settled, their meaning and the manner in which they ought to be applied to certain combinations of facts are not settled at all. In order to explain this it will be necessary to give a short account of the authorities. There are some [1] authorities on the subject in very early times indeed, but they are so general in their terms, and the subject was then so little understood, that they can be regarded only as antiquarian curiosities. Coke mentions the subject of madness only in the most casual and fragmentary manner. [2] Hale has a chapter upon it which seems to me to be marked by the ignorance of the age in which it was written, and to omit all the difficulties of the subject. It treats madness merely as a source of intellectual error. Thus, after distinguishing total from partial insanity, and saying that it is hard to draw the line between them, he arrives at this conclusion: "The best measure I can think of "is this, such a person as labouring under melancholy dis-"tempers hath yet ordinarily as great understanding as ordi-"narily a child of fourteen years hath, is such a person as "may be guilty of treason or felony." Surely no two states of mind can be more unlike than that of a healthy boy of fourteen, and that of a man "labouring under melan-"choly distempers." The one is healthy immaturity, the

[1] *e. g.* "Nota, si feme devient demes et hors de memorie, et issint esteant "occis son baron, el ne forfeta riens de son heritage ou de son franc tenement "q[d] nota, mes quant el vient a sa memor el occupier sa tr̄e come devant." FitzHerbert, *Forfeiture*, 33 (12 Hen. 3, 1228).

"Pres. fuit q̄ un feme quant il fuit enfrensy auer naye l y m p̆ son gree de-"mene dd· fuit de le dozyn si le malady se mist de jour en jour ou p̄ foies, "et dit fut q p̄ foits, p̄ q̄ les chateux fuer̄ forfets."

*i.e.* It was presented that a woman, whilst in a phrenzy, had drowned herself of her own accord. The jury were asked whether the malady took her from day to day, or only at times, and it was said that it was only at times, wherefore her chattels were forfeited. FitzHerbert, *Corone*, 324 (3 Edw. 3, 1330).

[2] Hale *P. C.* 29-37.

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other diseased maturity, and between these there is no sort of resemblance. It would, however, be unjust to Hale to omit to say that the chapter in question is marked by his ordinary shrewdness and judgment, and does recognise, though faintly and imperfectly, the main divisions of the subject.

[1] The only point worth noticing as to the ancient law is that in very ancient times proof of madness appears not to have entitled a man to be acquitted, at least in case of murder, but to a special verdict that he committed the offence when mad. This gave him a right to a pardon. The same course was taken when the defence was killing by misadventure or in self-defence.

From the time of Lord Hale to our own no legal writer of authority has discussed this matter upon its merits, and though there have been numerous trials, some of them memorable for different reasons, in which the prisoner has been alleged to be insane, the circumstances have never been such as to afford an opportunity for a solemn argument and judgment, laying down the principles of law by which the relation of insanity to crime may be determined. In [2] R. *v.* Arnold, [3] R. *v.* Lord Ferrers, and [4] R. *v.* Hadfield, the matter was much discussed, but in Arnold's case, as in most of the others to be referred to, the decision took the form of a direction to a jury by a single judge. In the cases of Lord Ferrers and Hadfield the speeches of the [5] counsel were the remarkable part of the pro-

[1] See 1 *Rot. Par.* 443 B. 3 Edw. 2 (1310), where the king promises that he will pardon felony only in cases where pardon was anciently granted. "Cest "a saver si hom tue autre pur misadventure ou soy defendant ou en deverie" (madness). In FitzHerbert, *Corone*, 351 (3 Edw. 3, 1330), it is said, "Troue "fuit par enquest que home lunatike occist un home, &c., par que le roye lui "graunt charter de pardone."

[2] 16 *St. Tr.* 695, 1724.

[3] 19 *St. Tr.* 886, 1760.

[4] 27 *St. Tr.* 1281, 1800.

[5] Charles Yorke (the Solicitor-General) in Lord Ferrers's case, Erskine in Hadfield's. Erskine's speech has been greatly admired. It seems to me to consist of that kind of emphatic and well-arranged ornamental commonplace which suits trial by jury, but to show no power of thought and no serious study of the subject. The highest flight which he takes is to show that Hale's expressions are much too narrow if construed literally. The undisputed facts were, that Hadfield (whose head had been almost cut to pieces in action, and who had been confined as a lunatic) was on the Tuesday night full of the wildest delusions, and in a state of furious mania, and that on the Thursday he fired a pistol at George III., under the influence of similar delusions. Upon this theme Erskine made an oration which proves satisfactorily enough

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ceedings, as the peers who tried Lord Ferrers of course received no charge and gave no reasons, and in Hadfield's case Lord Kenyon stopped the prosecution. In more recent times [1] many trials have taken place, in all of which the judges in charging the juries repeated each other with variations of language required by the particular circumstances of the different cases.

Several observations arise upon the authority of all these decisions. A few of them may be said to be the decisions of more judges than one, as [2] in some instances the prisoners were tried at the Central Criminal Court before three judges, according to a practice which in the present day has been almost entirely laid aside. In the great majority of cases, however, there was only one judge, and in every case the language employed was that which suggested itself to the speaker at the moment, in reference to the particular facts of the case. I know of no single instance in which the Court for Crown Cases Reserved, or any other court sitting in banc, has delivered a considered written judgment on the relation of insanity to criminal responsibility, though there are several such decisions as to the effect of insanity on the validity of contracts and wills.

The reports of the directions given by single judges to juries are, acccording to my experience, untrustworthy. What the judge says is constantly misunderstood, and the facts in relation to which he speaks are constantly left out of the report. Moreover any one who reflects on the number of cases in which the best judges are held to have misdirected juries in trials at nisi prius must feel that the value of the direction of a single judge, given on an occasion in which it cannot be questioned by any process of appeal, is often exaggerated by the very act of making it the subject of a report, however correct.

that the act was not criminal. Counsel are not to be blamed, but praised, for not going over the heads of the jury, but they ought not to have it both ways. Erskine was an admirable advocate and verdict-getter, but his speeches are but poor reading though they were once extolled as works of genius.

[1] A large collection of them is to be seen in 1 *Russ. Cri.* 117-135.

[2] *e.g.* McNaghten was tried for the murder of Mr. Drummond before Tindal, C.J., Williams, J., and Coleridge, J.

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Apart from these considerations, it is necessary to remark that every judgment delivered since the year 1843 has been founded upon an authority which deserves to be described as in many ways doubtful. This is the authority of the answers given by the judges to questions put to them by the House of Lords in consequence of the popular alarm excited by the acquittal of McNaghten for the murder of Mr. Drummond in that year. The circumstances of the case were that McNaghten being under an insane delusion that Sir Robert Peel had injured him, and mistaking Mr. Drummond for Sir Robert Peel, shot Mr. Drummond dead with a pistol. [1] "The medical "evidence was that a person of otherwise sound mind "might be affected with morbid delusions; that the prisoner "was in that condition; that a person labouring under a "morbid delusion might have a moral perception of right "and wrong: but that, in the case of the prisoner, it was a "delusion which carried him away beyond the power of his "own control, and left him no such perception, and that he "was not capable of exercising any control over acts which "had a connection with his delusion; that it was the nature "of his disease to go on gradually until it reached a climax, "when it burst forth with irresistible intensity; that a man "might go on for years quietly, though at the same time "under its influence, but would at once break out into the "most extravagant and violent paroxysms." The questions left to the jury were, "whether at the time the act in "question was committed, the prisoner had or had not the "use of his understanding so as to know that he was doing "a wrong and wicked act, whether the prisoner was sensible, "at the time he committed the act, that he violated both "the laws of God and man."

The prisoner was acquitted, and, much discusssion taking place in consequence, the House of Lords put to the judges certain questions, and received from them in June, 1843, certain answers upon the subject of insane delusions. It has been the general practice ever since for judges charging

[1] 1 *Russ. Cri.* 121. The questions put to and answered by the judges are printed in 10 C. and F. 200.

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juries in cases in which the question of insanity arises to use the words of the answers given by the judges on that occasion. It is a practice which I have followed myself on several occasions, nor until some more binding authority is provided can a judge be expected to do otherwise, especially as the practice has now obtained since 1843. I cannot help feeling however, and I know that some of the most distinguished judges on the Bench have been of the same opinion, that the authority of the answers is questionable, and it appears to me that when carefully considered they leave untouched the most difficult questions connected with the subject, and lay down propositions liable to be misunderstood, though they might, and I think ought to, be construed in a way which would dispose satisfactorily of all cases whatever.

The interest of the question as to the authority of the answers is speculative rather than practical, as there can be no doubt that the answers do express the opinion of [1] fourteen out of the fifteen judges, and they have in fact been accepted and acted upon ever since they were given. Two things however must be noticed with respect to them.

In the first place, they do not form a judgment upon definite facts proved by evidence. They are mere answers to questions which the judges were probably under no obligation to answer, and to which the House of Lords had probably no right to require an answer, as they did not arise out of any matter judicially before the House.

In the second place, the questions are so general in their terms, and the answers follow the words of the questions so closely, that they leave untouched every state of facts which, though included under the general words of the questions, can nevertheless be distinguished from them by circumstances which the House of Lords did not take into account in framing the questions.

The result of these two observations is that, if a case should

[1] All the then judges, except Maule, J., who gave a separate set of answers of his own. They are marked by his extraordinary ability, but are obviously drawn with the intention of saying as little as he could, and under a feeling that the questions ought not to have been put.

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occur to which the second observation might properly apply, the judge before whom it came might probably feel himself at liberty, either to direct the jury in such terms as he might regard as correctly expressing the law, or, if he thought himself bound to direct the jury in the terms of the answers given by the judges, to state a case for the Court for Crown Cases Reserved, which court, having regard to the circumstances under which those answers were given, would, I think, be at liberty to give such a judgment as might seem to them just, without being bound by the answers.

The points on which the law appears to me to be left in doubt by the authorities referred to are indicated in the passage extracted from my *Digest*. They may all be reduced to one question. Is madness to be regarded solely as a case of innocent ignorance or mistake, or is it also to be regarded as a disease which may affect the emotions and the will in such a manner that the sufferer ought not to be punished for the acts which it causes him to do?

The answers of the judges deal only with the question of knowledge, but it must be observed that they interpret the questions in such a manner as practically to confine them to that subject. This will appear from examining the questions and answers.

QUESTION I.—"What is the law respecting alleged crimes "committed by persons afflicted with insane delusion in re- "spect of one or more particular subjects or persons, as, for "instance, where, at the time of the commission of the alleged "crime, the accused knew he was acting contrary to law, but "did the act complained of with a view, under the influence "of insane delusion, of redressing or revenging some supposed "grievance or injury, or of producing some supposed public "benefit?"

ANSWER I.—"Assuming that your Lordships' inquiries "are confined to those persons who labour under such partial "delusions only, and are not in other respects insane, we are "of opinion that, notwithstanding the accused did the act "complained of with a view, under the influence of insane "delusion, of redressing or revenging some supposed grievance "or injury, or of producing some public benefit, he is never-

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"theless punishable, according to the nature of the crime "committed, if he knew at the time of committing such "crime that he was acting contrary to law, by which ex- "pression we understand your Lordships to mean the law "of the land."

The fourth question and answer may be considered here.

QUESTION IV.—"If a person under an insane delusion as "to existing facts commits an offence in consequence thereof, "is he thereby excused?"

ANSWER IV.—"The answer must of course depend on the "nature of the delusion; but, making the same assumption "as we did before, namely, that he labours under such partial "delusion only, and is not in other respects insane, we think "he must be considered in the same situation as to responsi- "bility as if the facts with respect to which the delusions "exist were real. For example, if under the influence of his "delusion he supposes another man to be in the act of attempt- "ing to take away his life, and he kills that man, as he "supposes in self-defence, he would be exempt from punish- "ment. If his delusion was that the deceased had inflicted "a serious injury to his character and fortune, and he killed "him in revenge for such supposed injury, he would be liable "to punishment."

The assumption upon which these answers proceed is that the supposed offender's disease consists exclusively in the fact that he is under a mistaken belief that something exists which, if it did exist, might or might not justify his conduct, but that he has the same power of controlling his conduct and regulating his feelings as a sane man; for if disease deprives him of those powers, he cannot be said to labour under partial delusions only and not to be in other respects insane. He is in other respects insane, and therefore the answers do not apply to his case. Such a state of things as madness consisting in a mere mistake caused by disease and extending no further is certainly imaginable, and I suppose all would agree that if it existed it ought not to excuse a crime caused by it, except in the cases in which other innocent mistakes would have that effect. If McNaghten had been injured by Sir Robert

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Peel, or if he had mistakenly, but honestly, and on reasonable grounds, supposed himself to have been so injured, he would clearly not have been justified or excused in shooting him; indeed, the fact that he had, or thought he had, been injured, would have been evidence of motive, and so of an intention to kill, which is one form of malice aforethought. The origin of the mistake can have no other effect than that of making the mistake itself innocent. Its effect as a mistake would be precisely the same whether it arose from disease of the brain or from false information. The mistake as to the injury supposed to be done by Sir Robert Peel, caused by madness, and the mistake as to the identity of the person shot, caused by the resemblance of Mr. Drummond to Sir Robert Peel, stand upon the same footing. Thus far there is no difficulty.

The difficulty which these questions and answers suggest and leave untouched is this: How would it be if medical witnesses were to say (as Dr. Griesinger says, and as the witnesses in McNaghten's case said in substance) that a delusion of the kind suggested never, or hardly ever, stands alone, but is in all cases the result of a disease of the brain, which interferes more or less with every function of the mind, which falsifies all the emotions, alters in an unaccountable way the natural weight of motives of conduct, weakens the will, and sometimes, without giving the patient false impressions of external facts, so enfeebles every part of his mind, that he sees, and feels, and acts with regard to real things as a sane man does with regard to what he supposes himself to see in a dream? Upon these questions the answer throws no light at all, because it assumes the man to be insane in respect to his delusion only, and to be otherwise sane; in a word, the prisoner is treated as a sane person under a mistake of fact for which he is not to blame.

The second and third questions and answers go further. They are in these words.

QUESTION II.—" What are the proper questions to be sub-
" mitted to the jury when a person, afflicted with insane
" delusions respecting one or more particular subjects or
" persons, is charged with the commission of a crime

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"(murder for instance), and insanity is set up as a "defence?"

QUESTION III.—"In what terms ought the question to be "left to the jury as to the prisoner's state of mind at the "time when the act was committed?"

ANSWER II. and III.—"As these two questions appear to "us to be more conveniently answered together, we submit "our opinion to be that the jury ought to be told in all cases "that every man is to be presumed to be sane, and to possess "a sufficient degree of reason to be responsible for his crimes, "until the contrary be proved to their satisfaction. That, to "establish a defence on the ground of insanity, it must be "clearly proved that at the time of committing the act the "accused was labouring under such a defect of reason from "disease of the mind as not to know the nature and quality "of the act he was doing, or if he did know it that he did "not know he was doing what was wrong. The mode of "putting the latter part of the question to the jury on these "occasions has generally been, whether the accused at the "time of doing the act knew the difference between right and "wrong; which mode, though rarely, if ever, leading to any "mistake with the jury, is not, we conceive, so accurate when "put generally and in the abstract, as when put with re-"ference to the party's knowledge of right and wrong in "respect to the very act with which he is charged. If the "question were to be put as to the knowledge of the accused, "solely and exclusively with reference to the law of the land, "it might tend to confound the jury by inducing them to "believe that an actual knowledge of the law of the land "was essential in order to lead to a conviction; whereas the "law is administered on the principle that every one must be "taken conclusively to know it without proof that he does "know it. If the accused was conscious that the act was "one which he ought not to do, and if that act was at the "same time contrary to the law of the land, he is punishable, "and the usual course therefore has been to leave the question "to the jury whether the accused had a sufficient degree of "reason to know he was doing an act that was wrong; and "this course we think is correct, accompanied with such

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"observations and corrections as the circumstances of each "particular case may require."

Upon these answers several observations arise. In the first place, the questions are put in a very general form, and the answers can hardly have been meant to be exhaustive. If they were so meant, they certainly imply that the effect of insanity (if any) upon the emotions and the will is not to be taken into account in deciding whether an act done by an insane man did or did not amount to an offence, but they do not explicitly assert this, and the proposition that the effect of disease upon the emotions and the will can never under any circumstances affect the criminality of the acts of persons so afflicted is so surprising, and would, if strictly enforced, have such monstrous consequences, that something more than an implied assertion of it seems necessary before it is admitted to be part of the law of England. To take a single glaring instance, the delusion under which Hadfield laboured was thus stated by Erskine. [1] "He imagined that he had con- "stant intercourse with the Almighty Author of all things, "that the world was coming to a conclusion, and that, like "our Blessed Saviour, he was to sacrifice himself for its salva- "tion; and so obstinately did this morbid image continue, that "you will be convinced he went to the theatre to perform, as "he imagined, that blessed sacrifice, and because he would not "be guilty of suicide, though called upon by the imperious "voice of Heaven, he wished that, by the appearance of crime, "his life might be taken away from him by others." In this case Hadfield clearly knew the nature of his act, namely, that he was firing a loaded horse-pistol at George III. He also knew the quality of the act, namely, that it was what the law calls high treason. He also knew that it was wrong (in the sense of being forbidden by law), for the very object for which he did it was that he might be put to death that so the world might be saved; and his reluctance to commit suicide shows that he had some moral sentiments. It would seem, therefore, that, if the answer given by the judges is not only true as far as it goes, but is also complete, so that no question

[1] 27 *St. Tr.* 1321. No evidence was given of this, but the case was stopped, Erskine "having," as he said, "still twenty witnesses to call."

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CH. XIX. can properly be left to the jury as to the effects of madness upon responsibility other than those which it states, Hadfield ought to have been convicted.

If, in order to avoid this conclusion, it is said that if his delusion had been true his act would not have been morally wrong, I should reply that the supposition of the actual truth of the delusion is one which cannot with decency be discussed, [1] but that a sane belief in such a state of things, however honest, and, in relation to the person who believed in it, however reasonable, would be no excuse at all for any crimes which it might cause. Human sacrifices are still by no means unknown in India. Suttee was, and to some extent still is, regarded not only as not criminal, but as an act of heroic virtue enjoined by religion. It is by no means impossible to imagine a person murdering an infant child, because he had brought himself to believe quite sanely that death in infancy and before actual sin could be committed was an infinite blessing, and life a fearful risk. Can any one doubt that in all these cases crimes are committed, or that Hadfield would have committed high treason if the delusion which was actually caused by disease had been caused (as it easily might have been) by some strange mixture of religious and political fanaticism working on an ignorant man? Either, therefore, Hadfield ought to have been convicted, or the presence of delusions must have some legal effect other than those which the answers of the judges to the House of Lords expressly recognise. It would be easy to multiply illustrations on this point, but I cannot think of a stronger one than this.

What effect, then, can the existence of an insane delusion have upon a man's conduct except the effect of misleading him as to the matter to which it relates? The answer is that the existence of a delusion may have an effect in both or either of two ways.

(1.) It may be evidence of disease affecting the mind otherwise than by merely causing a specific mistake.

[1] My own opinion, however, is that, if a special Divine order were given to a man to commit murder, I should certainly hang him for it unless I got a special Divine order not to hang him. What the effect of getting such an order would be is a question difficult for any one to answer till he gets it.

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(2.) It may be evidence of a state of mind which prevented the person affected by it from knowing that his act was wrong, if that expression is construed in one of the senses which may be given to it. The answers of the judges do not expressly deal with either of these topics, but they contain nothing in any way inconsistent with any opinion which may be formed upon them. I proceed accordingly to consider them.

1. A delusion which, considered as a mere mistake, has no importance at all, may as a matter of evidence be of the highest importance, because though trifling in itself it may indicate profound disturbance of every faculty of the mind. A man commits what on the face of it is a cruel and treacherous murder. It is proved that he laboured under an insane delusion that his little finger was made of glass. In itself such a delusion has no sort of tendency to excuse such a crime, and has no apparent connection with it, but if physicians of experience were to say that a fixed delusion on such a subject could arise only from deep-seated disease affecting a man's whole view of the world in which he lived, falsifying his senses, rendering him inaccessible to reasoning of the simplest kind, and incapacitating him from performing the commonest and most conclusive experiments, I do not see why they should not be believed. In a word, though the effect of a delusion considered merely as a mistake can hardly be other than that which the answers of the judges say it is, their answers throw no light on the question of the weight which should be attached to it as a symptom forming evidence of other and wider disease of the mind. The facts that a man stammers and that the pupils of his eyes are of different sizes are in themselves no excuse for crime, but they may be the symptoms of general paralysis of the insane, which is one of the most fatal forms of the disease. Why should not the existence of a delusion be as significant as the existence of a stammer?

It must also be remembered in estimating the importance of delusions and the probability of their being connected with acts which to a sane mind seem to stand in no relation at all to them, that the mental processes of an unsound mind are



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CH. XIX. often distorted as much as the conclusions connected with them are vitiated. To a sane man the belief (however caused) that his finger was made of glass would supply no reason for taking any peculiar view about murder, but if a man is mad and such a belief is a symptom of his madness, there may be a connection between the delusion and the crime as insane as the delusion itself.

The following is a well-known instance: A man had some insane delusion about windmills, and would pass hours in watching them. His friends kept him out of the way of windmills in order to cure him of his delusion. He mutilated and nearly killed a little girl. There is no apparent connection between the delusion and the act, but there was a connection in his mind. He thought that if he committed a crime he might as a punishment be confined in some place where he could pass all his time in watching windmills, and in fact he gained his object, for he was confined in such a place. Of course a man has no right to commit a crime in order that he may watch windmills, but that is not the point for which I refer to the case. It is to show that it is practically almost impossible to say what part of the conduct of a person affected with a fixed insane delusion is unaffected by it. If a man, owing to disease of the brain or nervous system, had contracted such a passion for watching windmills that he both believed that he would get a chance of gratifying it in the manner stated, and was willing to commit murder upon that chance, it would, I think, be open to a jury to draw the conclusion that he was incapacitated from forming a calm estimate of the moral character of his act, in other words that he had not a capacity of knowing that it was wrong.

It must be observed that these remarks have reference to the functions of the jury, not to those of the judge. [1] It undoubtedly is, and I think it is equally clear that it ought to be, the law, that the mere existence of an insane delusion which does not in fact influence particular parts of the conduct of the person affected by it, has no effect upon their legal

[1] Banks *v.* Goodfellow, L.R. 5 Q.B. D. 594. Smee *v.* Smee, L.R. 5 Prob. Div. 84.

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character. The cases referred to in the note[1] establish this proposition as regards contracts and wills.

What I have said goes only to show that juries ought to be careful not to conclude hastily that there is no connection between a madman's conduct and his delusions because a sane man would see no connection between what he does and what under the influence of his delusion he believes.

2. The existence of an insane delusion, and even the existence of insane depression or excitement of spirits apart from specific delusions, may be evidence that the person affected was "labouring under such a defect of reason from disease of "the mind that he did not know that what he was doing was "wrong," unless indeed these words are to be construed in a manner so literal that I can hardly think it was intended by those who used them.

What then is the meaning of a maniac "labouring under "such a defect of reason that he does not know that he is "doing what is wrong"? It may be said that this description would apply only to a person in whom madness took the form of ignorance of the opinions of mankind in general as to the wickedness of particular crimes, [1] murder, for instance, and such a state of mind would, I suppose, be so rare as to be practically unknown. This seems to me to be a narrow view of the subject, not supported by the language of the judges. I think that any one would fall within the description in question who was deprived by disease affecting the mind of the power of passing a rational judgment on the moral character of the act which he meant to do. Suppose, for instance, that by reason of disease of the brain a man's mind is filled with delusions which, if true, would not justify or excuse his proposed act, but which in themselves are so wild and astonishing as to make it impossible for him to reason about them calmly, or to reason calmly on matters connected with them. Suppose, too, that the

[1] The defence of insanity is seldom set up except upon trials for murder or attempts to commit murder, partly because murder is the crime which madmen usually commit, partly because an acquittal on the ground of insanity, involving as it does indefinite imprisonment in a lunatic asylum, is a far heavier punishment than would be awarded for any other offence. I once, however (as Recorder of Newark), tried a man for embezzlement who was acquitted on the ground of insanity.



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CH. XIX. succession of insane thoughts of one kind and another is so rapid as to confuse him, and finally, suppose that his will is weakened by his disease, that he is unequal to the effort of calm sustained thought upon any subject, and especially upon subjects connected with his delusion, can he be said to know or have a capacity of knowing that the act which he proposes to do is wrong? I should say he could not. That a man so situated might (I do not say necessarily would) be prevented by his disease from reading and understanding a book requiring sustained attention would, I suppose, be generally admitted. A man subject to delusions or hurried and excited by a rapid succession of thoughts might be prevented from following one of Euclid's demonstrations. He would thus be prevented from knowing that the square of the hypothenuse of a right-angled triangle is equal to the square of the other two sides. Might he not in the very same way be prevented from calmly reflecting on the question whether it is right to kill A. B.? For after all, why is it wrong to kill a man whom you hate? It is wrong because it is forbidden by law; because the existing sentiments of mankind strongly condemn it; because it is an act which if looked upon by itself inflicts the greatest possible loss on the man who is killed and on his family, and gratifies in the case of the murderer feelings of which the gratification is highly mischievous to himself and others; because viewed as a precedent it is an act which, if imitated, would lead to the dissolution of society. These are considerations which though obvious enough cannot be attended to and kept before the mind without an effort which mental excitement might render impossible.

Whether in any particular case a man more or less affected by insanity was in this condition, might be a doubtful question, but the general principle may be illustrated by considering cases analogous to madness, and within every one's experience. Take the case of extreme anger excited, not by madness, but by great provocation. A man spits in another's face, strikes him violently with a stick, and loads him with abuse. If the man so assaulted instantly and intentionally kills the other he is

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not indeed justified, but his guilt is greatly extenuated, and the reason given by [1] a writer of great authority is that this "is a condescension to the frailty of the "human frame to the *furor brevis*, which, while the frenzy "lasts, renders a man deaf to the voice of reason." Anger in such a case as I have put would not prevent a man from knowing the nature and quality of his act. If it is said to deprive him of the knowledge that it is wrong to revenge an insult by killing the aggressor, it would seem to follow *à fortiori* that disturbance and excitement of mind produced by madness may have that effect. If excusable anger is held to extenuate the offender's guilt, although it does not affect his knowledge either of the nature of the act or of right and wrong, it seems hard to say that a short madness occasioned by provocation is to have a greater effect than long madness occasioned by disease.

Again, take the case of drunkenness. A man wildly excited by drink can hardly be said to know at the moment of that excitement that any particular act which he may do is either right or wrong. That which prevents him from knowing it is not mistake, but excitement. The reason why ordinary drunkenness is no excuse for crime is that the offender did wrong in getting drunk; but a person brought into this state by some kinds of fraud, is said by [2] Hale to be in the same position as a man suffering under "any other frenzy." If so, it would seem to follow that, if madness produces an excitement like that of a drunken man, the person so excited may during such excitement be said to be prevented by disease affecting his mind from knowing that his act is wrong. If not, it must be admitted either that Hale was wrong about drunkenness or that the answers in McNaghten's case are not complete.

Lastly, take the case of dreaming. There is a sense in which a person in a dream knows the nature and quality of his imaginary acts, and that they are wrong; but all the mental processes in dreaming are so feeble and imperfect, that I should suppose no one who dreamed that he had committed a crime, even if the dream had included some feeling of

[1] Foster, 315. [2] 1 Hale, *Pl. Cr.* 32.

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conscientious reluctance, and of giving way to temptation, would on waking suffer from any remorse, as he would if being awake he had formed an intention to do wrong and had afterwards abandoned it. If it be the case that certain forms of insanity cause men to live as it were in waking dreams, and to act with as faint a perception of reality as dreaming men have when they suppose themselves to act, surely they could not be said to "know" that any particular act was wrong. Knowledge has its degrees like everything else and implies something more real and more closely connected with conduct than the half knowledge retained in dreams.

This last observation is specially important in connection with the behaviour of idiots, and persons more or less tainted with idiocy. Such persons will often know right from wrong in a certain sense, that is to say, they will know that particular kinds of conduct are usually blamed, and will be punished if detected, but at the same time they may be quite unable to appreciate their importance, their consequences, and the reasons why they are condemned, namely, the suffering which they inflict, and the alarm which they cause. An idiot once cut off the head of a man whom he found asleep, remarking that it would be great fun to see him look for it when he woke. Nothing is more probable than that the idiot would know that people in authority would not approve of this, that it was wrong in the sense in which it is wrong in a child not to learn its lesson, and he obviously knew that it was a mischievous trick for he had no business to give the man the trouble of looking for his head; but I do not think he could know that it was wrong in the sense in which those words are used in the answer of the judges to the House of Lords.

Dr. Maudsley [1] observes upon this part of the judges' answers that the rule, though objectionable because it is likely to mislead, "will, if strictly applied, cover and excuse many "acts of insane violence. Of few insane persons who do "violence can it be truly said that they have a full knowledge "of the nature and quality of their attacks at the time they "are doing them. Can it be truly said of any person who

[1] *Responsibility, &c.*, p. 96.

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"acts under the influence of great passion that he has such "a knowledge at the time?" If this is so—and I think it is—the judges who laid down, and those who act upon, the rule need not have been stigmatized so rudely and coarsely.

The word "wrong" is ambiguous as well as the word "know." It may mean either "illegal" or "morally wrong," for there may be such a thing as illegality not involving moral guilt, and when we come to deal with madness, the question whether "wrong" means "morally "wrong," or only "illegal," may be important. In Hadfield's case, for instance, knowledge of the illegality of his act was the very reason why he did it. He wanted to be hung for it. He no doubt knew it to be wrong in the sense that he knew that other people would disapprove of it, but he would also have thought, had he thought at all, that if they knew all the facts (as he understood them) they would approve of him, and see that he was sacrificing his own interest for the common good. I could not say that such a person knew that such an act was wrong. His delusion would prevent anything like an act of calm judgment in the character of the act.

I do not in connection with this subject attach practical importance to the controversies connected with the nature of the distinction between right and wrong. That some kinds of conduct are the subjects of blame and hatred, and others the subjects of praise and sympathy, is a perfectly well known matter of fact, and there is no offence, in answer to a charge of which madness is likely to be set up as a defence, as to the moral character of which any question can arise. A person who disbelieved in all moral distinctions, and had ridded himself of all conscience, would know that murder is wrong, just as an atheist would know that most Englishmen are Christians.

Upon these grounds I am of opinion that, even if the answers given by the judges in McNaghten's case are regarded as a binding declaration of the law of England, that law, as it stands, is, that a man who by reason of mental disease is prevented from controlling his own conduct is not responsible for what he does. I also think that the existence

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 of any insane delusion, impulse, or other state which is commonly produced by madness, is a fact relevant to the question whether or not he can control his conduct, and as such may be proved and ought to be left to the jury. These views would be strengthened if it should be considered that the considerations referred to above diminish the binding authority of the answers of the judges. I have expressed myself in my *Digest* doubtfully on the subject, because the answers of the judges in McNaghten's case are capable of being construed so as to support the opposite conclusion, though I do not think that that construction is correct. There are also some cases of less weight (though they purport to report the rulings of eminent judges) which more or less support the view of the case from which I dissent.

If the narrower interpretation of the answers given by the judges is the true one, and if those answers are regarded as a complete and binding authority, madness must be regarded merely as a possible cause of innocent mistakes as to matter of fact and matters of common knowledge. If the wider interpretation which I have suggested is the true one, the law includes all that I at all events should wish it to include, as will appear more fully from considering what the law ought to be.

I think it ought to be what I have stated it to be in my *Digest*, assuming the propositions which I have marked as doubtful to be good law, and assuming the word "know" to be interpreted in the wider sense, and the word "wrong" to mean "either illegal or morally wrong."

The proposition, then, which I have to maintain and explain is that, if it is not, it ought to be the law of England that 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 from controlling his own conduct, unless the absence of the power of control has been produced by his own default. The first part of this proposition may probably appear to many persons to be self-evident. How, it may be asked, can a man be responsible for what he cannot help? That a man can be made responsible in the sense of being punished for what he cannot help

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is obvious. Whether he ought to be made responsible, that is, whether it is expedient that people, so situated should be punished in such cases depends upon the question—What is meant by a man's not being able to help doing what he does? The expression may mean that the act to which it is applied is not a voluntary action at all, as when we say that a man cannot help coughing if his throat is irritated. Such cases give rise to no difficulty. As I have already observed, all crimes must be voluntary actions, and this is usually the case with madmen. "Few of the acts of the insane," [1] says Griesinger, "have the character of forced automatic move-"ments."

Commonly, however, the expression "I could not help "it" has a much narrower sense. It means that the thing which could not be helped was done voluntarily, but under compulsion, as a man chooses the least of two evils. I have already discussed the subject of the forms of compulsion which may affect the conduct of sane persons, and have given my reasons for thinking that compulsion ought to operate by way of mitigation of punishment and not as ground for an acquittal. There is, however, only a superficial resemblance between madness and compulsion, for compulsion consists in the action of some external motive, at once powerful and terrible, on a man able to judge of consequences and to control his conduct, whereas madness operates from within and in much more subtle ways. Taking the account already given of it the influence of madness over the will seems to me to admit of being classified under two heads. In some cases it furnishes a strong but at the same time a controllable temptation to crime. Such are the cases to which I have already referred of impulses to do harm in various ways which the sufferer struggles against and in many cases overcomes. I cannot see why such impulses, if they constitute the whole effect of the disease, should excuse crime any more than other sudden and violent temptations. A man whose temper was intensely exasperated by suppressed gout would not be excused for any act of violence which he might commit in consequence. If the disease were

[1] P. 77.

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some obscure affection of the brain producing feelings similar in all respects, and leaving his general power of self-control equally unaffected, why should he be excused merely because his complaint was classed as a form of madness?

No doubt, however, there are cases in which madness interferes with the power of self-control, and so leaves the sufferer at the mercy of any temptation to which he may be exposed; and if this can be shown to be the case, I think the sufferer ought to be excused. The reason for this will appear from considering the nature of self-control. A man has the opportunity of committing a fraud which will enrich him for life, and is highly sensible of the advantages of wealth and earnestly desirous to obtain them. His first impression is that he will commit the fraud. If he determines not to do so he exercises self-control. But how does, or how can, a man control himself? Whether he does the act or refrains from doing it he does what he wills, and it is he that does it. Why, then, is he said in the one case and not in the other to exercise self-control? The expression is no doubt more popular than accurate, but the meaning I suppose is this: The man who controls himself refers to distant motives and general principles of conduct, and directs his conduct accordingly. The man who does not control himself is guided by the motives which immediately press upon his attention. If this is so, the power of self-control must mean a power to attend to distant motives and general principles of conduct, and to connect them rationally with the particular act under consideration, and a disease of the brain which so weakens the sufferer's powers as to prevent him from attending or referring to such considerations, or from connecting the general theory with the particular fact, deprives him of the power of self-control.

Can it be said that a person so situated knows that his act is wrong? I think not, for how does any one know that any act is wrong except by comparing it with general rules of conduct which forbid it, and if he is unable to appreciate such rules, or to apply them to the particular case, how is he to know that what he proposes to do is wrong? Should the law upon this subject be codified, a question would no doubt

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arise whether the article relating to madness should refer in express terms to the possible destruction by madness of the power of self-control or not. Such a question arose on the Criminal Code Commission of 1878-9, and the Draft Code as settled omitted all reference to it. The Bill which I drew in 1878, and on which the Draft Code of 1879 was founded, did refer to it. If the words "know" and "wrong" are construed as I should construe them, I think this is a matter of no importance, as the absence of the power of self-control would involve an incapacity of knowing right from wrong. There is no doubt a convenience in not asking a jury in so many words whether a man could control his actions or not. Many people, and in particular many medical men, cannot be got to see the distinction between an impulse which you cannot help feeling and an impulse which you cannot resist. In the Bill of 1878 the test which I suggested was whether the impulse to commit a crime was so violent that the offender would not be prevented from doing the act by knowing that the greatest punishment permitted by law for the offence would be instantly inflicted, the theory being that it is useless to threaten a person on whom by the supposition your threats will have no influence. The Commission thought that this was not "practicable or safe." I have no very strong opinion on the subject. I should be fully satisfied with the insertion in a Code of "knowledge that an act is wrong" as the best test of responsibility, the words being largely construed on the principles stated here. All that I have said is reducible to this short form:—Knowledge and power are the constituent elements of all voluntary action, and if either is seriously impaired the other is disabled. It is as true that a man who cannot control himself does not know the nature of his acts as that a man who does not know the nature of his acts is incapable of self-control.

Changing the point of view, and regarding the matter as one for the legislature, I do not think that it is expedient that a person unable to control his conduct should be the subject of legal punishment. The fear of punishment can never prevent a man from contracting disease of the brain, or prevent that disease from weakening his power of control-

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CH. XIX. ling his own actions in the sense explained; and, whatever the law may declare, I suppose it will not be doubted that a man whose power of controlling his conduct is destroyed by disease would not be regarded as morally blamable for his acts. If a man is punished by law for an act for which he is not blamed by morals, law is to that extent put out of harmony with morals, and legal punishment would not in such a case, as it always should, connote, as far as may be possible, moral infamy.

Such punishments are not really necessary, or even useful, for the protection of society. They cannot by the hypothesis be useful by way of example, for I am dealing with the case of those who cannot control their conduct. To threaten such a man with punishment is like threatening to punish a man for not lifting a weight which he cannot move. The protection of society may be provided for by confining the madman.

I should be sorry to countenance the notion that the mere fact that an insane impulse is not resisted is to be taken as proof that it is irresistible. In fact such impulses are continually felt and resisted, and I do not think they ought to be any greater excuse for crime than the existence of other motives, so long as the power of control or choice, which consists in comparing together different motives near and remote, special and general, remains. The following case (innumerable cases of the kind might be referred to) will illustrate this.[1] A woman felt suddenly and violently impelled to kill with a knife the child she was nursing. She threw away the knife, rushed out of the room and asked a fellow servant to sit with her because she was "beset with evil thoughts." She woke in the night with a similar impulse, but resisted it saying, "O God, what horrible, what frightful thoughts. This is ridiculous, abominable, terrific." She took some medicine and became calmer. On another occasion the same thing happened, but she still resisted and took proper medicine. Ultimately the desire to harm the child died away. That this impulse was insane there can be little doubt, but sane or not it was obviously resistible, for it was in fact success-

[1] Gr. 266.

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fully resisted, and surely it was the legal duty of the woman to resist it. The statement of this case involves a contradiction in terms often noticeable in medical works. It is said that the woman woke "with the *irresistible* desire to murder the child." It appears, however, that she did successfully resist it. Certainly, a person has no choice about feeling an insane impulse, but the same may be said of all motives. Under certain circumstances men involuntarily desire revenge, gain, sensual gratification, and the like, just as they feel hungry or thirsty. The question of their responsibility for giving way to such desires ought, I think, to depend on the question whether disease has left them the power of comparing together the different motives by which their conduct may be affected, and so making a choice between them. This power may frequently consist with disease of the brain amounting to madness, for it is obvious that "mad," "insane," "lunatic," and other words of the same sort are indefinite terms. They represent the uncertain and varying symptoms of diseases of which the nature is imperfectly known, and the mode of operation absolutely unknown. [1] "There are no well-marked "boundaries between health and disease in general: there is, "in mental as in other pathology, an intermediate territory "of disorder which is not yet fully developed disease, and "where the individual still exhibits many of the character-"istics of health. Is not this the case with the simplest "bodily troubles? Where is the exact point at which we "can pronounce a man blind? Only where there is abso-"lutely no light? Or who is dumb? Who is dropsical? "The individual who has the slightest trace of œdema? If "not, where does the limit of dropsy commence?"

It is of course highly important to recognize the fact that insanity may not only alter the motives of action but may alter their mode of operation. In a remarkable passage [2] Dr. Maudsley describes as follows some insane impulses:—"The mind is "overwhelmed with such a vast and painful emotion, such an "unspeakable feeling of anxiety and distress, that the deed of "violence is as it were an uncontrollable convulsion of energy

[1] Gr. 122.
[2] *Responsibility, &c.*, p. 194.

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"giving rise to an indescribable morbid feeling: knowing not "what he is doing" (so that the rule about knowledge applies here), "he kills some one friend or fancied enemy, or perhaps an "entire stranger, not really from passion, or revenge, or enmity "of any kind, but as a discharge which he must have of the "terrible emotion with which he is possessed. The emotion "corresponds in the higher centres of thought with the "hallucinations in the sensory centres, and the act which dis-"charges it is as involuntary as the cry of agony, or the "spasmodic muscular tension, produced by intense physical "pain. Hence, there are four things noticeable in homicidal "mania,—*first*, the paroxysmal nature of the actual violence, "which takes place only when the emotion becomes unen-"durable, the idea or impulse, though present, being almost "passive in the intervals; *secondly*, the mighty relief which "the patient feels directly he has done the deed, so that he is "delivered from the extraordinary disquietude which he had "previously felt, and may give a rational account of himself; "*thirdly*, the frequency with which the attack is made on a "relative, or upon any one, friend or stranger, who happens "to be at hand when the paroxysm occurs; and, *fourthly*, the "indifference which he displays afterwards to the dreadful "nature of what he has done, which having been done when "he is *alienated* from himself was not more truly *his* act than "convulsion is an act of will."

Practically, then, what is the inference from what has been stated? In a few words it is as follows:—I understand by the power of self-control the power of attending to general principles of conduct and distant motives and of comparing them calmly and steadily with immediate motives and with the special pleasure or other advantage of particular proposed actions. Will consists in an exertion of this power of attention and comparison up to the moment when the conflict of motives issues in a volition or act. Diseases of the brain and the nervous system may in any one of many ways interfere more or less with will so understood. They may cause definite intellectual error, and if they do so their legal effect is that of other innocent mistakes of fact. Far more frequently they affect the will by either destroying altogether,

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or weakening to a greater or less extent, the power of steady, calm attention to any train of thought, and especially to general principles, and their relation to particular acts. They may weaken all the mental faculties, so as to reduce life to a dream. They may act like a convulsion fit. They may operate as resistible motives to an act known to be wrong. In other words they may destroy, they may weaken, or they may leave unaffected the power of self-control.

The practical inference from this seems to me to be that the law ought to recognize these various effects of madness. It ought, where madness is proved, to allow the jury to return any one of three verdicts: Guilty; Guilty, but his power of self-control was diminished by insanity; Not guilty on the ground of insanity.

I will now proceed to show that circumstances may exist which would justify, in the case of an insane person, any one of these verdicts.

First as to the verdict of guilty take these statements of [1] Dr. Maudsley:—"A person does not, when he becomes insane, "take leave of his human passions, nor cease to be affected by "ordinary motives; he does not by doing so take leave of his "insanity if he kills some one out of revenge for an imagined "injury; he is still a madman taking his revenge. Nothing is "more certain than that the inmates of lunatic asylums per-"petrate violence of all kinds and degrees under the influence "of the ordinary bad passions of human nature. The ques-"tion then is, whether it is just to hold a madman who acts "from revenge equally responsible with a sane person who "does a similar act in a similar spirit."

He then describes a madman, under an insane delusion that he has been injured, who knows that murder is wrong, and after long resistance to the temptation to murder, at last gives way to it; and he adds:—"To say of such an one that he has "no power of control, or to say of him that he has the same "power of control as a sane person, would be equally untrue. "To be strictly just we must admit some measure of respon-"sibility in some cases, though not the full measure of a sane "responsibility in any case."

[1] *Responsibility, &c.*, p. 198.

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Dr. Maudsley's illustration does not come up to his principle, because he supposes the madman to act under a delusion which would weaken his power of self-control. Suppose a case in which there is no delusion at all, and no connection at all between the madness and the crime. For instance, there are two brothers, A and B. A is the owner of a large estate, B is his heir at law. B suffers to some extent from insanity, and is under care at a private lunatic asylum, where his disease is going off and there is every prospect of his cure. A comes to see him; and B, who knew of his intention to do so, and who apart from his madness is extremely wicked, contrives to poison him with every circumstance of premeditation and deliberation, managing artfully to throw the blame on another person who is hanged. B completely recovers and inherits the estate. Why, when the truth comes to light, should not B be hanged? His act, by the supposition, was in every respect a sane one, though he happened to be mad when he did it. The fact that he was mad ought to be allowed to be relevant to his guilt, and to be left to the jury as evidence as far as it went in favour of a verdict of not guilty on the ground of insanity, or (if such a verdict were permitted by law) guilty, but the prisoner's power of self-control was weakened by insanity; but if the jury chose to find such a man guilty simply, I think they would be well warranted in doing so, and if they did I think he ought to be hanged. The case which I have suggested is of course so stated as to afford the strongest imaginable illustration of the principle which it illustrates, but in reality it does not go further than Dr. Maudsley's own statement, that the inmates of lunatic asylums perpetrate violence of all kinds and degrees under the influence of the ordinary bad passions of human nature. If a lunatic was proved to have committed a rape, and to have accomplished his purpose by an attempt to strangle, would there be any cruelty in sentencing him to a severe flogging? Would the execution of such a sentence have no effect on other lunatics in the same asylum? I assume of course a finding by the jury of guilty simply, after a direction that they might qualify their verdict if they thought that in fact the lunatic's power of self-control was

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diminished by his disease, and if evidence on the subject were submitted to them.

It is to be recollected in connection with this subject that though madness is a disease, it is one which to a great extent and in many cases is the sufferer's own fault. [1] In reading medical works the connection between insanity and every sort of repulsive vice is made so clear, that it seems more natural to ask whether in many cases insanity is not rather a crime in itself than an excuse for the crimes which it causes. A man cannot help an accidental blow on the head; but he can avoid habitual indulgence in disgusting vices, and these are a commoner cause of madness than accidents. He cannot avoid the misfortune of being descended from insane or diseased parents; but even if he has that misfortune, he ought to be aware of it, and to take proper precautions against the effects which it may be expected to produce. We do not recognise the grossest ignorance, the most wretched education, the most constant involuntary association with criminals, as an excuse for crime; though in many cases—I think in a smaller proportion of cases than is commonly supposed—they explain the fact that crimes are committed. This should lead to strictness in admitting insanity as being in doubtful cases any excuse at all for crime, or any reason for mitigating the punishment due to it.

It is upon this ground that I think that the general rule that a person should not be liable to be punished for any act done when he is deprived by disease of the power of controlling his conduct should be qualified by the words, "unless "the absence of the power of control has been caused by his "own default." The particular case which seems to me to exemplify this exception most strongly is that of William Dove, an account of which will be found at the end of this work. Whether Dove could ultimately have abstained from poisoning his wife may be doubtful, though my own impression is that he could; that he had brooded over the prospect of her death, in order that he might be able to

[1] No one exemplifies this so strongly as Dr. Maudsley. Nearly the whole of his *Pathology of Mind* might be referred to in illustration of it. The last chapter of his *Responsibility in Mental Disease* begins by asking, "How far "then is a man responsible for going mad?"

marry another woman, was clearly proved; and if this were so, if his impulse or desire to kill did become uncontrollable, I think it was clearly his own fault.

It should not be forgotten, in connection with this subject, that little or no loss is inflicted either on the madman himself or on the community by his execution. It is indeed more difficult to say why a dangerous and incurable madman should not be painlessly put to death as a measure of humanity, than to show why a man who being both mad and wicked deliberately commits a cruel murder should be executed as a murderer.

As to the suggested verdict of "guilty, but his power of "self-control was weakened by insanity," the passages which I have already quoted from Dr. Maudsley, and the various illustrations to which I have referred from the different writers mentioned as to the effects of madness, seem sufficiently to show that the law ought to sanction it. The following extract from the work of Dr. Bucknill and Dr. Tuke throws a strong light on this subject. [1] They observe that it is of the highest importance "to discriminate correctly between "that part of wrong conduct which patients are able, and that "which they are unable to control." .... "Clinical experience "alone gives the power of distinguishing between the "controllable wrong conduct which is amenable to moral "influences, and that violence utterly beyond the command "of the will which yields only to physiological remedies." ".... The violence of epileptic mania is beyond the reach of "any kind of moral control, and justifies only measures of pre-"caution and protection; while that of mania impressed "with the hysterical type of disease is greatly under the "influence of judicious control." [2] The same authors reprint a report which they addressed to the Commissioners of Lunacy in 1854, and to which nineteen years afterwards they still adhered. They say, after treating of other causes for secluding (*i.e.*, imprisoning) violent madmen, "It cannot be "denied that insanity frequently displays itself by excitement "of the malignant passions, and that some of the most "depraved of mankind terminate their career in asylums.

[1] B. and T., 673–74.

[2] Pp. 683-6.

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"Towards these seclusion must be occasionally employed in "its harsher form as a coercive means to prevent the welfare "of the many from being sacrified to the passions of a few." In other words, in lunatic asylums, as well as elsewhere, you must have laws and punishments. In another passage, a page or two further on, the same authors say, [1] "The violent "conduct of an insane patient is sometimes the expression of "his normal state of mind and disposition. Violent and "turbulent men supply their full share to the population of "asylums. Sometimes the red hand is palsied by the touch "of insanity. Sometimes the original disposition, and the "power to express itself in dangerous act, remain unchanged. "Violence of this kind, resulting from a fierce and wicked "disposition, might on first thoughts appear to justify the "most direct and energetic measures of repression; but when "we reflect how little the malevolent disposition of a sane "man has been proved by the failure of all reformatory "methods to be modifiable by any form of repression or "punishment,—when we reflect that punishment of any kind, "even when most deserved, is entirely foreign to the bene-"ficent calling of the medical man, we shall do right to "conclude that it is enough to distinguish this form of "violence from others which are the symptoms of disease, "and to meet the dangers resulting from it by measures of "precaution, while we strive to weaken the force of passionate "and evil temper by that long-suffering charity which over-"cometh evil with good."

With the latter part of this extract I have no sympathy. It suggests that nobody should ever be punished at all. Reluctance to punish when punishment is needed seems to be to me not benevolence but cowardice, and I think that the proper attitude of mind towards criminals is not long-suffering charity but open enmity; for the object of the criminal law is to overcome evil with evil. But, however this may be, it is impossible to state more clearly than these passages state it, the position for which lawyers have always contended as to insanity. That position is, that parts of the conduct of mad people are not affected by their madness,

[1] B. and T., 687-88.



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and that if such parts of their conduct are criminal they ought to be punished for it.

It may, however, be asked how ought they to be punished? Ought they to be punished in all respects like sane people? To this I should certainly answer: Yes, as far as severity goes; no, as far as the manner of punishment goes. The man who though mad was found guilty, without any qualification, of murder I would hang; but if the jury qualified their verdict in the manner suggested in respect of any offender, I think he should be sentenced, if the case were murder, to penal servitude for life, or not less than say fourteen years, and in cases not capital to any punishment which might be inflicted upon a sane man. As to the manner of executing the sentence, I think there ought to be special asylums, or special wards in the existing asylums, reserved for criminal lunatics, in which they should be treated, not as innocent lunatics are treated, but as criminals, though the discipline might be so arranged as to meet the circumstances of their disorder. At present, by an arrangement which appears to me to be nearly as clumsy as that of pardoning a man convicted of crime on the ground of his innocence, persons acquitted of crimes on the ground of insanity are confined in an establishment described by [1] parliament as "an asylum for criminal lunatics." To this asylum, moreover, "any person sentenced or ordered to be "kept in penal servitude, who may be shown to the satis- "faction of the Secretary of State to be insane, or to be unfit "from imbecility of mind for penal discipline," may be removed; so that a person otherwise inoffensive, who, under the influence of the blind fury of epilepsy, has unconsciously killed another, is forced to associate with the vile criminal whose vices have at last made him too mad for a convict prison, and what is more both are treated in the same way. The man who is acquitted on the ground of insanity and the man who is convicted but found to have been under the influence of insanity to some extent ought, I think, to be separated, and submitted to different kinds of discipline.

In connection with this subject I may observe that the

[1] 23 & 24 Vic. c. 75, ss. 1 and 2.

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principle that madmen[1] ought in some cases to be punished is proved by the practice of lunatic asylums.

Some important observations on this matter were communicated to me by a medical friend of very large experience who allows me to quote his letter. I had asked him how lunatic asylums were practically governed? The following is an extract from his reply:—"It is by no means easy to "answer your inquiry as to how patients in lunatic asylums "are governed; but I think I may safely say that no rules and "punishments are provided, or, as I should prefer to say, no "punishments by rule are inflicted as punishments. Unques-"tionably a great deal of pain and discomfort is inflicted upon "patients in consequence of their acts, and with a view to "prevent the recurrence of those acts, and it would be ex-"tremely difficult to say how much of this pain is of a "remedial, how much of a penal character. That asylum "physicians systematically substitute medicinal agencies for "simple force is well known, and the term 'chemical "'restraint' as a substitute for mechanical restraint has long "been applied. There are some forms of narcotics which give "intense discomfort, hyoscyamine for instance, and a maniacal or "perverse lunatic will exercise all the self-control of which he "is capable to avoid a dose of it,—at least I am told so on the "best authority, for I have never prescribed the drug myself. "All these remedies or punishments are of course in the "doctor's hands; but the immediate personal control of the "patients is in the hands of the attendants, who unquestion-"ably have the power of inflicting a great deal of discomfort "which is really punishment upon their charge." My correspondent remarks, I think with great justice, "No doubt the "most considerate and proper treatment of disease is frequently "very painful and deterrent, but surely there is a tremendous "waste of pain if it is inflicted under a disguise. I have a "beautiful setter. On the moors he committed all kinds

[1] Dr. Maudsley has some remarks which admit this. See *Responsibility, &c.* p. 129. He goes so far as to say, "Abolish capital punishment, and the dispute "between lawyers and doctors ceases to be of practical importance." He says also that the punishment of death should never be inflicted on an insane person. The illustrations given above show the cases in which I should wish to inflict it. They would be rare, but they might occur.

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"of dog enormities, for which I flogged him with a lash "(which he probably thought was a bit of cord) without "result; so I got a tremendous dog-whip, and since then he "has never wanted a single thrashing. He behaves admirably. "The whip is a threat. I crack it, and that is enough. "Moreover it is probably like the keeper's whip which he has "felt. Now regular and legal punishment is a dog-whip. "We know what it means, and keep in order lest we may "feel it; whilst disguised punishment has very little power as "a threat, and is wasteful of pain and inefficacious."

A further illustration of the fact that the mad are capable of government by fear is supplied by the circumstance that at least one physician tried the effect of "[1] the forcible repression "of every expression of the insane ideas" by the douche—that is to say, in plain words, by corporal punishment—as a means of cure, thereby reviving the ancient practice of chaining and scourging madmen in a less cruel form. This treatment did not effect cures; but it did succeed in many cases in disguising the existence of the disease, and compelling the patients not to exhibit or act upon their insanity. No one of course would advocate a return to the barbarities of former times on this subject, but it is possible to be too indulgent as well as too severe, and the former is the characteristic temptation of our own days.

As to the verdict of not guilty on the ground of insanity, the foregoing observations show in what cases it ought in my opinion to be returned; that is to say, in those cases in which it is proved that the power of self-control in respect of the particular act is so much weakened that it may be regarded as practically destroyed, either by general weakening of the mental powers, or by morbid excitements, or by delusions which throw the whole mind into disorder, or which are evidence that it has been thrown into disorder by diseases of which they are symptoms, or by impulses which really are irresistible and not merely unresisted.

To conclude, it appears to me that the line which ought to be drawn between the departments of law and medicine in

[1] Griesinger (pp. 485-6) gives an account of Leuret's book, *Du Traitement moral de la Folie*, in which this plan was described.

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this matter is theoretically, and ought to be in practice, perfectly clear.

The question, "What are the mental elements of responsibility?" is, and must be, a legal question. It cannot be anything else, for the meaning of responsibility is liability to punishment; and if criminal law does not determine who are to be punished under given circumstances, it determines nothing.

I believe that by the existing law of England those elements (so far as madness is concerned) are knowledge that an act is wrong and power to abstain from doing it; and I think it is the province of judges to declare and explain this to the jury.

I think it is the province of medical men to state for the information of the court such facts as experience has taught them bearing upon the question whether any given form of madness affects, and in what manner and to what extent it affects, either of these elements of responsibility, and I see no reason why, under the law as it stands, this division of labour should not be fully carried out.

If I am wrong in thinking that the power to abstain from a given act is an element of responsibility for it, the duty of the judge is to tell the jury that such is the law, and to exclude from the consideration of the jury as being irrelevant all evidence tending to show that the accused person was deprived by disease of control over his actions.

In illustration of this view I will mention the only form of madness to which I have not as yet referred—I mean moral insanity. The accounts given by Dr. Maudsley of this form of disease agree closely with those of earlier writers, particularly Prichard and Ray. I do not know why such evidence, if uncontradicted and confirmed by other observers, should not be taken to prove that disease may in some cases have the specific effect of destroying for a time, or diminishing in a greater or less degree, those habitual feelings which are called, I think unfortunately, the "moral sense." Assume that it is so, ought the sufferer to be acquitted on the ground of insanity? or ought it to be said that his power of self-control was diminished by insanity? or ought he to be regarded as responsible for his crimes? Dr. Maudsley, after giving a description of the

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disease,[1] says he shrinks from answering in the affirmative the question whether persons morally insane should in "every case "be exempted from all responsibility for what they do wrong." In the same way I should shrink from saying that moral insanity ought never under any circumstances to be admitted as an excuse for any offence whatever. Its existence might or might not convince a jury that the sufferer in a given case was deprived of the knowledge or of the power which I regard as the two constituent elements of responsibility by law. In any case it would be a fact for a jury to consider, and would be relevant to a defence on the ground of insanity. I think, however, that if such a defence were set up, it would be most important to bear in mind that if the expression "moral sense" is fit to be used at all—as to which there is room for endless controversy—many people, who are undoubtedly sane, appear by their conduct to possess nothing which remotely resembles it. If it exists, it varies from time to time, place to place, and class to class, so much that it is impossible to say that it is more than habitual sympathy with the moral sentiments of a given time or class of people with whom the person lives of whom moral sense is affirmed. The moral sense of an English gentleman, the moral sense of an Irish peasant, the moral sense of a Hindoo, the moral sense of any two individual men, differ profoundly.

The criminal law is essentially distinct from all these differences. It says to all alike, "Think and feel as you "please about morals, but if you do certain things you shall "be hanged," and accordingly large numbers of people are hanged for murders which probably do not strike them as particularly wrong, either before or after they are committed.

In a note to their remarks on homicidal mania, Drs. Bucknill and Tuke refer to certain articles in the *Journal of Medical Science*, and make the following quotation:—"Mr. J. "B. Thompson, the resident surgeon of the General Prison for "Scotland, says, 'From large experience among criminals I "'have come to the conclusion . . . . that the principal "'business of prison surgeons must always be with mental "'disease; that the number of physical diseases are less than

[1] *Responsibility, &c.* p. 181.

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"'the psychical; that the diseases causing death amongst "'prisoners are chiefly of the nervous system; and, in fine, "'that the treatment of crime is a branch of psychology.'"[1] Mr. Thompson is quoted also for this remark:—"'When I "'read Despine's conclusion that the moral sense is utterly "'and invariably absent in all criminals who commit violent "'crimes in cold blood, I confess it startled me as a most "'extravagant proposition;' yet" (say Drs. Bucknill and Tuke) "he adds that the result of his investigations has much "astonished him, and not a little shaken his incredulity. "He states that, of 430 murderers he has had in medical "charge, only three discovered the slightest remorse for their "crime, corroborating, he considers, the opinion that the "moral sense is wanting in great criminals."[2]

My own experience certainly is, that people who commit great crimes are usually abominably wicked, and particularly murderers. I have the very worst opinion of them. I have seen something of a good many of them, and if I had not had that experience I should not have imagined that a crime which may be the result of a transient outbreak of passion indicated such abominable heartless ferocity, and such depths of falsehood as are, in my experience, usually found in them. This peculiarity appears to me to be a reason, not for sparing them, but for putting them to death. If, however, when a bad man acts according to his nature, he is—as I think he ought to be—put to death, I do not quite see why a person, who suddenly becomes bad by reason of a disease, should be in a better position than he who is bad by birth, education, and natural character. If the morally insane man is as able to abstain from crime as a sane bad man, and has the same reason—namely, fear of punishment—for abstaining from crime, why should not he be punished if he gives way to temptation?

The importance of the whole discussion as to the precise terms in which the legal doctrine on this subject are to be stated may easily be exaggerated so long as the law is administered by juries. I do not believe it possible for a

[1] B. and T., p. 261.

[2] B. and T., p. 277.

person who has not given long-sustained attention to the subject to enter into the various controversies which relate to it, and the result is that juries do not understand summings up which aim at anything elaborate or novel. The impression made on my mind by hearing many—some most distinguished—judges sum up to juries in cases of insanity, and by watching the juries to whom I have myself summed up on such occasions, is that they care very little for generalities. In my experience they are usually reluctant to convict if they look upon the act itself as upon the whole a mad one, and to acquit if they think it was an ordinary crime. But their decision between madness and crime turns much more upon the particular circumstances of the case and the common meaning of words, than upon the theories, legal or medical, which are put before them. It is questionable to me whether a more elaborate inquiry would produce more substantial justice.

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# CHAPTER XX.

## CONSTITUENT ELEMENTS OF THE SUBSTANTIVE CRIMINAL LAW; COMMON LAW AND STATUTE LAW; TREASON, FELONY, AND MISDEMEANOUR.



FROM the subject of criminal responsibility I pass to the other great branch of the substantive criminal law, namely, the classification and definition of crimes. Crimes may be classified in respect of their origin as being either crimes at common law or by statute; and in respect of their nature and gravity as being either treasons, felonies, or misdemeanours. I propose in the present chapter to give an account of the relation in which the common and statute law upon this subject stand to each other, and to describe and discuss the classification of crimes as treason, felony, or misdemeanour.

Originally the whole of the criminal law was unwritten, and it is curious to find that at the very dawn of its history this fact had attracted attention and suggested comments not altogether unlike those of much more modern times.

The most ancient of English law books is the work of Glanville, who wrote in the reign of Henry II. In his prologue occur the following passages:—"Leges namque "Anglicanas, licet non scriptas leges appellari non videtur "absurdum (cum hoc ipsum lex sit 'quod principi placet "'legis habet vigorem') cur scilicet quas super dubiis in "consilio definiendis, procerum quidem consilio, et principis "accedente authoritate, constat esse promulgatas." "Si "enim ob scripturæ solummodo defectum leges minime "censerentur majoris (procul dubio) auctoritatis robur ipsis

"legibus accommodare videretur scriptura quam vel decernentis "æquitas vel ratio statuentis. Leges autem et jura regni "scripto universaliter concludi, nostris temporibus omnino "quidem impossibile est; cum propter scribentium ignoran- "tiam, tum propter earum multitudinem confusam." From Glanville's time to our own the "confusa multitudo" of the unwritten law (which expression, however, in his day probably applied rather to the intricacy of local customs than to any state of things resembling our law libraries) has been gradually reduced to writing until in the present day it may be said that the whole of the law is written, either in the form of express acts of Parliament, or in the form of reported decisions and statements of text-writers. These authorities are upon the whole quite as binding as statutory enactments and not much less explicit, though some are imperfect and many of them are in an exceedingly confused and intricate shape.

Speaking generally the relation between statute and common law in relation to the definition of crimes has been as follows. The common law supplies a certain number of general principles and leading definitions of crimes. The statute law assuming these has provided in many cases that common law offences aggravated or modified in particular ways shall be subject to special punishments. In other cases statutes have created offences unknown to the common law, and in some few instances it has altered the principles and reduced to certainty the definitions of the common law. This process, speaking roughly, may be said to have been in progress for about 600 years, possibly since the time of Henry III., at all events since the time of Edward I. At the present day the result is as follows.

The principles and rules on which all questions relating to criminal responsibility depend are, without an exception, or with hardly an exception, unwritten, and therefore belong to the common law. No act of Parliament throws any light on the questions as to the extent to which insanity is an excuse for crime, and hardly any throws light on the limits of the right of self-defence. These are nearly the only branches of the criminal law on which it can be said with truth that

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any considerable number of questions likely to be of practical importance still continue undecided. They relate mainly to the question of insanity; and to the cases in which, and the degree to which, it is lawful to apply violence to the person of another.

The law relating to Principals and Accessories, and principals of the first and second degree was originally an intricate branch of the common law. It has now been reduced by [1] statute to great simplicity though the common law definitions must still be resorted to in order to ascertain what makes a man an accessory before or after the fact to felony, and who are considered to be principals in treason and misdemeanour.

With regard to the degrees in the commission of crimes, the common law defines what amounts to incitement to commit a crime, and what constitutes an attempt and a conspiracy, and provides in general that such incitements, attempts and conspiracies are misdemeanours. There are, however, instances in which attempts and conspiracies are by statute made either felonies or misdemeanours liable to punishments of great severity. Thus, for instance, [2] attempts to commit murder are felonies punishable by penal servitude for life as a maximum, and [3] conspiracies to commit murder are misdemeanours punishable with ten years penal servitude.

Nearly all [4] political offences are defined by statute. High treason was an offence at common law, but its definition was so vague that it was defined by statute (25 Edw. 3, s. 5, c. 2) in 1352. In course of time, however, judicial constructions were put upon the statute, which have given it a technical meaning which no doubt differs from its obvious one. Unlawful assembly and riot, seditious libel, seditious conspiracies, and seditious words are defined by the common law. Most of the offences in which foreigners are principally concerned, or which are connected with navigation, are defined by statute, as for instance offences under the foreign

[1] 24 & 25 Vic. c. 95.
[2] 24 & 25 Vic. c. 100, ss. 11-15; *Digest*, art. 233.
[3] 24 & 25 Vic. c. 103, s. 4; *Digest*, art. 234.
[4] *Digest*, part ii. pp. 32-70.

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enlistment act, and offences of the nature of slave trading and statutory piracies. Piracy by the law of nations is defined by the common law, but its punishment is provided for by statute (in a very circuitous way).

Offences which may be classified under the general head of Abuses and Obstructions of Public Authority are in part defined by statute and in part by the common law. Extortion and oppression by public officers, official frauds and breaches or neglects of duty, disobedience to the provisions of a statute or to the lawful orders of a court, judicial corruption, and the corruption of other public officers, perjury, false swearing other than perjury, and several kinds of escapes are common law offences. The sale of offices, the bribery of voters, certain escapes are offences by statute, and the punishment of perjury and of some of the other offences mentioned are also provided for by statute.

The class of offences of which nuisance may be taken as the type, and which consists of acts injurious to the public as a whole, and in particular of offences relating to religion and morals, is composed partly of common law and partly of statutory enactments. To this class must be referred the power which has in some instances been claimed for the judges of declaring anything to be an offence which is injurious to the public although it may not have been previously regarded as such. This power, if it exists at all, exists at common law. Blasphemy and blasphemous libel are offences at common law, but a denial of the truth of Christianity, depraving the book of Common Prayer, and some others are statutory offences. Some acts of gross immorality and indecency are punishable by common law, others by statute. The common law defines a common nuisance, but a large number of those common nuisances which occur most frequently (keeping disorderly houses for instance) are punishable under special statutory provisions. Libel against individuals is a common law offence, and the doctrines relating to the cases in which libels are justifiable or excusable are part of the common law. The punishment is provided by statute.

The remainder of the criminal law is contained in statutes,

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and nearly the whole of it in the five consolidation acts [1] of 1861, of which I shall have to speak more particularly hereafter. Each of them defines and provides punishment for a large class of offences, but three out of the five also presuppose the knowledge of a greater or less number of common law doctrines. I will take them in their order. Chapter 96, the Larceny Act, is founded upon the common law definition of theft, and many intricate and subtle common law doctrines are connected with that offence. To take one instance out of a great number, the statute defines the offence of stealing horses, but it would be necessary to resort to the common law to ascertain whether a person who, under pretence of trying a horse got leave to mount him and rode away with him had committed theft or not. The whole structure of the act is unintelligible without reference to a variety of common law doctrines which have given rise to the distinctions (amongst others) between theft, embezzlement and obtaining goods by false pretences. The definitions of burglary and robbery are also common law definitions presupposed by the enactments which provide punishment for them.

Chapter 97 relates to malicious injuries to property. I do not think that any of the offences which it defines and punishes are defined by the common law. Arson was an offence at common law, but the definition (if there was one) is superseded by the terms of the act.

Chapter 98 relates to forgery. The definition of forgery is a part of the common law, and presents several peculiarities. Every section of the act makes it an offence to forge or utter certain specified documents.

Chapter 99 relates to offences against the coinage. They are all statutory.

Chapter 100 relates to offences against the person. This act presupposes the common law definitions of murder, manslaughter, rape, assault, and a variety of common law doctrines which determine the cases in which homicide is and is not unlawful. The act, however, provides punishments for all the offences mentioned, and creates many others.

[1] 24 & 25 Vic. cc. 96-100.

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To sum up, the principal parts of the criminal law which still remain unwritten are, the law as to matter of excuse and justification both in general, and in particular cases, and the definitions of murder, manslaughter, assault, theft, forgery, perjury, libel, riot, unlawful assembly, and the different doctrines connected with those offences. The rest of the substantive criminal law is defined by statute.

As regards procedure I have noticed in the earlier part of this work the provinces of the common and statute law; but I may here shortly refer to it. The rule as to the apprehension of offenders without warrant is part of the common law, but it is supplemented by many statutory enactments. The preliminary procedure in regard to information, warrant, or summons, the procedure before justices, bail and committal for trial is regulated by statute. The rules relating to indictments are common law modified by statutory exceptions. The procedure at the trial is regulated almost entirely by common law though there are a few statutory modifications, and the same may be said as to the rules of evidence.

The classification of crimes, as felony and misdemeanour, is very ancient. The word "felonia," indeed, appears in [1] Glanville, and is commonly used in Bracton. [2] For instance, in the form of an appeal, "quæ oritur ex pace et roberia," the appellant avers that the act was done "nequiter et in "'felonia.'" And the appellee "venit et defendit pacem "et feloniam." I do not, however, remember in Bracton any express classification of offences as being either felonies or misdemeanours. In later times the sense of the word came to be definitely fixed, though it is not easy to give any exact definition of it. It is usually said that felony means a crime which involved the punishment of forfeiture, but this definition would be too large, for it would include misprision of treason which is a misdemeanour. On the other hand, if felony is defined as a crime punishable with death, it excludes petty larceny which was never capital, and includes piracy which was never felony. Felony was

[1] *e.g.* "Sicut in cæteris placitis de feloniâ," lib. xiv. ch. i.
[2] Brac. 475.

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substantially a name for the more heinous crimes, and all felonies were punishable by death, with two exceptions, namely, petty larceny and mayhem, which came by degrees to be treated as a misdemeanour. If a crime was made felony by statute the use of the name implied the punishment of death, subject, however, to the rules already stated as to benefit of clergy. Thus, broadly speaking, felony may be defined as the name appropriated to crimes punishable by death, misdemeanours being a name for all minor offences. There were, and, indeed, still are a good many differences of considerable importance in the procedure relating to the prosecution of felonies and misdemeanours respectively. The most important are, that as a rule a person cannot be arrested for misdemeanour without a warrant; that a person committed for trial for a misdemeanour is entitled to be bailed (speaking generally), whereas a person accused of felony is not; and that on a trial for felony the prisoner is entitled to twenty peremptory challenges, whereas upon a trial for misdemeanour he is entitled to none.

So long as the punishment of death and the law relating to benefit of clergy were in force, the distinction between felony and misdemeanour was not only an important but might almost be described as an essential part of the law, but since the substitution of milder punishments for death, the distinction has become unmeaning and a source of confusion, especially as many offences have been made misdemeanours by statutes, which render the offender liable to punishments as severe as those which are now usually inflicted upon persons convicted of felony. It is impossible to suggest any reason why the offence of embezzlement should be a felony, and the offence of fraud by an agent or bailee a misdemeanour, or why bigamy should be a felony, and perjury a misdemeanour, or why certain kinds of forgery should be felonies, and obtaining goods by false pretences a misdemeanour.

It is remarkable that the classification of crimes as felonies and misdemeanours should be the only one known to the law of England. In the French *Code Pénal* the division is into *crimes*, *délits*, and *contraventions*, *crimes*



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answering very roughly to felonies, *délits* to indictable misdemeanours, and *contraventions* to police offences punishable on summary conviction. For this class of offences which are extremely numerous in our law we have no distinct name. Many cases of felony may be dealt with in a summary way, so may innumerable cases which not being felonies must be regarded as misdemeanours. But upon the whole it may be said that no classification of crimes exists in our law except one, which has become antiquated and unmeaning. In the Draft Criminal Code the distinction between felony and misdemeanour was omitted, and whenever an offence was defined it was expressly stated whether the offender was to be entitled to be bailed and was liable to be arrested without warrant.

It may be asked whether such a classification is or is not desirable. After much consideration of the matter I think it is not, for the following reasons.

There is no practical use in any classification of crimes, unless the nature of the subject is such that it is possible to make the same provisions for all the crimes which belong to each class. For instance, if it is determined that all serious crimes are to be punished or punishable by death, it is no doubt a convenience to call all such crimes by the common name of felony, but on the other hand the facility which such a classification gives for hasty legislation is a great objection to it. I doubt whether, if the word "felony" had not been ready to their hand, the legislature in the eighteenth century would have made so lavish a use as they did of the punishment of death.

There are four points in which crimes must differ from each other. They are as follows:—

1. Different crimes must be tried in different courts.

2. Different crimes must be subjected to different maximum punishments.

3. Some crimes ought and some ought not to render the offender liable to arrest without warrant.

4. Persons charged with some crimes ought, and persons charged with other crimes ought not to have a right to be bailed till trial.

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Each of these four distinctions depends upon a different principle, so that a crime may as to some of these distinctions belong to what might be called the higher, and as to the others to the lower class. Take for instance libel. Obviously the offence ought to be tried only in the superior courts, because it is likely to raise important questions of law and of fact. Obviously, also, the maximum punishment should not be high. Offenders ought not to be arrested without warrant, and ought to be entitled to be bailed. Thus with a view to the first distinction, libel must be regarded as amongst the more serious crimes. With a view to the other three, as one of the less serious. Again, take perjury. This is a most serious crime, and it ought in particular cases to be liable to a far heavier punishment than can at present be awarded to it. It is clearly not a crime for which a man ought to be liable to summary arrest. Neither is it a crime for which the offender ought in all cases to have a right to be bailed. If the maximum punishment were as severe as in some cases (*e.g.* perjury with intent to convict an innocent man of a capital crime) it ought to be, a man when committed for trial would be very likely to abscond.

Again, there are many crimes which, from the nature of the case, must differ almost infinitely in the degree of guilt and danger which they involve. Burglary may be a trifling form of theft, as for instance, if a man opens the door of a back-kitchen of a house in a street in London at 9.30 P.M., and steals a loaf of bread without alarming any one. It may be a crime of the greatest atrocity, as for instance, if armed men break into a lonely dwelling-house in the country, rob the owners of all their property, and frighten and ill-use them. So robbery with violence may mean something close upon murder, or something hardly differing from a common assault. With regard to such crimes it would be found extremely convenient to provide that the inferior courts should have concurrent jurisdiction with the superior courts, but that the inferior courts should not be able to pass a sentence exceeding a certain degree of severity—say, for instance, seven years' penal servitude, and that they should be at liberty to



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transmit the case to a superior court if they thought a more severe punishment would be required.

A classification which had different general names for the various combinations which might be made out of the various distinctions mentioned would be extremely intricate and technical. A classification which did not recognize them would be of little use. Hence the most convenient course in practice is to have no classification at all.

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## CHAPTER XXI.

### LEADING POINTS IN THE HISTORY OF THE SUBSTANTIVE CRIMINAL LAW.

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THOUGH, for reasons which I have already given, it is impossible to say that the whole of the criminal law has any continuous history, it is nevertheless possible to mark a certain number of leading points, acquaintance with which will make it much easier than it would otherwise be to follow the development of its details.

The earliest writer who is in any way connected with the existing law of England is Glanville. His account (such as it is) of the criminal law is contained in the fourteenth and last book of his work. It is contained in a few small pages and relates almost entirely to matters of procedure. The crimes which he mentions are treason, though he does not use the word, concealment of treasure trove, homicide, arson (incendium), robbery, rape, and "generale crimen falsi," which "plura sub se continet crimina specialia, quemadmo-"dum de falsis chartis, de falsis mensuris, de falsa monetâ." He also says that he does not mean to write "de furtis et "aliis placitis quæ ad vicecomites pertinent." The whole matter is disposed of in these few words, just as in the assizes of Clarendon and Northampton, which were the most important legislative acts of that age, no further light is thrown on the subject of crime than such as is afforded by the bare use of the words[1] "robatores "vel murdatores vel latrones vel receptores eorum." The vagueness of these references to crimes may be compared

[1] Stubbs, *Charters*, p. 144, no. 13.

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CH. XXI. with the famous provision in [1] Magna Carta: "Liber "homo non amercietur pro parvo delicto, nisi secundum "modum delicti, et pro magno delicto amercietur secundum "magnitudinem delicti salvo contenemento suo." What amounted to "delictum," and what delicta were magna or parva respectively, there is no definite authority to show. Proof, however, still remains that this branch of the law which I think subsequently developed into the law relating to misdemeanours was anciently wide and indefinite to the last degree, and was thus capable of being used, as we know that in fact it was used, for oppressive and corrupt purposes. [2] In Madox's *History of the Exchequer* there are collected a vast mass of instances of fines and amercements, extracted from the rolls of Henry II., Richard I., John, Henry III., and Edward I., from which it appears that fines were paid on every imaginable occasion, especially on all grants of franchises, at every stage of every sort of legal proceeding, and for every description of official default, or irregularity, or impropriety. In short, the practice of fining was so prevalent that if punishment is taken as the test of a criminal offence, and fines are regarded as a form of punishment, it is almost impossible to say where the criminal law in early times began or ended. It seems as if money had to be paid to the king for nearly every step in every matter of public business, and it is impossible practically to draw the line between what was paid by way of fees and what was paid by way of penal fines. [3] Madox observes, "The amercements in criminal and common "pleas which were wont to be imposed during this first "period" (Henry II., Richard I., John) "and afterwards, were "of so many different sorts, that it is not easy to place them "under distinct heads. Let them for method's sake be re-"duced to the heads following: Amercements, for or by reason "of murders and manslaughters, for misdemeanours, for "disseisines, for recreancy, for breach of assize, for defaults, "for non-appearance, for false judgments, and for not making "suit or hue and cry." Then follow twenty-five 4to pages

[1] Art. 20, Stubbs, *Charters*, p. 299.
[2] Vol. i. chaps. xi.-xv. pp. 395-568.
[3] *Ib.* p. 542.

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of illustrations of each kind of amercement. Under the head of amercements for misdemeanours occur a great variety of matters, some of which we should regard as indictable offences, as, for instance, harbouring a robber, and interfering with jurors; but others are, according to our notions, far remote from criminal offences, *e.g.*, [1] "Fossard was fined for a mort-"gage unjustly taken." [2] "The hundred of Stanberg was "amerced for denying before the justices what they had "acknowledged in the County Court," and the town of "Charleton for confessing what they had before denied." How long this system lasted, or by what precise steps it fell into disuse it would take more trouble to discover than the discovery is worth. It is important with a view to the present subject, because it shows the extreme vagueness of that part of the criminal law which related to misdemeanours at the beginning of the history of the system.

The earliest writer on the criminal law who gives anything like a general view of the matter is Bracton, who wrote in the earlier part of the thirteenth century. Lately, and especially since the revival in the study of Roman law which has taken place in the course of the last thirty years, Bracton's merits have been fully acknowledged. There can be no doubt that his book is by far the most comprehensive and also the least technical account of the law of England, written from the very origin of the system down to Blackstone's *Commentaries*, and it is free from various defects which have been imputed to that great work. Bracton is a remarkable mixture of Roman and English law, the Roman law supplying some of the principles and definitions, the English law supplying the procedure. Remarkable as the work is on many accounts, its arrangement is not what a modern writer would adopt. It seems to me to have been founded, partly on the Institutes and partly on the Digest. To show how Bracton introduced the Criminal Law it is necessary to say a few words on his arrangement of the whole subject of his work. The title of the first book is *Of the Division of Things*, but its contents do not correspond to the title, for it relates not only to its professed

[1] Madox, *History of the Exchequer*, i. p. 545. [2] *Ib*. p. 546.

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object (which, by the way, is placed at the end of the book), but to general matters about justice and the various rights which are usually described as constituting the law of persons. The second book is headed, "De acquirendo rerum dominium," and the third, "De "actionibus." The fourth and fifth relate to particular actions, namely, the fourth to assises, and the fifth to writs of right, Essoigns, defaults, warranty, and pleas. He thus conceives of the law as being divisible into three great parts—personal rights, proprietary rights, and actions relating to their enforcement. This way of treating the subject has considerable conveniences, though it has also great inconveniences, but it is certainly the mode which in the earlier stages of legal history commends itself to persons who have acquired their knowledge by experience and practice. It is much as if a modern writer, after laying down a greater or less number of preliminary general principles, were to proceed to describe the law of England under the heads of actions at law, suits in equity, conveyancing, and special pleading, subdividing each head according to the principal kinds of procedure contained under it. Such a distribution of the subject would involve all kinds of repetitions and would be difficult to follow, but it might be made complete and of great practical use.

Its inconvenience is illustrated by the place which Bracton assigns to the criminal law. Criminal law obviously is one of the great heads of the law, and in a complete account of the laws of a country it ought to occupy a prominent position of its own, and to be treated in reference to the natural divisions of the subject. In Bracton it comes in as the second treatise of the third book. The third book is "De Actionibus." The first treatise is "de actionibus" in general; the second, "De Coronâ." This treatise, which I have already quoted repeatedly and largely in reference to procedure, treats of crimes, not according to their own nature, but according to the nature of the procedure by which they are punished. The procedure appropriate to each offence, and in particular all the forms of appeal, and all the exceptions or pleas which might be made to an appeal, are described with the greatest

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minuteness. The definitions of the crimes themselves are given by way of explanation. Of these eleven are specified, namely, (1) Læsa Majestas; (2) falsum; (3) concealment of treasure trove; (4) homicide; (5) wounding; (6) mayhem; (7) false imprisonment; (8) robbery; (9) arson; (10) rape; (11) theft. Besides these there is a general reference to lighter offences—[1] "dicendum est de minoribus et levioribus "criminibus, quæ civiliter intentantur, sicut de actionibus "injuriarum personalibus et pertinent ad coronam eo quod "aliquando sunt contra pacem domini regis."

Most of these offences require hardly any definition. This applies to the concealment of treasure trove, wounding, false imprisonment, arson, and rape. The definitions given of these offences hardly go beyond the use of the words which are their appropriate names. Rape, however, seems to have included abduction. The other definitions I shall not examine minutely here, but I may say of them generally that the influence of the Roman law is manifest in the definitions of "Læsa majestas," and "falsum," and that [2] theft is defined not precisely in the words of Paulus (Dig. xlvii., Tit. ii. 1, 3), but very nearly. The definition of homicide has less resemblance to the doctrines of the Roman lawyers relating to that crime. The relation between the substantive criminal law of England as it stood in Bracton's day, and the Roman law as it stands in the forty-seventh and forty-eighth books of the Digest is unmistakably clear, but it is also less close than has been sometimes supposed of late years. In each of the definitions to which I have referred the doctrines of the Roman lawyers are modified by Bracton in the manner which in his opinion was required to adapt them to the laws and customs of England. Into this, however, I shall inquire more fully when I come to the definitions of particular offences. For my present purpose it is enough to say that when Bracton wrote the substantive criminal law consisted

[1] 2 Brac. 545.

[2] *Paulus*: "Furtum est contrectatio rei fraudulosa lucri faciendi gratia vel "ipsius rei vel etiam usus ejus possessionis ve."

*Bracton*: "Furtum est secundum leges contrectatio rei alienæ fraudulenta "cum animo furandi invito illo domino cujus res illa fuerit."

The differences are intentional and highly important, as will appear in the chapter on theft.

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of eleven capital crimes or felonies and an unspecified number of misdemeanours, the influence of the Roman law being clearly traceable in all the definitions, though it was in all cases adopted with modifications peculiar to England.

Bracton was followed by Fleta and Britton who wrote in the reign of Edward I. Fleta, so far as the criminal law is concerned, is simply a later edition of Bracton. Britton wrote on a different plan, and less elaborately than Bracton, but his work conveys the impression that hardly any change of importance in the substantive criminal law had taken place between Bracton's time and his own. He is less given to definitions than Bracton, for instance he gives no definition of either homicide or theft, though he defines treason.

Upon the whole I think that the account already given of the contents of Bracton may stand as a substantially accurate account of the substantive criminal law of England in the reigns of Henry III. and Edward I. This body of law indeed supplied the foundation on which the rest was built, and part of Bracton's definitions still lie at the root of the law and give their peculiar form to many of its most important departments.

From the days of Bracton to those of Coke, an interval of at least 350 years there was an extraordinary dearth of writers on English law. The law itself underwent changes of the utmost importance, but they have to be traced in the statutes and the year-books. No writer of any considerable eminence—if we except Fortescue, the chancellor to Henry VI. and author of the treatise, "De laudibus legum Angliæ" —deserves notice between the time of Edward I. and the beginning of the seventeenth century.

The interval, however, is filled up by the year-books which cover the whole period from Edward I. to Henry VII. A notion of their contents, sufficient for the present purpose, is to be got from the title "Corone et plees del Corone," in FitzHerbert's abridgment, which contains notes, some of them very full, others short, of 467 cases scattered over the eleven folios of which the year-books consist. I have looked through the whole of them, though I have not thought it necessary to verify all the references. The result is that the substantive

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part of the criminal law appears to have varied very little during this period. A certain number of the cases decided turn upon the definition of crimes, and throw some light upon our present law, but the immense majority relate to matters of practice long since obsolete. Most of them turn upon details about appeals. The other subjects which occur most frequently are forfeitures, abjuration, fines and amercements inflicted on townships; but upon the whole this body of decisions conveys the impression that the unwritten law as to crimes varied little from the days of Bracton to those of Henry VIII. It was still composed of a few vague definitions of the grosser crimes, but I suspect that it hardly provided for the minor offences at all, except by the vague and arbitrary system of fining to which I have referred, but which seems to have been greatly restricted and to have fallen much into disuse during this period.

The statutes creating offences during this period are not very numerous, and there is a resemblance between them. They relate principally to crimes of violence, especially crimes directed against the public peace and the administration of justice. The principal subjects dealt with are treason, riot, maintenance in its various forms, forcible entry and the extortions of officers of different kinds, and in particular those of purveyors. Crimes of dishonesty, such as cheating, embezzlement, forgery, and the like, are hardly noticed, nor have I observed any attempt to break up into specific offences the eleven general heads of the law. During all this period theft was either grand or petty larceny, and no form of personal violence was made the subject of special punishment unless it amounted to mayhem. The only exception I have noticed occurs in the Act of [1] 5 Hen. 4, c. 5 (1403).

Leaving out of notice what the king might do by his prerogative, the general character of the law under the

[1] This act is highly characteristic of the occasional and limited character of English legislature on criminal subjects. It is in these words. "Item, "because that many offenders do daily beat, wound, imprison, and maim "divers of the king's liege people, and after purposely cut their tongues or "put out their eyes, it is ordained and established that in such case the "offenders that so cut their tongues, or put out the eyes of any of the king's "liege people, and that duly proved and found that such deed was done of "malice prepensed, they shall incur the pain of felony."

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Plantagenets seems to have been somewhat as follows:—If a man committed or was supposed to commit a gross crime, or felony, he was hung unless he got his clergy or took sanctuary and abjured the realm. If he was guilty of official misconduct or of tampering with any royal prerogative, or infringing, however slightly, any royal right, or if he committed maintenance, riot or forcible entry, he was liable to fine and imprisonment. The less serious forms of force and fraud were comparatively little noticed. They were treated to a great extent as civil injuries.

The offences which in our days would be dealt with in a summary way by police magistrates were under the jurisdiction of courts leet, and sheriff's tourns, and the ecclesiastical courts had a jurisdiction in all matters involving immorality which has been little noticed but to which I shall direct attention in a special chapter.

The great characteristic of the criminal law up this period was its strange mixture of excessive severity and excessive laxity and inefficiency. A man who could not read, and a woman whether she could read or not, must be hung for stealing two shillings. But a murderer of the worst kind who knew how to read escaped from nearly all punishment, unless indeed he had married a widow. Moreover, the whole system was worked by juries, which might be and continually were exposed to all sorts of corrupt influences. One effect of the Reformation which has been less noticed than it deserves to be was that the law was made greatly more severe than it had been by the restriction of privilege of clergy and the abolition of privilege of sanctuary. The legislation of Henry VIII. and Edward VI. on this subject I have already noticed. A change of earlier date and of even greater importance was effected by the Court of Star Chamber. I have given its history elsewhere, and have shown how it existed from the earliest times, but was called into special vigour by the statute 3 Hen. 7, c. 1. The period of its importance thus coincides almost accurately with the Tudor period. Its power was at its height under James I. though even then it was becoming an object of suspicion. It became a partisan court and fell in the

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reign of Charles I. It made, however, great additions to the law as it was under the Plantagenets. For under the fiction of declaring the law it converted into misdemeanours some acts which were not previously criminal at all, as for instance, perjury by a witness, and to say the least, it greatly extended and rendered far more definite than it had formerly been the law as to attempts and conspiracies to commit crimes, and the law as to libel, forgery, and some other offences.

The great outburst of intellectual and literary activity which signalised the period of the Reformation extended to law as well as to other subjects. Many of the books written at this period are learned, but nothing more. For instance, FitzHerbert's *Grand Abridgment* is a classified abstract of the year-books, and has in many instances been used as a substitute for them, but it might have been compiled by any one who with moderate technical knowledge combined time and inclination to go through a great deal of drudgery. Lambard's *Eirenarcha* and Dalton's *Justice* and some others are mere books of practice, Lambard being a particularly good one, but one writer aimed at all events at a higher kind of effort, and produced a work which may be regarded as having coloured English law for more than than two centuries. I refer, of course, to Coke's *Institutes*. When Coke wrote the law was in such a state that any one who possessed a technical acquaintance with it, and would take the trouble to give anything which could be regarded as a popular exposition of it might exercise great influence upon it. Coke's *Institutes* have had a greater influence on the law of England than any work written between the days of Bracton and those of Blackstone. When the older learning became obsolete, Coke came to be regarded more and more as a second father of the law behind whose works it was not necessary to go. The characteristics of his style and of his mind are sufficiently well-known. He has usually been credited with great learning, and I have no doubt he had diligently read the year-books and the statutes and acquainted himself with many records, but on the occasions where I have compared his statements with his authorities I have not found him very accurate.

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CH. XXI. The amount of knowledge to be acquired was much less then than it is now, but the facilities for acquiring it were far smaller, and the risk of detection in falsely pretending to have acquired it much less. [1] A more disorderly mind than Coke's and one less gifted with the power of analysing common words it would be impossible to find. His divisions are all technical and pedantic, running upon words instead of facts, and the speculative parts of his writings are mostly puerile and often contradictory. The Third Institute, which treats of crimes, is less ill-arranged than the first, for each offence is put in a chapter by itself, but where any arrangement is wanted it is very bad. The book, however, contains what is no doubt a fairly correct catalogue of offences both at common law and by statute. It shows that the law was composed of the elements which I have already enumerated, namely, the common law offences enumerated by Bracton, about thirty statutory felonies, and as many misdemeanours. If the law as it stood in Bracton's time had been codified, I think the penal code might have been put into an act of perhaps twenty sections. In Coke's time the same subject would perhaps have filled eighty sections.

Such of the new felonies created by statute in the interval between Bracton and Coke as are worth specific notice may be thus classified. In six cases provision was made by statute for what can now be recognised as defects in the common law definitions of common crimes or omissions to define them. These are [2] abduction with intent to marry, which appears at one time to have been regarded as rape; [3] cutting out the tongue or the eyes, which seems not to have been sufficiently provided for by the law of mayhem; [4] stealing records, which at common law were not the subject of larceny; [5] stealing falcons

[1] This is admirably brought out by Hobbes in his *Dialogue of the Common Laws*, *Works*, vi. 1-160. This nearly-forgotten work is, to my mind, the most powerful speculation on the subject to which it refers before the days of Bentham and Austin. Nothing can be better than the following remark on Coke. "Sir Edward Coke does seldom well distinguish when there are two "divers names for one and the same thing; he makes them always different." He might have added that when one name applies to two things he makes them always the same.

[2] Coke, p. 61; 3 Hen. 7, c. 2, and 39 Eliz. c. 9.

[3] Coke, p. 62; 5 Hen. 4, c. 5.

[4] Coke, p. 70; 8 Hen. 6, c. 12.

[5] Coke, p. 97; 37 Edw. 3, c. 9.

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to which the same remark applies; [1] embezzlement of armour or military stores by soldiers or others in charge of them; and [2] the embezzlement by servants of their master's property to the value of 40*s.* or upwards. These are early instances of defects in the definition of larceny which have since given great trouble and produced much legislation and many failures of justice.

In two instances common law offences were defined by statute. These were the Statute of Treason, 25 Edw. 3, st. 5, c. 2, and the Statute of Conspirators, 33 Edw. 1 (A.D. 1305).

In five cases it was made felony to do acts regarded as prejudicial to the commercial interests of the country. These cases were, [3] the importation into England of certain kinds of money; [4] the exportation of silver and the importation of bad money; [5] the exportation of wool and some other goods; [6] the exportation of certain metals, timber for shipbuilding, and some other things; [7] and "congregations and confederacies by masons "in their general chapters and assemblies" in prejudice of the Statute of Labourers.

There are three instances in which matters long considered as being only ecclesiastical offences were made felony by statute—a small but significant effect of the Reformation. These are [8] unnatural offences; [9] bigamy or polygamy; [10] conjuration, witchcraft, and sorcery or enchantment.

It is also characteristic that vagrancy in [11] several forms was punished as felony in Coke's days.

The misdemeanours known to Coke were partly those to which I have already referred as having been created by the statutes against maintenance, forcible entry, riot, and conspiracy in its older form, and partly offences which were specially

[1] Coke, p. 78; 31 Edw. 3, c. 4.
[2] Coke, p. 105; 21 Hen. 8, c. 7; 27 Hen. 8, c. 17; 28 Hen. 8, c. 2; 1 Edw. 6, c. 12; 5 Eliz. c. 10.
[3] Co. 91; 3 Hen. 5, c. 1; 9 Hen. 5, c. 6; 2 Hen. 6, c. 9.
[4] Co. 92; 17 Edw. 3.
[5] Co. 94; 27 Edw. 3, cc. 3, 11, 12, and 18.
[6] Co. 96; 28 Edw. 3, c. 5; 33 Hen. 8, c. 7; 2 Edw. 6, c. 37.
[7] Co. 99; 3 Hen. 6, c. 1.
[8] Co. 58; 25 Hen. 8, c. 6; 5 Eliz. c. 17.
[9] Co. 88; 1 Jas. 1, c. 11.
[10] Co. 43; 33 Hen. 8, c. 8; 5 Eliz. c. 16; 1 Jas. 1, c. 12.
[11] Co. 85; 39 Eliz. c. 17; Co. 102; 1 & 2 Phil. & Mary, c. 4; 5 Eliz. c. 20; 39 Eliz. c. 4; 1 Jas. 1, cc. 7 and 25.

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punished by the Star Chamber, and in some instances constituted as such by its decisions. The following were the most important:—[1]conspiracy, [2]bribery, [3]extortion, [4]usury, [5]fighting duels and sending challenges, [6]perjury, [7]forgery, [8]libel, [9]riots, [10]striking in church or in the King's Court, and the whole class of offences called [11]maintenance.

Little change in the criminal law took place during the seventeenth century, except what was effected by the abolition of the Court of Star Chamber. In regard to procedure this was of the highest importance, but its effect upon the substantive criminal law was considerably diminished by the circumstance that the Court of King's Bench after the Restoration recognised the decisions and to some extent assumed the authority of the Court of Star Chamber, treating as crimes acts which though not forbidden by any express law were nevertheless highly and plainly injurious to the public.

Under the Commonwealth the reform of the law engaged much attention, and measures more comprehensive and far-reaching than were ever suggested before, or have ever been introduced on any one occasion since, were proposed in what was known as the Barebones Parliament. [12]These measures were prepared by two committees, one of members of Parliament, of whom Oliver Cromwell is first-named, and the other of persons not in Parliament, of whom Matthew Hales, afterwards Lord Chief Justice, is first-named. They are of the highest interest, and have never been noticed as they deserve. Amongst other things it was proposed to introduce great changes into the whole administration of the criminal law.

The scheme was shortly as follows:—

[13]There were to be two courts at Westminster with six judges in each Court, namely the Court of Upper Bench and the Court of Common Pleas. [14]There was to be a county judicature in every county, consisting of six judges, one of

[1] Co. 143. [2] Co. 145. [3] Co. 149.
[4] Co. 151. [5] Co. 157. [6] Co. 163.
[7] Co. 168. [8] Co. 174. [9] Co. 176.
[10] Co. 177. [11] Co. 175.
[12] Somers's *Tracts*, vol. vi. pp. 177-245.
[13] P. 211. [14] P. 212.

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whom was to be a judge of one of the Courts at Westminster. The county judicature was to sit four times a year, and the sittings of the courts of the different counties were to be so arranged that six judges from the courts at Westminster, three from each court, could attend the county judicatures on each of the six circuits. [1]Both the procedure to be observed in criminal trials and the law itself were to have been modified. The prisoner was not to be asked to plead guilty or not guilty, but only, [2]"What sayest thou to the "charge now read against thee?" "And if the party accused "shall not thereupon confess the fact or plead specially, "such party shall say, 'I abide my lawful trial,' whereupon "without any further form or questions of course to the "prisoner, the court shall proceed to trial."

Peine forte et dure was to be abolished, and standing mute to be taken as a confession. The extreme anxiety not to appear to question the prisoner, and the determination, nevertheless, to make him say, "I abide my lawful trial," are equally characteristic of the scrupulosity of the Puritans and the rigidity of English lawyers.

Prisoners were to be entitled to counsel in all cases if counsel were employed against them, and their witnesses were to be sworn.

In cases of murder "it shall be part of the judgment "pronounced against every such offender that their right hand "shall be cut off before their life be taken away." Deodands and all forfeitures for killing in self-defence or by misadventure were to be abolished.

Benefit of clergy was to be abolished absolutely, and in consequence the punishments of clergyable felonies were to be revised. Persons convicted of manslaughter were to be punished by death, but without corruption of blood or forfeitures. This was probably due in part to the Puritan hatred of duelling, and partly to their respect for the law of Moses, "Whoso sheddeth man's blood by man shall his "blood be shed." Bigamy and adultery were to be punished

[1] The concluding words of the recommendation are, "And those which "ride one circuit shall be spared the next."

[2] Somers's *Tracts*, pp. 234-245.



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CH. XXI. by death; but in each of these cases the court was to have power to reprieve and Parliament or the Council of State power to pardon.

In the case of clergyable thefts the offender was to be kept at hard labour till he had paid the treble value of the goods stolen, or for three years. Things fixed to the freehold were to become the subjects of larceny. Cattle stealers and pick-pockets were "to be burnt in the left hand and to abide at "hard labour in chains in the workhouse by the space of "three years, and to be whipped once every month, and not "to be released until restitution made to the parties injured "treble the value, and whenever released to have a collar "of iron riveted about the neck to be seen, and if found "without the said collar of iron and convicted thereof to "suffer death."

In all other cases of clergyable felony the offender was to be branded in the left hand, pilloried twice for two hours each time, committed to hard labour for not exceeding three years, and not to be released "before he have given security to "be of good behaviour during his life."

Women were no longer to be burnt for treason, but hanged.

The abduction of children under fifteen was to be punished by death, and all felonies excluded from benefit of clergy except those above specially provided for were to remain capital. A limited provision was made for the payment of the costs of witnesses not worth £100.

A remarkable provision required committing magistrates if satisfied of the guilt of a person committed for robbery, burglary, or theft, to "express the same in his warrant of "commitment," and require the keeper of the gaol to make the prisoner work for his maintenance if he cannot maintain himself.

An elaborate system of appeals was to be provided in all cases civil and criminal, except only capital cases.

[1] By a separate Act wager of battle was abolished, but I do not see that it was proposed to abolish appeals in the sense of private accusations. The same Act punished duelling with

[1] Somers's *Tracts*, vi. p. 188.

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extraordinary severity. Every one who fought a duel was to lose his right hand, and forfeit all his property, real and personal, and be "for ever banished out of this nation," and suffer death if he returned. Penalties nearly as severe were to be imposed on those who sent or accepted challenges.

Many of these proposals have since been adopted and form a part of our present law. The proposed secondary punishments, if sharper, were not so prolonged as our own. It is true that we have ceased to brand, and that we seldom flog, and then with, I think, foolish leniency, but penal servitude for life, for twenty, fourteen, seven, or even five years, is a far more severe punishment than the three years' hard labour, which was the maximum secondary punishment in this remarkable draft.

The discredit into which schemes of law reform fell upon the Restoration is a striking illustration of one of the evils of civil war. Rational measures proposed by one party become odious to the other, not on their own account, but because they are accidentally associated with political enemies. However this may have been, little change took place in the criminal law during the remainder of the seventeenth century. The most remarkable circumstance connected with it was the composition of Sir Matthew Hale's *History of the Pleas of the Crown*. He never completed it, and it was not published till after his death. It is not only of the highest authority, but shows a depth of thought and a comprehensiveness of design which puts it in quite a different category from Coke's *Institutes*. It is written on an excellent plan, and is far more of a treatise and far less of an index or mere work of practice than any book on the subject known to me.

He begins by investigating matter of excuse, infancy, madness, misadventure, ignorance, compulsion, and necessity. He then considers all the more important crimes successively, and, in particular, treason, homicide, larceny, robbery, burglary, escape; and he concludes by a reference to the statutory felonies passed in various reigns. He had intended to write on misdemeanours, but unfortunately never did so.

His second volume goes through the whole subject of criminal procedure in capital cases, following the subject out

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 according to its natural division, from process to compel appearance to the execution of the sentence.

A great part of his book has now become obsolete, and a great deal of it is occupied with technical details and minute and hardly intelligible distinctions. It has often struck me as singular that in proportion as we go far back in legal history the law appears to become more and more intricate, technical, and minute in its details, and more and more vague in its general principles. Great principles such as those which apply to the responsibility of lunatics or persons under compulsion, or to the definitions of the greater offences are hardly noticed before we arrive at Hale. He discusses them, not indeed as they ought to be discussed in the present day, but with great force of mind and much judicial discrimination, but these great merits, which have given his book the reputation which it deserves, are marred by the endless technicalities about principal and accessory, about benefit of clergy, about the precise interpretation of obscure phrases in statutes, and many other subjects which make a great part of the work, and in particular the part which relates to procedure, almost unreadable except by a very determined student.

With the Revolution, as I have already observed, a new era of legislation on criminal law began. The excessive crudity of the early criminal law made itself apparent by the commission of numerous acts of fraud, mischief, and violence, for which the law, as it stood, provided no sufficient punishment. The modern objection to capital punishment was at that time very faintly appreciated, and accordingly for upwards of a hundred years the common result of any novel offence was the enactment of a statute making it felony without benefit of clergy. An immense accumulation of statutory felonies thus occurred throughout the eighteenth and at the beginning of the nineteenth centuries. Many statutory misdemeanours were created during the same period and for similar reasons.

Whilst this process was going on, the unwritten law was greatly developed and in many respects improved by judicial decisions. The definitions of homicide and larceny were

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studied, commented upon, and carefully discussed by many judges of great eminence. Some of the cases reported during this period are of the highest merit. I may mention as a specimen the judgment of Lord Chief Justice Holt, in [1] R. *v.* Mawgridge, which contains the best definition of malice aforethought with which I am acquainted. "He that doeth "a cruel act voluntarily doeth it of malice prepense."

Two writers may be noticed whose works illustrate the great development of the criminal law in the middle of the eighteenth century. The first is Sir Michael Foster, who in 1762 published his Report of Criminal Cases decided mostly in the reign of George II., followed by discourses on treason, homicide, and accomplices in capital cases. The second is Sir William Blackstone, the author of the *Commentaries*, the first edition of which was published between 1765 and 1769.

The scope of Foster's work is narrow, but it would be difficult to overrate its merits within the limits which the author has chosen to impose upon himself. He wrote at a time when the number of reported cases was sufficiently great to show where the difficulties of the subject lay, but when there was still room for the improvement of the law by discussions meant to show, not what had as a fact been decided in reported cases, but what it would be reasonable to decide on general grounds. Foster may thus be considered as the last, or nearly the last, author who has done much towards making the law by freely discussing its principles on their merits. Viewed in this light his discourses are admirable. They are perfectly clear, disencumbered of all unnecessary technical details, admirably comprehensive as far as they go, and full of good sense and good feeling. I do not think it would be possible to cite a better illustration of the good side of what has been called judicial legislation. Foster writes as only a perfect master of his profession can write, with a clear, firm grasp of its principles, and without encumbering himself with unimportant details. The law both as to treason and as to homicide has since he wrote been overlayed with decisions, but I think they add but little to what he has said. There are, however,

[1] Kelyng, 174. (It was decided, however, long after Kelyng's death.)

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points on which he seems to me to have given too much weight to very technical reasoning. For instance, he was one of the authors of the well-known opinion, that if a man shoots at a tame fowl with intent to steal it, and accidentally kills a man, the offence is murder, because of the felonious intent; but that if he shoots at a wild fowl and kills a man "it is but barely manslaughter." So no one laid down more decidedly than he artificial constructions of the statute of treason, or contended more earnestly for their substantial justice. His work, however, shows clearly that in the middle of the eighteenth century the leading doctrines of the common law relating to crime had nearly reached their full development.

Blackstone's *Commentaries* give us a complete view of the whole system as it stood at the beginning of the last quarter of the century. This celebrated work has been made the subject alternately of high praise and extreme depreciation. Of late years I think its defects have attracted more attention than its merits. These defects are sufficiently obvious. Blackstone was neither a profound nor an accurate thinker, and he carried respect for the system which he administered and described to a length which blinded him to its defects, and led him in many instances to write in a tone of courtly, overstrained praise which seems absurd to our generation. These defects brought upon him the denunciations of Bentham, who in many of his writings pointed out the essential absurdity of the commentator's courtly language, and the obscurity and confusion of his fundamental ideas, with irresistible point and vigour, and with a racy sense of humour which was in Bentham the natural consequence and companion of easy circumstances, perfect health, and pursuits which gave him that cheerful sense of intellectual superiority over many of the most distinguished men of his time which is characteristic of the critics of established institutions. After admitting all this, however, the fact still remains, that Blackstone first rescued the law of England from chaos. He did, and did exceedingly well, for the end of the eighteenth century, what Coke tried to do, and did exceedingly ill, about 150 years before; that is to say, he gave an account of the

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law as a whole, capable of being studied, not only without disgust, but with interest and profit. If we except the *Commentaries* of Chancellor Kent, which were suggested by Blackstone, I should doubt whether any work intended to describe the whole of the law of any country possessed anything like the same merits. His arrangement of the subject is, I think, defective, for reasons which have often been given, but a better work of the kind has not yet been written, and, with all its defects, the literary skill with which a problem of extraordinary difficulty has been dealt with is astonishing. The dryness of the subject is continually relieved by appropriate digressions. The book is full of knowledge of many kinds, though no special attempt is made to exhibit it. It is also full of judicious if somewhat timid criticism, and, so far as I am qualified to judge, I should say, that though Blackstone did not encumber himself with useless learning, he knew nearly everything relating to the subject on which he wrote which was at all worth knowing.

As regards the Criminal Law in particular, Blackstone's exposition of it follows in the main the method of Hale, and whilst quite full enough for all the purposes for which that work was intended, it is singularly free from technical details which have no value or interest except in the actual administration of justice. One of its merits is, that it presents a distinct and trustworthy picture of the Criminal Law as it was before the notion of recasting it had made any progress worth mentioning, and whilst belief in the wisdom of its principles still remained unshaken. It differs from the law as known to Coke and Hale in the greater precision and completeness given to the various Common Law principles and definitions, but still more in the great additions which had been made in the course of the eighteenth century to the substantive Criminal Law by statutory enactments. I have already [1] quoted the well-known passage in which Blackstone laments "that among the variety of actions "which men are daily liable to commit, no less than an hun-"dred and sixty are declared by Act of Parliament to be

[1] *Com.* iv. 18.

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"felonies without benefit of clergy, or, in other words, to be "worthy of instant death." For the wantonness with which the punishment of death was thus lavished in cases in which it was never intended to be inflicted no excuse can be made, but most of the offences thus punished were deserving of severe secondary punishment, and the extreme crudity and imperfection of the Common Law is proved to demonstration by the necessity which experience showed to exist of making statutory provisions respecting them. The legislation of the eighteenth and the early part of the nineteenth century on crime, was in fact the slow enactment of a penal code the articles of which consisted of short Acts of Parliament passed as particular offences happened to attract attention.

As time went on this state of the law was severely criticised, especially by Bentham, whose theories upon legal subjects have had a degree of practical influence upon the legislation of his own and various other countries comparable only to those of Adam Smith and his successors upon commerce. His view was that the existing law should be repealed, and that in its place there should be enacted a new code, based upon what he regarded as philosophical principles. He found less difficulty than might have been expected (though he found considerable difficulty) in convincing the public of the defects of the existing state of things, but he found it impossible to persuade them to accept a new code from his hands, or from the hands of his disciples. Highly important steps, however, were taken in his life time in the direction of the changes of which he approved, and the subject has never since been altogether dropped, though the interest taken in it by the legislature has been fitful and intermittent.

Two great efforts in the direction of a criminal code have been made in the course of the present century. The first produced Sir Robert Peel's Acts, which were passed between 1826 and 1832. Of these, 6 & 7 Geo. 4, c. 28, effected some of the reforms proposed by the Barebones Parliament 165 years before. It abolished questions of course in pleading, and benefit of clergy, in respect of which it made various changes in the punishment of so-called capital

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offences to which I have already referred. Chapter 29 of the same year consolidated the law relating to larceny, and chapter 30 the law relating to malicious injuries to property.

In 1828 was passed 9 Geo. 4, c. 31, which consolidated the law relating to offences against the person. The law relating to forgery was consolidated by 11 Geo. 4, and 1 Will. 4, c. 66, passed in 1830; and the law as to offences against the coin by 2 Will. 4, c. 34, passed in 1832. These acts extended only to England, and a separate set were passed for Ireland at about the same time. They left a large part of the law in its original condition, and in particular they left on one side all the common law principles and definitions.

These acts were amended by 1 Vic. cc. 85, 86, 87, 88, 89, and 90, which abolished the punishment of death in many of the cases in which it had been retained in the earlier Acts.

Though this state of things was a great improvement on that which preceded it, it left the Criminal Law in a most confused and intricate condition; for, in order to appreciate the alterations made, it was, as it still is, necessary to know how the law stood before they were made. In order to remove these admitted evils, several commissions were issued to advise as to the improvement of the Criminal Law. The first set of Commissioners issued eight reports between July 1834 and 1845. They are highly valuable and interesting. The most important are the 7th Report, which was published in 1843 containing a draft Penal Code, and the 8th Report, published in 1845, which contained a draft code of criminal procedure. These drafts, however, were not regarded as satisfactory, and did not become law.

[1] Some later commissions were issued and minor measures taken between 1845 and 1861, and in the last-mentioned year were passed the six Consolidation Acts which I have often had occasion to mention, and which form the nearest approach on the Statute Book to a Criminal Code. They are 24 & 25 Vic. cc. 96 (larceny), 97 (malicious mischief), 98 (forgery), 99 (coinage), and 100 (person). These acts apply both to England and Ireland. They cover rather more than

[1] See Mr. Greaves's preface to his edition of the Acts of 1861.

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half of the Criminal Law, and provide for the punishment of most of the offences which are of common occurrence; but they assume the existence of a large number of common law definitions and principles which have never been in an authoritative manner reduced to writing, and the result is that their arrangement is complicated and difficult to an extreme degree. I have had occasion to study with the utmost minuteness every section of each of these Acts, and I can bear testimony to the extreme care with which they have been prepared. This indeed is clearly proved by the fact that hardly any decisions upon their interpretation have been found necessary in the course of the twenty-one years which have passed since their enactment. They have, however, great defects, of which I shall speak in reference to the particular offences with which they deal. They are exceedingly cumbrous and ill-arranged, and they reproduce faithfully, though under somewhat different forms, the defects of the system of which they are for the present the final result.

[1] Of the Criminal Code Bills of 1878 and 1879 I will here say only that some reference will be made hereafter to the objects which they were intended to effect, and to the manner in which they proposed to effect them. This work may be regarded in the light of a preface to and a commentary upon them, and I still hope that Parliament may in time be induced to pass a measure into law reproducing their proposed enactments.

Since the publication of Blackstone's *Commentaries* hardly any work has been published in England upon the Criminal Law which aims at being more than a book of practice, and books of practice on Criminal Law are simply compilations of extracts from text-writers, and reports [2] arranged with greater

[1] A few words as to their origin will be found in the preface.

[2] The last editor of Russell *On Crimes*, which is perhaps the largest and fullest of these compilations, observes that he has made some alterations in the author's plan. For instance, "title 'Pleas of Autrefois Acquit,' *which* "*was, in the former edition, in chapter 'Burglary,'* and title 'Amendment of "'Indictments at the Trial,' formerly under title 'Evidence,' have been "transferred to 'General Provisions.' Moreover, Vol. I. being found incon- "veniently large, 'Bigamy' and 'Libel' were put into Vol. III." What would be thought of a copy of a picture in which, to improve the effect a man's head was transferred to the shoulders of a woman, and a group was shifted, to suit the shape of the canvas, from the foreground to the back, and when

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or less skill—usually with almost none—but representing the aggregate result of a great deal of laborious drudgery, performed as a rule with more accuracy and care than could be expected in work so tiresome and usually so very poorly paid.

To sum up in a few words the contents of this chapter. The following, in a highly condensed form, is the history of the Criminal Law in England.

1. In the time of Henry III. the Criminal Law consisted of eleven known offences, nearly all of which were capital, and of an indefinite number of *minora et leviora crimina*. Its definitions and doctrines were crude and unsettled.

2. Between Bracton and Coke the definitions and doctrines of Bracton's times were to a considerable extent settled and greatly developed, and about twenty statutory felonies and as many misdemeanours were added to the crimes known to Bracton. The Court of Star Chamber was one great agent in bringing about this change as to misdemeanours.

3. Between the days of Coke and those of Blackstone the common law principles and definitions of crimes were completely settled, Hale and Foster having contributed more than any other writers to their settlement, and much having been done in the same direction by judicial decisions, especially in the early part of the eighteenth century. Owing mainly to the crudity of the Common Law, an immense quantity of fragmentary occasional legislation had taken place, by which the number of capital felonies had been increased, according to Blackstone, to 160, and the number of statutory misdemeanours to a very considerable, though ill-ascertained amount.

4. From the days of Blackstone to the [1] present time numerous attempts have been made to codify the law. They have been partially, but only partially, successful, about half of it having been reduced to a statutory form twice over, namely, once in 1826–32, and again in 1861.

5. A number of minor offences were in early times

everybody felt that such changes made no difference, and were indeed rather judicious than otherwise?

[1] Written in 1882.

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punished by the sheriffs' tourn and the courts-leet of manors, and the Ecclesiastical Courts had a wide jurisdiction over every kind of conduct which could be regarded as sinful.

The courts-leet and sheriffs' tourns fell into disuse before the sixteenth century, though to this day they continue to exercise a very trifling jurisdiction.

The Ecclesiastical Courts were totally abolished in 1640 and though they were revived in 1661, their procedure was so much altered, especially by the abolition of the *ex-officio* oath, that they have fallen into almost entire disuse for all purposes except the discipline of the clergy.

The offences which were formerly dealt with by the courts-leet and sheriffs' tourns, and a certain number of the offences formerly dealt with in the Ecclesiastical Courts, are now disposed of by the Courts of Summary Jurisdiction, which in the course of the last century and a half have acquired by many Acts of Parliament very extensive powers.

In the following chapters most of these matters will be stated in full detail.

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## CHAPTER XXII.

### OF PARTIES TO THE COMMISSION OF CRIMES, AND OF INCITEMENTS, ATTEMPTS, AND CONSPIRACIES TO COMMIT CRIMES.

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THE first subject to be considered in reference to the substantive criminal law is that of the parties to crimes and of degrees in the commission of crimes—matters which are obviously closely connected with each other.

The facts to which the law has to be applied must always, from the nature of the case, be more or less as follows :—

A crime must first occur to the mind, it must then be considered and determined upon, preparations more or less extensive must, in most cases, be made for it, and it must be carried into execution. The execution may either be prevented or may be fully carried out, in which case it may either accomplish, or fail to accomplish, the full object which the criminal proposed to himself. Finally, after a crime has been committed, the person who committed it usually wishes to conceal or to profit by it.

In each of these stages one person, or more persons than one, may be engaged, and they may or may not receive assistance from others. It ought also to be observed that apart from every general doctrine as to attempts, many actions which under any circumstances would be regarded as crimes, are in the nature of attempts to commit some further crime. For instance, every crime against the person must of necessity involve an assault. An assault is not less an assault because it is intended to be the first step towards murder, or rape, or robbery. So forgery,

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coining, and the offering of bad money, are attempts to defraud, though they may not in fact produce the desired result; and the same remark applies to perjury. Treason, again, at least in its highest form, is essentially an attempt to subvert the established Government. If it succeeds fully it ceases to be treason and becomes a successful revolution or new departure in the political history of the country. These are the different facts relating to the subjects with which the Criminal Law has to deal.

The following is the history of the manner in which the law relating to attempts to commit crimes arrived at its present state.

The first general rule upon the subject with which I am acquainted was that in cases of attempts to murder the will was to be taken for the deed when it was accompanied by overt acts clearly indicating the intention of the party. Coke, in his exposition of the Statute of Treasons (25 Edw. 3, st. 5, c. 2), refers to this principle, regarding apparently the provision as to compassing and imagining the king's death as an illustration of it, and he refers to instances which occurred some time before the statute in which offenders who had clearly shown their intention to kill were punished as for murder, although their object was not carried out. [1] Two of the cases to which he refers are abstracted by FitzHerbert, and are given in the note.

[1] "*Berr.* [Sir W. Beresford, Chief-Justice of the Common Pleas], dit "que devant luy et ces cōpaign̄ un garson fuit arr̄ de ceo q il voill' aū "emport les bn̄s son mastr̄ il vient al lite son maistr̄ lou son mastr̄ fuit "dormant et il trechia (trancha) duremt̄ en le goul' issint qē il entend q̄ il aū "trench son gorge et se treit et son mastr̄ cria et ses vicens oier̄ ceo et prist "le garson et sur ceo fuit arr̄. *Berr.* apres ceo que tout soit trouve par "enquest ne voile luy pend· pur ceo que il [the master] fuit en vie q̄ il duist "aver occis, pur que il fait maunde al prison; et apres compaign̄ don juge- "ment que il duit pendre, &c.

"Quia voluntas in isto casu reputabitur pro facto la on le volunte est cy "appartement troū." (*i.e.* There was a special verdict. The judge did not like to pass sentence because the person assaulted was still alive, but on argument the other judges gave judgment of death.)

"*Spig.* (probably Spigurnel) dit q̄ un femme se tient ove son advouters, et "son advoutr̄· et luy compass le mort son baron et luy assail' come il chivauch "vers le deliverances, &c. [as he was riding to the assizes—the gaol delivery] "et luy naufrer̄· ove fetz, &c. [Coke translates 'weapons'] issint que ils less· "luy giss· pur mort et fuger et le baron leva huy et crie et vient al deliveraunces "et mr̄e ceo as justices, et les justices maundr̄ pur eux prendre et fuer̄ prises "et arr̄ de ceo et tout ceo fuit troue p v̄dit et par ag [by the judgment of "the court] il fuit pend· et la femme ars," &c. Fitzherbert, *Corone*, 383; 15 Edw. 2 (A.D. 1322).

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This rule, however, appears to have been considered too severe and to have fallen into disuse, no general principle at all taking its place. The wide discretion which was then, and is now, allowed to the courts in regard of punishment would obviate many difficulties which the want of such a principle would raise. Many attempts to commit crimes must have been punished as assaults, forgeries, or the like, and no doubt in such cases the intent on the part of the offender to commit some special crime would involve a corresponding severity in punishment. A remarkable instance of the results of this state of the law is afforded by the [1] trial of Giles before Jeffreys, then Recorder of London, for a desperate attempt to murder Arnold, a magistrate who had made himself conspicuous by his Protestant zeal. Giles cut Arnold's throat, and stabbed him in many places, giving him in particular one wound "of the depth of seven inches in his body between his belly and his left pap." For this offence he was fined £500, pilloried thrice, imprisoned till his fine was paid, and required to find sureties for his good behaviour for life. Jeffreys described this as "as great a corporal punishment as the law will allow," an opinion which he must have altered when he afterwards sentenced Oates. In the present day the punishment for such an offence would be penal servitude for life, or for a long term of years.

Apart, however, from the punishment of attempts under the name of assaults or the like, the doctrine that an attempt is as such an offence had been established, or at least suggested, by the decisions of the Court of Star Chamber before its abolition. This appears from [2] Hudson's *Treatise on the Court of Star Chamber.* In his chapter on "causes here examinable not otherwise punishable," he says that it is the "great and high jurisdiction of this court," that it "punisheth "errors creeping into the Commonwealth, which otherwise "might prove dangerous and infectious diseases, — yea, "although no positive law or continued custom of common "law giveth warrant to it." After mentioning some other cases, he says, "Attempts to coin money, to commit burglary, "or poison, or murder, are an ordinary example of which the

[1] 7 *State Trials*, 1130, 1160.

[2] Pp. 107, 108.

CH. XXII. "attempt by Frizier against Baptista Basiman in 5 Elizabeth "(1563) is famous; and that attempt of the two brothers who "were whipped and gazed" (I suppose pilloried) "in Fleet "Street in 44 Elizabeth (1602) is yet fresh in memory." Though I am not able to prove it positively I have little doubt that this was with some other decisions of the Star Chamber adopted by the Court of King's Bench as part of the common law. In our own days it may be stated as a general proposition that all attempts whatever to commit indictable offences, whether felonies or misdemeanours, and whether, if misdemeanours they are so by statute or at common law, are misdemeanours, unless by some special statutory enactment they are subjected to special punishment. This was established by [1] a series of decisions between which there were a variety of minute distinctions.

I do not think the law has ever been carried so far as to decide that an attempt to commit a police offence subjecting a person to a conviction upon a summary proceeding before a magistrate is a misdemeanour, though an agreement to do so is an indictable conspiracy. On the other hand, there are attempts for which fine and imprisonment would obviously be far too light a punishment, such as attempts to commit murder or arson. These, and a few others, are provided for specially by statute, the severest secondary punishment being in some cases allotted to them.

[2] The law as to what amounts to an attempt is of necessity vague. It has been said in various forms that the act must be closely connected with the actual commission of the offence, but no distinct line upon the subject has been or as I should suppose can be drawn. Some decisions have gone a long way towards treating preparation to commit a crime as an attempt. For instance [3] the procuring of dies for coining bad money has been treated as an attempt to coin bad money.

[1] For the present state of the law see my *Digest*, pp. 29-30, art. 47-50. See also a large collection of cases in 1 Russell *On Crimes*, 188-192, and see in particular Higgins's case, 2 East, R. 21; R. *v.* Schofield, Cald. 400; R. *v.* Butler, 6 C. and P. 368; R. *v.* Roderick, 7 C. and P. 795.

[2] *Digest*, art. 49, p. 29.

[3] Roberts's case, Dearsley, 539.

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The most curious point on this subject is the question whether, if a man attempts to commit a crime in a manner in which success is physically impossible, as for instance if he shoots at a figure which he falsely supposes to be a man with intent to murder a man, or puts into a cup pounded sugar which he believes to be arsenic, or attempts to pick an empty pocket, he has committed an attempt to murder or to steal. By [1] the existing law he has committed no offence at all, and this is also the law of France, and I believe of other countries, the theory being that in such cases the act done merely displays a criminal intention, but cannot be regarded as an attempt because the thing actually done was in no way connected with the purpose intended to be effected. It was proposed by the Criminal Code Commission to reverse this, I think with unnecessary severity. The moral guilt is no doubt as great in the one case as in the other, but there is no danger to the public, and it seems harsh to treat as an attempt one only of many kinds of acts by which a criminal intention is displayed; but the question is one of little practical importance. It has been held in one case that an attempt to commit a crime is not the less an offence because the offender voluntarily desists. This, however, rests upon the [2] decision of a single judge.

[3] The French *Code Pénal* and the German *Strafgesetzbuch* lay down general rules as to the punishment of attempts, the

[1] Collins's case, L. and C. 471. As to the French law, *Théorie du Code Pénal* (Adolphe et Hélie), i. pp. 382, 383. In Collins's case the offender attempted to pick an empty pocket, and it was held that this was not an attempt to steal. No doubt the prisoner, in Collins's case, ought not to have escaped, but that was because his act was in itself an injury to the person wearing the coat. He might, and I think ought, to have been indicted for an assault with intent to commit a felony, and I think that the substantial difference between the two things will be made clear by supposing the case of a man putting his hand into the empty pocket of a coat hanging up on a peg, or looking into an empty box with intent to steal. Common sentiment would, I think, feel that in either of these cases it would be over severe to punish an act harmless except for the intention which it displayed.

[2] R. *v.* Taylor, 1 F. and F. 511.

[3] "2. Toute tentative du crime qui aura été manifestée par un commencement "d'exécution, si elle n'a été suspendue, ou si elle n'a manqué son effet que par "des circonstances indépendantes de la volonté de son auteur, est considérée "comme le crime même.

"3. Les tentatives de délits ne sont considérées comme délits que dans les "cas déterminés par une disposition spéciale de la loi."—*Code Pénal*, arts. 2 and 3, and see notes in Sirey's edition of the Code; see also Adolphe et



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effect of which is to exclude from punishment all attempts in which the offender has voluntarily desisted from his crime. Nor does either Code punish, except in a few exceptional cases, attempts to commit what we should describe as misdemeanours (*délits, Vergehen*).

Article 2 of the *Code Pénal* preserves the rule of *voluntas pro facto* which was regarded as too severe by English lawyers several centuries ago. This provision is said by an [1] eminent French commentator on the *Code Pénal* to be peculiar to France. On the other hand, the French law, and that of most other countries, takes no notice of an attempt to commit a crime from which the offender voluntarily desists, and treats as mere acts of preparation many things which in England would be regarded as attempts. The rule of the French Code is that in order to constitute an attempt (*tentative*) there must be a *commencement d'exécution* (in the German Code, *Anfang der Ausführung*) whereas it is only in very recent times that the English courts have drawn distinctly the line between acts displaying a criminal intent, and acts amounting to a commencement to execute that intention. The distinction indeed must in the nature of things be indefinite.

It is not easy to say upon grounds of expediency whether it is or is not wise to lay down the rule that an attempt from which a man voluntarily desists is no crime. It would be dangerous to lay down such a rule universally. Suppose,

Hélie, vol. i. 376-382, and Hélie's *Procédure Criminelle* (1877), i. 2. The corresponding articles in the German Code are :—

"43. Wer den Entschluss ein Verbrechen oder Vergehen zu verüben durch "Handlungen welche einen Anfang der Ausführung dieses Verbrechens oder "Vergehens enthalten, bethätigt hat, ist, wenn das beabsichtigte Verbrechen "oder Vergehen nicht zur Vollendung gekommen ist, wegen Versuches zu "bestrafen.

"Der Versuch eines Vergehens wird jedoch nur in den Fällen bestraft in "welchen das Gesetz dies ausdrücklich bestimmt."

The punishment of attempts in the German Code is milder than in the *Code Pénal* :—

"44. Das versuchte Verbrechen oder Vergehen ist milder zu bestrafen als "das vollendete."

Then follows a scale of proportional punishments.

[1] Adolphe et Hélie, i. 372, &c. The German law is far less severe. After a few special provisions the Code enacts as follows :—

"S. 44. In den übrigen Fällen kann die Strafe bis auf ein Viertheil "des mindesten Betrages der auf das vollendete Verbrechen oder Vergehen "angedrohten Freiheit und Geldstrafe ermässigt werden."

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for instance, a man voluntarily desisted from an intended and attempted murder, robbery, or rape, because he encountered more resistance than he expected, or suppose that, having lighted a match to blow up a mine under a house, or to set a stackyard on fire, he blew it out because he was or thought he was discovered?

These, however, are cases which seldom occur and are of little practical importance.

I do not think that there is room for much improvement in this part of the law, except in some particular cases which will be noticed in their place. It is singular, but it is also true, that there are a large number of crimes which it is impossible to attempt to commit. For instance, high treason by imagining the king's death cannot be attempted, because the crime consists in displaying by an overt act a treasonable intention, but an attempt to do something (*e.g.* an attempt to fire a loaded pistol at the Queen) would be an overt act displaying a treasonable intention just as much as actual firing, indeed the actual murder of the Queen would (as appears from the case of the regicides) be no more than an overt act manifesting a treasonable intent to put Her Majesty to death. Similarly a man could hardly attempt to commit perjury, or riot, or libel, or to offer bad money, or to commit an assault, for an attempt to strike is an actual assault.

## CONSPIRACY.

Conspiracy has much analogy to an attempt to commit a crime. It consists in an agreement between two or more persons (as is commonly said) "to do an unlawful act or to "do a lawful act by unlawful means." In other words, it is an agreement to do anything unlawful, whether the thing agreed upon is in itself an ultimate object, or only a means to an end lawful or unlawful.

The crime of conspiracy regarded as an inchoate offence, calls for little observation, but it has a remarkable history. In very early times the word had a completely different



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CH. XXII. meaning from that which we attach to it. This appears from two early statutes, the first is the *Articuli super Chartas* (28 Edw. 1, A.D. 1300) which was intended to supplement and enforce Magna Charta. The tenth chapter begins: "In "right of conspirators, false informers, and evil procurers of "dozens, assizes, inquests, and juries, the king has provided "remedy for the plaintiffs by a writ out of chancery. And "notwithstanding he willeth that his justices of the one bench "and of the other, and justices assigned to take assizes, when "they come into the country to do their office shall upon every "plaint made unto them award inquests thereupon without "writ, and shall do right unto the plaintiffs without delay."

In the 33 Edw. 1 (1304) there is a definition of conspirators: "Conspirators be they who do confeder or bind "themselves by oath, covenant, or other alliance, that every "of them shall aid and bear the other falsely and maliciously "to indict or cause to indict, or falsely to move or maintain "pleas; and also such as cause children within age to appeal "men of felony whereby they are imprisoned and sore grieved; "and such as retain men in the country with liveries or fees "to maintain their malicious enterprises; and this extend-"eth as well to the takers as to the givers; and stewards "and bailiffs of great lords which by their seignory office "or power undertake to bear and maintain quarrels, pleas, "or debates that concern other parties than such as touch "the estates of their lords or themselves."

The earliest meaning of conspiracy was thus a combination to carry on legal proceedings in a vexatious or improper way, and the writ of conspiracy, and the power given by the *Articuli super Chartas* to proceed without such a writ, were the forerunners of our modern actions for malicious prosecution. Originally, therefore, conspiracy was rather a particular kind of civil injury than a substantive crime, but like many other civil injuries it was also punishable on indictment, at the suit of the king, and upon a conviction the offender was liable to [1] an extremely severe punishment which was called

[1] "That they shall lose the freehold or franchise of the law, to the intent "that he" [they] "shall not be put or had upon any jury or assize, or in any "other testimony of truth; and if they have anything to do in the king's

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"the villain judgment." The Star Chamber [1] first treated conspiracies to commit crimes or indeed to do anything unlawful as substantive offences, and after the Restoration this amongst other doctrines of theirs found its way into the Court of King's Bench. The doctrine was expressed so widely or loosely, that it became in course of time a head of law of great importance, and capable of almost indefinite extension. In various cases the definition that a conspiracy is an agreement to do an unlawful act was held to mean something more than an agreement to do an act which is in itself criminal when done by a single person, the word "unlawful" being used in a sense closely approaching to immoral simply, and amounting at least to immoral and at the same time injurious to the public. The length to which this doctrine has been carried even in our own days with respect especially to conspiracies in restraint of trade, and conspiracies to compel employers of labour to submit to terms imposed upon them by persons in their employment is well known, but upon this and some other adaptations of the law of conspiracy I defer my observations until I come to the particular conspiracies which have been treated as substantive crimes.

## PRINCIPAL AND ACCESSORIES.

From the subject of imperfect inchoate crimes I pass to that of parties to crimes, who in our law are technically known as accessories before and after the fact, and in more general language as accomplices. The possible cases as to a crime in which more persons than one are concerned are as follows:—

A person may suggest a crime to another and persuade

"courts, they shall come, *per solem id est*, by noonday, and make their attorney, "and forthwith return by broad day; and their houses, lands, and goods "shall forthwith be seised into the king's hands, and their houses and lands "estrepped and wasted, their trees rooted up and errased, and their bodies to "prison: all things retrograde and against order and nature in destroying all "things that have pleasured and nourished them, for that by falsehood, "malice, and perjury they sought to attaint and overthrow the innocent."— Coke, *Third Institute*, 143 ("Conspiracy").

[1] Hudson, 104-107. Mr. Wright has gone into this subject at great length and with much learning in his work on the law of criminal conspiracies. He does not happen to quote Hudson.

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CH. XXII. him to commit it. The crime so suggested may or may not be committed. When it is committed, it may be done by a single person, either alone, or in the presence of one or more persons aiding or countenancing the actual perpetrator in the commission of the crime. After it has been committed, the criminal may be helped to avoid justice, or to make use of the proceeds of his crime, or to escape from justice, or to resist apprehension.

These are the possible cases to which the law has to be adapted. [1] So far as it need be stated here, it is as follows. A person who "counsels, procures, or commands" another to commit either a felony or a misdemeanour is guilty of the misdemeanour of incitement if the offence suggested is not committed, and if it is committed, he is an accessory before the fact if the offence is felony, and a principal if the offence is either treason or misdemeanour. [2] Incitement to commit a treason not committed in consequence, would in many cases be treason.

Every person who takes part in the actual execution of a crime is a principal, even if he is present only for the purpose of aiding or countenancing the person by whom the crime is actually committed. Such persons were formerly described as accessories at the fact, and are now called principals in the second degree.

Several doctrines as to the degree of participation in the actual commission of a crime which makes a person a principal in the second degree have been established by decided cases. I have made a statement of them, to which I have nothing to add, in my *Digest*, articles 35-38 inclusive. They have no historical interest, and I need not further refer to them. How far they would be recognised on the Continent I am unable to say. The provisions both of the French *Code*

[1] For a full statement of it, involving a variety of detailed points to which I do not here refer, see my *Digest*, pp. 22-28, articles 35-46.

[2] "Every instance of incitement, consent, approbation, or previous abet-"ment in that species of treason which falleth under the branch of the statute "touching the compassing of the death of the king, queen, or prince, every "such treason is in its own nature, independently of all other circumstances "or events, a complete overt act of compassing, though the fact originally "in the contemplation of the parties should never be effected, nor so much as "attempted."—Foster, 346.

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*Pénal* and the German *Strafgesetzbuch* on the subject are extremely curt. The *Code Pénal* makes no distinction between what we describe as principals of the first and second degree. The *Strafgesetzbuch* distinguishes between the *Anstifter*, who answers in the main to an accessory before the fact, and the *Gehülfe*, who is thus defined (art. 49): "Wer "dem Thäter zur Begehung des Verbechens oder Vergehens "durch Rath oder That wissentlich Hülfe geleistet hat," words which seem to include assistance in the actual commission of the offence as well as beforehand. [1] There are endless speculations by continental writers as to what, according to certain theories to which they attach more importance than we do, ought to be the law on this subject.

I now pass to the law as to accessories, which is much more complicated. Those who "counsel, procure, or com-"mand" another to commit a felony are accessories before the fact; those who in any way assist the criminal after his crime, with a view to shielding him from justice, are [2] accessories after the fact.

The history of the law upon this subject is intricate and characteristic. [3] Its gradual progress may be traced by reading the statements of it as it stood between Coke and Blackstone, referred to in the note. Stated in the broadest and most unqualified way it came to this. There was no distinction between principals and accessories in treason or misdemeanour, and the distinction in felony made little difference, because all alike, principals and accessories, were felons, and were, as such, punishable with death.

After a careful account of the matter which arrives at this result, [4] Blackstone not unnaturally observes:—"Why

[1] See *e.g.* Adolphe et Hélie, i. 407-430, *Théorie Générale de la Complicité*. The authors almost blame the *Code Pénal* for being too simple (p. 431). It must be owned that it is in many places crude in the extreme. See too Schütze, *Lehrbuch des Deutsche Strafrechts*, "Die Verbrechenmehrheit in Allgemeinen," 142-146; *Thäter und Misthäter*, 146-150.

[2] "Recive and comfort" were the words usually employed to define this offence. Coke gives a curious instance of what might safely be done. "A "vicar which instructed an approver which could not read whilst he was in "prison to read, whereby he escaped, was adjudged no accessory to the felony." *Third Institute*, 139. (He was a bold man, however, to raise the question.)

[3] *Third Institute*, 137 (very fragmentary); 1 Hale, 233-239, 612-626; Foster, *Discourses*, pp. 341-375; 4 Blackstone, 34-40.

[4] 4 *Com.* 39.

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CH. XXII. "then, it may be asked, are such elaborate distinctions made "between accessories and principals, if both are to suffer the "same punishment?" He gives two answers. 1. To distinguish the nature and denomination of crimes, that the accused may know how to defend himself when indicted; the accusation of an actual robbery being quite a different accusation from that of harbouring the robber. 2. Because though by the ancient common law the rule is, as before laid down, that both are punished alike, yet now, by the statutes relating to the benefit of clergy, a distinction is made between them: accessories after the fact being still allowed the benefit of clergy in all cases, which is denied to the principals and accessories before the fact in many cases. He suggests that a distinction ought to be made in all cases.

The first of these reasons has, I think, little weight, as it implies, contrary to the fact, that the law upon this subject was enacted consciously at once and for definite reasons. The second, I think, supplies, or rather imperfectly hints at, the true reason which weighed more or less consciously with a long series of judges. The essential part of the doctrine of the law of principal and accessory is, that from the earliest times a doctrine prevailed that "no accessory can "be convicted or suffer any punishment where the principal "is not attainted or hath the benefit of his clergy." The result was, that if the principal died, stood mute, challenged peremptorily more than the proper number of jurors, was pardoned, or had his clergy, the accessory altogether escaped. This was founded apparently upon a notion, half scholastic, half derived from the Roman law (a fertile mother of arbitrary rules put forward as self-evident truths), that [1] "accessorius

[1] There is an elaborate exposition of this principle in Jeremy Taylor's *Ductor Dubitantium* (see his works by Heber, vol. xiii. p. 573). Its theological use was to show that the soul is the principal and the body the accessory, and that therefore the Spiritual Power is the principal, and the Temporal Power the accessory, whereby the king is subject to the pope. This Taylor indignantly denies. It is strange to observe how, even in our own times, a commonplace which is not even true may be made to look plausible by putting it in Latin. Bentham had a great disgust at the crudity and dictatorial air of the Roman law, and I wish that his remarks on its defects were borne in mind by those who in these days extol it in an unqualified manner. There can be no question as to its historical value, nor in a general way as to its merits, but they are merits of an essentially humble, commonplace kind. If

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"sequitur naturam principalis sui." It was used in practice in different ways, and no doubt with different objects, in relation to treason and felony respectively.

With regard to treason, there can be little doubt that the courts wished, as a rule, to make the law as severe, and to spread as wide a net for offenders, as they could. They accordingly laid down the rule, "*Propter odium delicti*," as Blackstone says, that all are principals in treason. This rule still exists, though it is now of little practical importance. Indeed, as treason was never clergyable, it made less difference in regard to that offence than in regard to felony.

It extends to accessories after the fact as well as to accessories before; but [1] Hale says that the receiver of a traitor "thus far partakes of the nature of an accessory" . . . . "that if he be indicted by a several indictment he shall not "be tried till the principal be convicted." No authority is given for this, and in his second volume he says that if A be indicted for treason and B for comforting and receiving him, "it is true they are all principals, but inasmuch as B in case "of a felony would have been but accessory, and it is pos-"sible that A may be acquitted of the fact, it seems to me "that B shall not be put to answer of the receipt . . . . till "A be outlawed, or at least jointly with A." This appears to me to make the rule unmeaning, and to put a person said to be a principal after the fact in treason very nearly on the same footing as an accessory after the fact in felony. The plain truth is that Hale must have felt the cruelty of treating as a traitor a person who charitably helped perhaps a wounded and helpless fugitive, and he tried accordingly to evade the harsh rule thus laid down. If, however, a woman is to be burnt alive for trying to enable a wounded man to escape from those who are seeking to put him to death, it is absurd to make her burning depend on the question whether he was or was not previously attainted. The moral and

any one will read any book of the *Digest* he pleases, and then read the corresponding title in Fisher's *Digest*, he will find that the merits and defects of the two works are much of the same kind. When a number of able men are set to decide questions arising out of the common affairs of life, they will in practice set out from much the same results and reach very similar conclusions.

[1] 1 H. *P. C.* 238, and see 2 H. *P. C.* 223.

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political character of the action is precisely the same whether he died of his wounds, or was put upon his trial and hanged, drawn, and quartered. These passages of Hale are the only authorities relied upon to show that Jeffreys acted illegally in not telling the jury in Lady Lisle's case that she could not be convicted till Hicks was attainted. Hale's work was not then published, and as he gives no authority for his opinion, it is difficult to say that it was in his day well-established law. Jeffreys' abominable cruelty, the gross indecency of his behaviour on the occasion, and the shameful partiality of his summing up on the question of Lady Lisle's knowledge of Hicks's offence had the effect of causing the law upon the subject to be stated, both by Parliament in reversing Lady Lisle's attainder, and by Foster in discussing the case, to be the opposite of what Jeffreys affirmed it to be; and no doubt should the case ever arise it would be so held, but [1] I doubt whether, on the mere point of law, Jeffreys was not right.

I do not think that the law as to accessories in treason has been put in force in the present or the last century, and it still remains theoretically a capital crime to "receive or "comfort" any person who commits that offence.

In the Draft Criminal Code it was proposed to make it an offence punishable with secondary punishment to be accessory to treason after the fact, but it is most unlikely that the question would ever be raised.

The rule as to accessories in felony was probably one of the devices by which the extraordinary severity of the old criminal law was mitigated. This is proved in several ways.

In the first place, [2] the rules as to the interpretation of statutes by which felonies were created were subtle and intricate to the last degree, especially in regard to the various

[1] Lord Campbell's remarks on this subject will be found, on careful examination, to be characteristically cautious. See *Lives of Chancellors*, iv. 376. I have my doubts as to Lady Lisle's ignorance that Hicks had been in Monmouth's army. He was afterwards hanged at Glastonbury, and made a long and striking dying speech, printed in 11 *St. Tr.* 312-321. He does not mention Lady Lisle. He must have known of her fate, and would probably have asserted her innocence if he could have done so conscientiously; besides, Dunne's evidence implies that she did know.

[2] 1 Hale, *P. C.* 613-614.

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forms of expression which were used by the legislature as to the punishment of accessories and their being or not being deprived of clergy. This is strikingly put by [1] Foster. "Cases "without number may be cited to show in general how ex-"tremely tender the judges have been in the construction of "statutes which take away clergy, sometimes even to a degree "of scrupulosity excusable only in favour of life;" and in the following pages he proceeds to give many instances.

In the second place, the statute (1 Anne, st. 2, c. 9) which first abridged this unreasonable privilege of accessories was passed whilst the last vestiges of the old rule which confined benefit of clergy to clerks, properly so called, were in course of removal, namely, nine years after women were admitted to the benefit of clergy, and four years before the necessity for reading was abolished.

The history of the rule itself is as follows:—From the earliest times till the year 1702, the rule was (as is stated in the preamble of the statute which altered it) that "no accessory "can be convicted or suffer any punishment where the prin-"cipal is not attainted or hath the benefit of his clergy." The statute of Anne (Anne, st. 2, c. 9, A.D. 1702) narrowed this privilege, but it did so very slightly. It provided that the accessory should be liable to punishment "if any prin-"cipal offender shall be convicted of any felony, or shall "stand mute, or peremptorily challenge above the number "of twenty persons returned to serve on the jury. Notwith-"standing that such principal felon shall be admitted to the "benefit of his clergy, pardoned, or otherwise delivered before "attainder." This rule, as modified by the statute of Anne, is thus stated by [2] Foster. "The offence of the accessory, "though different from that of the principal, is yet in judg-"ment of law connected with it, and cannot subsist without "it, and in consequence of this connection the accessory shall "not without his own consent be brought to trial till the guilt "of the principal is legally ascertained by the conviction or "outlawing of him, unless they are tried together." This continued to be the law till 1826, when it was enacted by 7 Geo. 4, c. 64, s. 9, that every accessory before the fact "shall be

[1] P. 355. [2] P. 360.

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"deemed to be guilty of felony, and may be indicted and "convicted either as an accessory before the fact to the "principal felony, together with the principal felon, or after "the conviction of the principal felon, or mây be indicted "and convicted of a substantive felony, whether the principal "felon shall or shall not have been previously convicted, or "shall or shall not be amenable to justice."

It might have been thought that this enactment put an end to the distinction between principals and accessories before the fact, but this was held not to be its effect. [1] It was considered that it did not make those accessories triable who were not triable before.

To meet this difficulty it was enacted by 11 & 12 Vic. c. 46, s. 1 (A.D. 1848), that "if any person shall become an "accessory before the fact to any felony, whether the same "be a felony at common law, or by virtue of any statute "made or to be made, such person may be indicted, tried, "convicted, and punished in all respects as if he were a "principal felon." The 7 Geo. 4, c. 64, ss. 9 and 11, and 12 Vic. c. 46, have both been repealed, but they were re-enacted by 24 & 25 Vic. c. 94, ss. 1 and 2, which is still in force. [2] Under the statute of 1848 it was held that an accessory might be convicted even after the acquittal of the principal. This finally set at rest nearly every question that can be raised as to principal and accessory, and put principals and accessories before the fact on the same level. It is, however, practically impossible to say, when the precise words of so many acts have to be considered, whether the intricacies introduced by a bad principle never in terms disavowed have been effectually removed. It was accordingly proposed by the Criminal Code Commissioners to substitute for the whole of the old law the following provisions:—

Every one is a party to and guilty of an indictable offence who

(*a*) Actually commits the offence, or does or omits to do any act the doing or omission of which forms part of the offence; or

[1] R. *v.* Russell, R. & M. *C. C. R.* 356; 1 Russ. *Cr.* 179.
[2] R. *v.* Hughes, Bell, 242.

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(b) Aids or abets any person in the actual commission of the offence, or in any such act or omission as aforesaid; or

(c) Directly or indirectly counsels or procures any person to commit the offence, or to do or omit any such act as aforesaid.

Accessories after the fact to felony were and are felons as well as accessories before the fact, but their felony was always clergyable. When benefit of clergy was abolished in 1827 by the act 7 & 8 Geo. 4, c. 28, s. 6, it was enacted that no felony should for the future be punished with death except felonies excluded from benefit of clergy. All other felonies were to be punished, unless any special statutory provision was made for their punishment, by transportation for seven years as a maximum. This applied to accessories after the fact in all cases, as all such cases were clergyable. By 24 & 25 Vic. c. 95, s. 4, it is provided that the maximum punishment for an accessory after the fact shall be two years' imprisonment and hard labour. The only case in which a higher punishment is provided is that of an accessory after the fact to murder, when the maximum punishment is ten years' penal servitude, by 24 & 25 Vic. c. 100, s. 67.

Till 1847 an accessory after the fact could be tried only with, or after the conviction of, the principal felon. In that year it was enacted by 11 & 12 Vic. c. 46, s. 2, that he might be tried either as an accessory after the fact, with the principal felon, or after the principal felon; or he may be indicted and convicted of a substantive felony, whether the principal felon has been convicted or not, or is or is not amenable to justice. The act is now repealed, but this provision is reenacted by 24 & 25 Vic. c. 94, s. 3. This part of the law was not proposed to be altered, except in one very slight particular, by the Draft Criminal Code. (See ss. 73, 425, 426.)

Two offences must here be mentioned which, though now wholly independent of the law as to accessories after the fact, were at one time regarded as cases of that offence. These were, the offence of escape and rescue from custody or from prison, and the receiving of stolen goods. The law

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relating to escape was and is extremely intricate, but of little interest. The receiving of stolen goods was not anciently regarded as making a man accessory after the fact to theft,[1] "for the indictment of an accessory after the fact "is that he received and maintained the thief, not the goods." By the statute 3 & 4 Will. & Mary, c. 9, receivers were made accessories after the fact, and by 1 Anne, st. 2, c. 9, it was provided that they might be prosecuted for misdemeanour, though the principal was not convicted. By 7 & 8 Geo. 4, c. 27, these acts were repealed, and by 7 & 8 Geo. 4, c. 29, s. 54, the offence of receiving stolen goods was made a substantive felony, though it was enacted that the receiver might also be indicted as an accessory after the fact. This was repealed, but reenacted with some additions by the present Larceny Act, 24 & 25 Vic. c. 96, s. 91, which forms the existing law on the subject.

In concluding this account of our own law, I may just mention the practically obsolete offence of misprision, which meant concealment of either treason or felony without otherwise taking part in it. On this I have only to refer to articles 156 and 157 of my *Digest*. I may add to what is there said that the commonest form of misprision of felony was forbearing to prosecute in consideration of the return of stolen goods, which was anciently called theftbote.[2]

The French and German law relating to accomplices is in some ways wider, in others narrower, than our own.

The French law is in these words:—

"Art. 59. Les complices d'un crime ou d'un délit seront "punis de la même peine que les auteurs même de ce crime "ou de ce délit, sauf les cas où la loi en aura disposé autre-"ment.

"Art. 60. Seront punis comme complices d'une action quali-"fiée crime ou délit ceux qui, par dons, promesses, menaces, "abus d'autorité ou de pouvoir, machinations ou artifices "coupables, auront provoqué à cette action, ou donné des "instructions pour la commettre; ceux qui auront procuré "des armes, des instruments, ou tout autre moyen qui aura "servi à l'action, sachant qu'ils devaient y servir; ceux qui

[1] 1 Hale, 620. [2] 1 Hale, 619; 2 Hale, 400.

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"auront avec connaissance aidé ou assisté l'auteur ou les "auteurs de l'action dans les faits qui l'auront preparée ou "facilitée ou dans ceux qui l'auront consommée."

None of these expressions goes so far as our "counsel, "procure, or command."

Accessories after the fact are punished by the *Code Pénal* only in particular cases. The most general provisions are articles 61 and 62, which are as follows:—

"61. Ceux qui, connaissant la conduite criminelle des mal-"faiteurs exerçant des brigandages ou des violences contre la "sureté de l'État, la paix publique, les personnes, ou les pro-"priétés, leur fournissent habituellement logement, lieu de "rétraite ou de réunion, seront punis comme leurs complices.

"62. Ceux qui sciemment auront recélé, en tout ou en "partie, des choses enlevées, détournées, ou obtenues à l'aide "d'un crime ou d'un délit, seront aussi punis comme com-"plices de ce crime ou délit."

The German Code (art. 48) is almost a translation of the *Code Pénal*, article 60. The only difference worth noticing is the distinction already referred to between the "Anstifter" or accomplice, and the "Gehülfe" or aider. The "Anstifter" is liable to the same punishment as the principal criminal. The "Gehülfe" is to be punished "nach demjenigen Gesetze "—welches auf die Handlung Anwendung findet zu "welcher er wissentlich Hülfe geleistet hat, Jedoch nach den "über die Bestrafung des Versuches aufgestellten Grund-"sätzen zu ermässigen." I am not quite sure whether this means that he is to be punished as if he had attempted to commit the offence in which he assisted, or as if he had attempted to do the particular act in which he assisted, which may not have been criminal at all except in connection with other acts; *e.g.* A breaks into B's house and murders him, C helps A to break open the door. Is he to be punished (*a*) as for an attempt to break open the door, or (*b*) as for an attempt to commit murder? If (*a*) is the meaning, the "Gehülfe" would escape altogether if his act was not criminal in itself, *e.g.* if he lent the principal an arm with which to rob or murder.

Article 257 of the German Code, headed "Begunstigung

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"und Hehlerei," contains what seems an excellent definition of an accessory after the fact. "Wer nach Begehung eines "Verbrechens oder Vergehens dem Thäter oder Theilnehmer "wissentlich Beistand leistet um denselben der Bestrafung zu "entziehen oder um ihm die Vortheil des Verbrechens oder "Vergehens zu sichern ist wegen Begunstigung — zu be-"strafen." The subsequent articles punish "Begunstigung," which answers very nearly to "receiving and comforting," leniently, though the trade of receiving stolen goods ("wer die "Hehlerei gewerbt oder gewohnheitsmassig betreibt") is punishable with ten years' "Zuchthaus," which answers to our penal servitude.

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# CHAPTER XXIII.

## OFFENCES AGAINST THE STATE.—HIGH TREASON.

CH. XXIII.

OFFENCES against the State constitute the first great division of complete substantive offences. The first and most general object of all political associations whatever is to produce and to preserve a state of things in which the various pursuits of life may be carried on without interruption by violence, or, according to the well-known expression of our law, to keep the peace. Every crime is to a greater or less extent a breach of the peace, but some tend merely to break it as against some particular person or small number of persons, whereas others interfere with it on a wider scale, either by acts which strike at the State itself, the established order of Government, or by acts which affect or tend to affect the tranquillity of a considerable number of persons, or an extensive local area. [1]Attacks upon the State itself when they succeed cease to be within the scope of the criminal

[1] There is a well-known epigram—

> "Treason can never prosper—what's the reason?
> "If it does prosper, none dare call it treason."

This is a good instance of the way in which small wit is deprived of its point by the growth of knowledge. All such sarcasms derive what point they have from the tacit assumption that morals and political institutions are eternal and unchangeable. Take, for instance, the well-known passage in Pascal's *Pensées*, which treats as a monstrous absurdity the notion that what is right on one side of a river can be wrong on the other. In these days, at least to many people, there seems nothing extraordinary in this. There are many forms of morality, and they may be bounded by local frontiers, as well as by any others. When English law prevailed within the Indian Presidency towns and not in other parts of India, it would have been true to say that suttee was or was not murder according as it was or was not carried on within the Mahratta ditch. In the same way it was morally right according to Hindoo views and morally wrong according to English views.



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law. They put an end if not to all existing law, at least to all the existing sanctions of law, and constitute a new point of departure for a fresh set of political institutions. Even before the final success of a forcible revolution the common rules of criminal law may cease to be applicable to revolutionary proceedings, not because the theory of the law is altered, but because what may have been originally an apparently unimportant outbreak has changed into a civil war, in which each side is strong enough to compel the other to treat its adherents as enemies and not as criminals. This was the case in the American war long before the independence of the States was acknowledged. If, however, the Americans had been finally defeated, and British power re-established, every one who had taken part in the war or adhered to those who did so, would have been in strict law a traitor liable to be treated as such.

It often happens, however, that the public peace is disturbed by offences which without tending to the subversion of the existing political constitution practically subvert the authority of the Government over a greater or less local area for a longer or shorter time. The Bristol riots in 1832 and the Gordon riots in 1780 are instances of this kind. No definite line can be drawn between insurrections of this sort, ordinary riots, and unlawful assemblies. The difference between a meeting stormy enough to cause well-founded fear of a breach of the peace, and a civil war the result of which may determine the course of a nation's history for centuries, is a difference of degree. Unlawful assemblies, riots, insurrections, rebellions, levying of war, are offences which run into each other, and are not capable of being marked off by perfectly definite boundaries. All of them have in common one feature, namely, that the normal tranquillity of a civilised society is in each of the cases mentioned disturbed either by actual force or at least by the show and threat of it.

Another class of offences against public tranquillity are those in which no actual force is either employed or displayed, but in which steps are taken tending to cause it. These are the formation of secret societies, seditious conspiracies, libels or words spoken.

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Under these two heads all offences against the internal public tranquillity of the State may be arranged. I have stated the existing law upon the subject in my *Digest*.[1] I propose now to relate the history of such of these offences as have a history of sufficient interest to be related.

The first and by far the most important of these is the history of the law relating to high treason, which is connected with all the most stirring periods of our history, and has gone through a remarkable series of changes from the very earliest times to our own days.

The history of the definition of treason begins at the beginning of our law. The offence is referred to in a few words by Glanville, who says—[2] "Cum quis itaque de morte regis, "vel de seditione regni, vel exercitus infamatur aut certus "accusator apparet aut non." These few words it should be observed specify the principal heads of treason as ascertained by 25 Edw. 3, imagining the king's death (de morte regis), levying war (seditionem regni), adhering to the king's enemies (seditionem exercitus).

Bracton, however, may be regarded in this as in most other cases as the earliest writer of importance. His definition or description is as follows:—[3] "Habet enim crimen læsæ majes- "tatis sub se multas species, quarum una est ut si quis "ausu temerario machinatus sit in mortem domini regis vel "aliquid egerit, vel agi procuraverit ad [4] seditionem domini "regis vel exercitus sui, vel procurantibus auxilium et consi- "lium præbuerit vel consensum, licet id quod in voluntate "habuerit non perduxerit ad effectum." . . . "Continet "etiam sub se crimen læsæ majestatis crimen falsi, quod "quidem multiplex est: ut si quis falsaverit sigillum domini "regis, vel monetam reprobam fabricaverit, et hujusmodi. "Si sit aliquis qui alium noverit inde esse culpabilem, vel "in aliquo criminosum statim et sine intervallo aliquo "accedere debet ad ipsum regem si possit, vel mittere si "venire non possit ad aliquem regis familiarem et omnia ei

[1] Chapters vi. vii. viii. pp. 32-57.
[2] Glanville, lib. xiv. ch. 1.
[3] 2 Bracton, 258.
[4] Sir H. Twiss says: "It seems probable that '*seditionem*' is the older "reading," though some read "*seductionem*."



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"manifestare per ordinem. Non enim debet morari in uno "loco per duas noctes vel per duos dies antequam personam "regis videat, nec debet ad aliqua negotia quamvis urgen-"tissima, se convertere, quia vix permittitur ei quod retro "aspiciat." Treason is to be punished upon conviction with the greatest severity. "Ultimum supplicium sustenebit cum "pœnæ aggravatione corporalis, et omnium bonorum amissi-"one, et hæredum suorum perpetuâ exheredatione, ita quod "nec ad hæreditatem paternam vel maternam admittuntur, est "enim tam grave crimen istud quod vix permittitur hæredibus "quod vivant."

This account of the crime of treason has some resemblance to the [1]"Majestas" of the Roman Law, though it cannot be said to be expressly taken from it. No doubt, however, the adoption of the name would in practice go far to import the definition itself, or at least to authorise and countenance its gradual introduction.

Here, as elsewhere, Fleta simply repeats Bracton. Britton mentions the crime in several places.

[2] The *Mirror* gives an account of "majestas" which throws some light on the way in which the law in the thirteenth century was capable of being extended. "The crime of "majestas is an horrible offence done against the king, and "that is either against the King of Heaven or an earthly "king." "Against the earthly king in these manners:— "1. By those who kill the king or compass to do so. 2. By "those who disinherit the king of his realm by bringing in "an army or compass so to do. 3. By those adulterers who "ravish the king's wife, the king's lawful eldest daughter "before she be married being in the king's custody; or the "nurse, or the king's aunt heir to the king." He adds, "The crime of majestas or offence against the king is neigh-"bour to many other offences; for all those who commit

[1] See *Dig.* xlviii. tit. iv. and see all the texts on the subject collected in Pothier on that title. Sir H. Twiss says that Bracton, "as regards the juris-"prudence of the crime of high treason, adopts the whole doctrine of the "Roman law as to what constitutes the *crimen læsæ majestatis*," as well as the collateral penalties attached to the crime (ii. lvii.). As far as regards the definition of the crime, this is, I think, an overstatement. Many things amounted to majestas which no one ever supposed to be treason.

[2] *Mirror*, 16.

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"perjury whereby every one lieth against the king, falleth "into this offence." The author then proceeds to specify a great number of what he calls perjuries against the king. They are all cases of the breach of duties which any public officer is sworn to discharge, or of the usurpation of such duties. For instance, "Into perjury fall all those subjects of the king "who appropriate to themselves jurisdictions over the king, "and of themselves make judges, sheriffs, coroners, and other "officers to have command of law." There is much more to the same purpose. The whole chapter recalls, though it does not quote or directly imitate, the various texts of the Roman law as to the minor form of majestas—majestas as distinguished from perduellio.

How far the *Mirror* can be regarded as an authority at all is a question, but if it is an authority as to any period, it is so for the reign of Edward I., and if the chapter on perjury against the king gives any sort of indication of the manner in which the judges of those days were disposed to interpret the general offence of "majestas" it must undoubtedly have been to the last degree oppressive. Amongst many other cases of the offence is mentioned the following: [1]"Those who "charge the king wrongfully. And those who spend the "king's quarries, timber, or other thing otherwise than in the "king's service, without sufficient warrant."

A certain number of judicial decisions as to what constituted treason before the statute of Edward III. still remain. They are all referred to by Hale. The first is the case of [2] Nicholaus de Segrave in 33 Edw. 1 (1305), to which I have already referred. Segrave having quarrelled with Crumbwell during the war in Scotland left the army, and laid a charge against Crumbwell in the court of the King of France. The Lords being consulted, held this to be a crime which "meretur pœnam amissionis vitæ," and this, says Hale, "seems to import "no less than the crime of high treason." This may be so, but the entry in the roll does not mention that offence.

The proceedings against Gaveston in 1311, against the Despensers in 1321 and again in 1326, and against Thomas

[1] P. 21.

[2] Hale, 79; and see Vol. I. p. 147.

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of Lancaster in 1322, and the prosecution of Mortimer in 1331, may also be referred to. In two of these, namely, the cases of the Despensers and Mortimer, the charge was that of "accroaching royal power;" but Mortimer was attainted of treason, and executed for procuring Maltravers and Gurney to murder Edward II. after his deposition. Perhaps this was regarded as treason on the ground that Edward II. was the father of the reigning king.

[1] Piracy by one of the king's subjects on another is said to have been held to be treason, on what ground it is difficult to conjecture, unless it was regarded as a general levying of war against the king's subjects.

[2] In 21 Edw. 3 (1348) it was held that an appeal of treason lay for killing of malice prepense a person sent in aid of the king in his wars with certain men at arms.

In the following year, John at Hill was attainted of high treason for the death of "Adam de Walton nuntii domini "regis missi in mandatum ejus exequendum."

The case, however, which appears to have attracted most attention and to have been the immediate occasion of the passing of the statute, was [3] that of Sir John Gerberge, who was indicted in 1348 (21 Edw. 3.), "Quod ipse univit cum "aliis in campo villæ de Royston in alta regiâ strata, rode "armed, with his sword drawn in his hand, modo guerrino, "and assaulted and took William de Boletisford, and detained "him till he paid £90, &c., and took away his horse, usur-"pando sibi infra regnum regis regiam potestatam ipso "domino rege in partibus exteris existente contra sui lege-"antiam, et regis et coronæ suæ prejudicium et seditionem "manifestam." He prayed his clergy, which was not allowed, "but yet he refusing to plead was not convicted as "in case of treason, but was put to penance." Two of his companions were convicted, and had judgment "quod dis-trahantur et suspendantur." The case cannot accordingly be described as one of a definite conviction of treason. Upon its decision, however, the [4] Commons presented a petition

[1] *Third Inst.* 7, quoting 40 Ass. 35.
[2] 1 Hale, 81.
[3] 1 Hale, 80, referring to the rolls of the King's Bench.
[4] 2 *Rot. Par.* 166B, but I have quoted it from Hale.

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praying "qe come ascuns justices en place devant eux ore "de novel ont adjudgè pur treason accrochement de royal "poer prit le dit comen, que le point soit desclaré en ceo "parlement en quell case ils accrochent royal poer, per quei "les seigneurs perdent leur profit de la forfeiture de leur "tenents et les arreynes benefice de sant eglise." The answer to the petition was, "En les cases où tiel judgments "sont rendus, sont les points des tieux treasons et accroch- "ments declares par mêmes les judgments." The Commons, in a word, pray that the offence of accroaching royal power may be defined. The king answers, that as cases occur the judges will decide.

There may of course have been other decisions besides these, which are now forgotten, but those which are recorded are enough to show the way in which questions arose as to the law of treason. The extensions of the law (if such they were) in most of the cases which I have mentioned, do not appear to our modern notions particularly dangerous. The offences of the Despensers and Mortimer were hardly likely to be committed except in what amounted to a revolution, and all the other offences were capital crimes whether called treason or not. Thus, if Sir John Gerberge did not commit treason, he at least committed highway robbery by taking his enemy's horse and forcing him to pay £90 for his liberty. So in the other cases, the accused persons were guilty, in some instances of murder, and in one of piracy. The difference between these offences and treason lay in the two points noticed in the petition of the Commons, namely, that treason was not clergyable, and that the king had the forfeiture of the traitor's goods and lands, so that the immediate lord lost the escheat which he would have had upon a conviction for felony. The additional severity of the punishment established a further distinction, but probably one of less practical importance. I should doubt whether in the fourteenth century the political significance of a distinction between different grades of political offences had made itself felt. Probably the great importance of the Act of Edward as a protection to what we should now call political agitation and discussion, was hardly recognised till a much later time.

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However this may have been, it was passed upon a memorable occasion. [1] The Parliament by which it was passed was the first that sat after the interruption of all legal and public business by the great pestilence called the Black Death. It sat about twenty years after Parliament had been finally divided into two houses. It passed in the same session the Statute of Provisors, and [2] one of the statutes long afterwards used to show the illegality of the proceedings of the Court of Star Chamber. This period was, in Mr. Stubbs's opinion, [3] "the culminating point of Edward's glory: "in 1349 he completed the foundation of the Order of the "Garter, and in 1350 he was requested to accept the imperial "crown."

Whatever may have been the reasons which led to the passing of the Statute of Treason, the statute has formed not only the foundation, but the principal part of the law of high treason since 1352, and its interpretation and application to particular cases has been associated with some of the most stirring periods in our history. Before noticing the leading points in this history, I will examine the statute itself so far as it relates to [4] political offences. It is in these words: "Pur ceo q̄ divses opinions ount este einz ces heures "qell cas qant il avient doit estre dit treson et en quel cas "noun le Roi a la requeste des Seignrs et de la Cōē ad fait "declarissement q̄ ensuit. Cest assavoir qant home fait "compasser ou ymaginer la mort n̄r̄e Seigneur le Roi, "sa dame, sa compaigne, ou de lour fitz primer et heir; ou "si hōme violast la compaigne du Roi, ou leisnesce fille le "Roi nient marie, ou la compaigne leisne fitz et heir du Roi; "et si hōme leve de guerre contre n̄r̄e Seignr le Roi en le "Roialme ou soit aherdant as enemys n̄r̄e dit Seignr le Roi "en le Roialme donnant a eux eid ou confort en son Roialme "on p̄ aillours, et de ceo pvablement soit atteint de overt "faite p̄ gentz de lour condicion."

[1] See 2 Stubbs, *C. H.* 376.
[2] 25 Edw. 3, st. 5, c. 3.
[3] Stubbs, ii. 390.
[4] I pass over for the present the provisions relating to the coin, and to forging the Great Seal, and to some murders, some of which are called petty treason.

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This memorable enactment, it will be observed, differs but little from the definition of the crime given in Bracton. Indeed it follows it so closely in some particulars that it seems to have been adapted from it. Thus, "quant home fait compasser · ou *ymaginer* la mort nr̃e Seigneur le Roi," is almost a translation of "Siquis ausu temerario *machinatus* est in mortem domini regis." The fact that the statute extends to every intention displayed by an act, corresponds with the "licet id quod in voluntate habuerit non perdux- " erit ad effectum."

It is obvious that to kill the king must be the readiest and most natural means of effecting a political revolution in any kingdom, and that an attempt to do so would be the first step towards such a revolution. Probably the killing of the queen and of the eldest son and heir apparent might be treated as treason by way of a sort of compliment to the king.

The violation (even with her own consent, for the word does not necessarily imply violence) of the queen or of the wife of the heir apparent might obviously interfere with the succession to the crown, but why the violation of the king's eldest daughter unmarried should be treason I am at a loss to understand. These points, however, are of no practical or historical interest, and may be passed over, together with a variety of strange [1] refinements upon them, which are elaborately stated and discussed by Hale.

Viewing the statute broadly, it declares three things to be treason—(1) Forming and displaying by any overt act an intention to kill the king. (2) Levying war against the king. (3) Adhering to the king's enemies. It also contains a proviso, afterwards appealed to in the case of Lord Strafford. It is in these words: "Et pur ceo q̃ plusurs aut̃s cases de semblable " treson purront escheer en temps a venir queux hõme " ne purra penser ne declarer en pr̃sent assentu est q̃ si autre " cas supposee treson q̃ nest especefie p amount aviegne de " novel devant ascunes justices, demoerge la justice saunz

[1] *e.g.* Do the words "nient marry," as applied to the king's eldest daughter, include a widow, or are they confined to an eldest daughter who never has been married? The case may well be left undetermined till it arises.

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"aler au juggement de treson, tan q devant nre Seignr le "Roi en son plement soit le cas monstree et desclarre le "quel ceo doit estre ajugge treson ou autre felonie."

The fact that the Statute of Treasons was passed at the moment when Edward III. was at the very height of his power, more securely seated on the throne and in the enjoyment of greater popularity and more undisputed authority than was the lot of any other English sovereign for a great length of time, must be borne in mind in considering the provisions of the Statute of Treasons. It enumerates the only crimes likely to be committed against a popular king who has an undisputed title, and as to the limits of whose legal power there is no serious dispute. Of course Edward might have personal or political enemies who might wish to murder him. Theoretically war might be made upon him in his realm, and it was always possible to adhere to his enemies in France, Scotland, or elsewhere; but his personal qualities prevented such proceedings as were common in his grandson's reign, and the time for religious, political, and social revolutions had not yet arrived, though it was not far distant. This may account for the extreme leniency of the Statute of Treasons, and also for its incompleteness. It protects nothing but the personal security of the king. He is not to be killed, nor is any step to be taken towards his death. War is not to be levied against him, but no provision at all is made for any acts of violence towards the king's person which do not display an intention to take his life. Nothing is said about attempts to imprison or depose the king, or to interfere with the exercise of his most undoubted prerogatives; or about disturbances, however violent, which do not reach the point of an actual levying of war; nor even of a conspiracy, or attempt to levy war. All these matters are totally unprovided for except by the proviso, which I read as enacting that Parliament, in its judical capacity, may, upon the conviction of any person for any political offence, hold that it amounts to high treason, though not specified in the act.

These considerations perhaps explain the popularity of the statute. In quiet times it is seldom put in force, and if by any accident it is necessary to apply it, the necessity for

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doing so is obvious. For revolutionary periods it is obviously and always insufficient, and at such times it is usually supplemented by enactments which ought to be regarded in the light of war measures, but which are usually represented by those against whom they are directed as monstrous invasions of liberty. The struggle being over, the statute of 25 Edw. 3 is reinstated as the sole definition of treason, and in this way it has become the subject of a sort of superstitious reverence.

During the remaining twenty-five years of Edward III. no change worth mentioning took place in the law of treason, but the reign of Richard II. was, as Lord Hale [1] says, "a "fruitful time for declaring and enhansing of treason in "Parliament." One remarkable case, which had no special political bearing, occurred in 3 Rich. 2 (1380). [2] John Imperial was sent as agent to the king by the duke and commonalty of Genoa, and coming under the king's safe-conduct, was murdered. The Coroner's inquisition was brought into Parliament, and under the proviso quoted the case was declared by the King, Lords, and Commons, to be treason.

Cases of much greater importance, to which I have already referred in connection with the subject of impeachments, followed. These were the series of appeals of treason which were brought before Parliament in 1387–8 and 1399. The first set of appeals or accusations charged the Archbishop of York, Robert de Vere (Duke of Ireland), Tressilian the Chief Justice, and Brember the Lord Mayor, with leading Richard II. to misgovern the country. This was elaborated into thirty-nine heads, of which fourteen were held to amount to treason.

It would be difficult, without a somewhat minute reference to the history of those times, to explain accurately the nature of the treasons with which the appellees were charged, but speaking very generally it may be said that their [3] alleged offences consisted first in taking advantage of the king's

[1] 1 Hale, 263. [2] 4 Hale, 263; Co. 8.

[3] Of the thirty-nine heads of accusation the following were held to amount to treason—1, 2, 11, 15, 17, 28, 29, 30, 31, 32, 37, 38, 39.—3 *Rot. Par.* 230-237.

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youth, to persuade him fraudulently to place unlimited confidence in them, and even to swear to maintain and sustain them; and afterwards in persuading him to do, and to authorise them to do, many acts in opposition to the powers of a commission of regency appointed by statute just before he attained his majority. These acts seem to be considered in the light of so many overt acts of the treason of "accroaching royal power." In 1399 the accusers of 1389 were themselves accused of accroaching royal power, as I have already observed in giving an account of impeachments.

In commenting upon these proceedings, [1] Hale observes that the case of John Imperial was a good declaration of treason within the 25 Edw. 3, as it was made by the King, Lords, and Commons; that the judgment of 1387–8 was bad, because "the King and Commons did not consent "*per modum legis declarativæ*, for the judgment was only "the Lords'."

I find considerable difficulty in accepting the view of the proviso suggested by this remark. There was no necessity for Parliament in 1352 to reserve the right of future parliaments to pass declaratory acts as to treasons not mentioned in the statute, and the whole language of the proviso seems to refer rather to a judicial than to a legislative declaration of the law, especially because the declarations were to refer to and to be made upon the occurrence of particular cases, as was actually done in the case of John Imperial.

As to the observation that the judgments in Richard II.'s time were by the Lords alone, Lord Hale does not observe that [2] the Lords, in reference to the first set of appeals, claimed the right to act as judges in such cases, and that the Commons afterwards declared that judgments in Parliament "belong only to the King and the Lords, and not to the "Commons."

Whatever may have been the true view of the proviso, it must be taken to have ceased in some way to operate. It was argued in Lord Strafford's case by [3] Sir R. Lane that the

[1] 1 Hale, *P.C.* 263.

[2] See the passage quoted in full, *ante*, vol. i. p. 154.

[3] See Lord Campbell's *Lives of the Chancellors*, iii. 303. "He came to the "main point which had been urged by the Commons, 'whether the salvo

ii, 626 (3 d)

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statute of 1 Hen. 4, c. 10 (A.D. 1399) repealed it. This statute enacts that in no time to come any treason be judged otherwise than it was ordained by the statute of Edward III., making no mention of the proviso. The act 1 Mary, sess. 1, c. 1, s. 3, is to much the same effect, and only [1] one declaration of treason seems to have been made by Parliament in its judicial capacity after the reign of Richard II. The fact that the Commons abandoned Strafford's impeachment, and proceeded against him by act of attainder, must, I think, be taken as an admission as strong as the nature of the case admitted, that either by the statutes referred to by Lane or otherwise the proviso had ceased to have the force of law.

An act of parliament (21 Rich. 2, c. 3, A.D. 1397) was passed at the end of Richard II.'s reign relating to treason. It enacted that every one should be guilty of treason "which "compasseth or purposeth the death of the king, or to "depose him, or to render up his homage or liege, or he "that riseth against the king to make war within his "realm." Nothing is said of any overt act. The trial was to be in Parliament. It is difficult to understand the object of this statute, unless it was to convert into treason mere words, or indeed anything whatever which could be considered to indicate in any way hostility to the king. The act was passed in 1397, when Richard was no doubt fully aware of the dangers which were gathering round him, and which in 1399 led to his deposition. It was repealed two years afterwards by 1 Hen. 4, c. 10, the preamble of which recites that "divers pains of treason" were ordained by it "inasmuch that there was no man which did know how he

" 'in that statute as to Parliament declaring a law of treason could apply to " 'a parliamentary impeachment, and he argued to demonstration that this " 'could only be exercised by Parliament in its legislative capacity.' " I think this is not correct. What Lane argued was that the "salvo" was repealed by the statutes of Henry IV. and Queen Mary, but his whole argument, as reported in the *State Trials*, admits that under that salvo, while it was in force, Parliament acting judicially (*i.e.* the House of Lords being judges and the House of Commons a grand jury) could declare new treasons.

[1] Mortimer's case in 2 Hen. 6 (1426); see 1 Hale, 268. In this case the Lords, at the request of the Commons, declared it to be treason in a man imprisoned on suspicion of treason to break prison.

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"ought to behave himself, to do, speak, or say, for doubt of "such pains."

This language is obviously exaggerated. A man could hardly help knowing whether or not he intended, and whether or not his conduct indicated, an intention to kill or depose the king, but strict accuracy of statement is not to be expected of political opponents.

In the reign of Henry V. (2 Hen. 5, c. 6, A.D. 1414) it was made treason to kill, rob, or spoil persons having the king's safe-conduct—a measure probably connected with the French war; but this act was repealed by 20 Hen. 6, c. 11 (1442). Except in this unimportant particular, the law relating to treason was unaltered during the fifteenth century, though throughout the Wars of the Roses, in Hale's words, [1] "every new revolution occasioned the attainder "by Parliament of the most considerable of the adverse "party."

This period has, however, left one singular mark upon the Statute Book, in the shape of the statute 11 Hen. 7, c. 1 (1494), which provides in substance that obedience to a king *de facto*, but not *de jure*, shall not expose his adherents to the punishment of treason when the rightful king re-establishes himself. [2] The words of the act are very

[1] P. 271.

[2] The words (slightly abridged) are as follows:—"The king, calling to his "remembrance the duty of allegiance of his subjects, and that they are bound "to serve their prince for the time being in his wars for the defence of him "and the land against every rebellion, and to do him service in battle, and "that for the same service what fortune ever falls by chance in the same battle "against the mind and will of the prince (as in this land some time passed "hath been seen), that it is not reasonable, but against all reason, that the "said subjects going with their sovereign lord in wars, anything should lose or "forfeit for doing their true duty and service of allegiance; be it enacted, that "from henceforth no persons that attend upon the king and sovereign lord of "this land for the time being in his person, and do him true and faithful service "of allegiance in the same, for the said deed and true duty of allegiance be "in nowise convict or attaint of high treason or of other offences for that "cause." This statute may perhaps be regarded as the earliest recognition to be found in English law of a possible difference between the person and the office of the king, though nothing can be more vague and indirect than the way in which the distinction is hinted at by the words "king and "sovereign lord of this land for the time being." The recital as to the chances of battle are also noticeable in an act passed by the sovereign who owed his crown to the victory of Bosworth, and who, within two years of the passing of this act, had to fight for his crown at the battle of Stoke Field.

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remarkable, and if the history of the Wars of the Roses were unknown would be wholly unintelligible.

The statute of Edward was found, or was at all events considered as altogether insufficient to protect the royal power and the person of the king during the whole of the critical period which intervened between the beginning of the Reformation and the end of the reign of Elizabeth—that is to say, during the seventy eventful years from 1533 to 1603. During this interval a great number of acts were passed by which different offences were made treason. They are enumerated and their substance is given by [1] Hale, and omitting several which do not relate to political offences, their substance was as follows:—

There were in all nine acts in the time of Henry VIII. which created new treasons. Four were directed to the object of asserting and maintaining the position taken up by the king in opposition to the pope, and five to maintaining the succession of the crown as it stood after the king's various marriages. [2] The four which I refer to as constituting the first class were 26 Hen. 8, c. 13 (A.D. 1534), 28 Hen. 8, c. 10 (1536), 31 Hen. 8, c. 8 (1539), and 35 Hen. 8, c. 3 (1543).

The treasons created by these acts were as follows. By the 26 Hen. 8, c. 13, which was passed in the same year as the Act of Supremacy, and in the year following the divorce of Catherine of Aragon and the marriage with Anne Boleyn, the following acts were made treason:—

(1) "Maliciously to wish, will, or desire by words or "writing, or by any craft to imagine, invent, practise, or

[1] Pp. 274-282.

[2] In order to appreciate the significance of these dates some other dates should be borne in mind. In 1533 Catherine was divorced, and the marriage with Anne Boleyn took place. The Act of Supremacy was passed in 1534. In 1536 was passed the first of the three Acts of Succession, and the act by which all ecclesiastical and lay officers were required to abjure the pope. In the same year the lesser monasteries were dissolved. In 1537 occurred the pilgrimage of grace. In 1539 was passed the Act of the Six Articles. In 1543 Cromwell, who had been at the head of affairs for nearly ten years, was attainted and executed. Between 1543 and 1547 (when Henry VIII. died), occurred first a motion towards Catholicism, marked by the execution of Ann Askew, and then a motion in the opposite direction, marked by the execution of Lord Surrey. Henry's later marriages were dated as follows:—Anne Boleyn, 1533; Jane Seymour, 1536; Anne of Cleves, 1540; Catherine Howard, 1540; Catherine Parr, 1543.

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"attempt any bodily harm to the king, queen, or their "heirs apparent; or"

(2) "To deprive them, or any of them, of their dignity, "title, name, or of their royal estates; or"

(3) "Slanderously or maliciously to publish and pronounce, "by express writing or words, that the king our sovereign "lord is an heretic, schismatic, tyrant, infidel, or usurper; or"

(4) "Rebelliously detain or keep any of his ships, am-"munition, or artillery," and not to deliver them up when demanded.

The 28 Hen. 8, c. 10 (1536), described by Hale as "the "great concluding act against the papal authority," subjected to the penalties of *præmunire* the asserting and maintaining of the papal authority; and obstinate refusal to take the oath of abjuration therein provided was made high treason.

By 31 Hen. 8, c. 8 (1539), which was passed in the same year as the Act of the Six Articles, proclamations concerning religion were put on the same footing as acts of parliament, and those who went beyond sea in order to avoid the penalties enacted by the proclamations were to be guilty of high treason.

By 35 Hen. 8, c. 3 (1543), passed after the fall of Cromwell, the king's [1] style was united and annexed to the imperial crown of England, and it was made treason to "imagine to "deprive the king, queen, prince, or the heirs of the king's "body, or any to whom the crown is or shall be limited, of any "of their titles, styles, names, degrees, royal estate or regal "power annext to the crown of England."

These were the new treasons created by Henry VIII.'s legislation, in order to secure and establish the great religious and political revolution which he had effected. I think that the impression which they have created of tyranny is somewhat exaggerated though it is not unnatural. Hale observes that part of the act of 1534, viz., "the practising "of any bodily harm, if there be an overt act, and also the re-"bellious detaining of the king's castles after summons by "proclamation," are treasons within 25 Edw. 3. I suppose

[1] Henricus Octavus Dei gratiâ Angliæ, Franciæ, et Hiberniæ rex, Fidei Defensor, et in terra ecclesiæ Anglicanæ et Hiberniæ supremum caput.

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that in the word "practising" Hale would include "wish, "will, or desire, by writing, or by craft to imagine, invent, or "practise." To wish the infliction of bodily harm on the king by voluntary agencies, and to display the wish by writing, would, I think, at least according to the older authorities, be an overt act of imagining the king's death. In the expression "or word" and what follows, the statute no doubt goes much beyond the old law, but, as we shall see, several of Henry VIII.'s successors made the speaking of treasonable words treason.

The part of the act which makes it treason to desire by words or writings to deprive the king of his title, which no doubt was levelled principally at denials of the king's ecclesiastical supremacy, may be compared to 4 Anne, c. 8, which made it treason to affirm maliciously by writing that "the "pretended Prince of Wales or any other person hath any "right to the crown of these realms," and *præmunire* to affirm the same by advised speaking. I do not see that the 35 Hen 8, c. 3, as to the king's style, carried this any further. The 31 Hen. 8, c. 8 (1539), which made it treason to go abroad in order to avoid the penalties of proclamations, may also be compared to acts passed by William III. and Queen Anne. By 9 Will. 3, c. 1, it was made treason for any subject who since a certain day had gone into France without license, to return into England without license, and 3 & 4 Anne, c. 14, contained a similar provision. All these acts may be compared to the penalties imposed upon the *émigrés* by the French revolutionary legislation. The 28 Hen. 8, c. 10, which made it high treason to refuse obstinately the oath of abjuration against the pope, I think carried the practice of test oaths to a greater length than it was ever carried to before or since, but the refusal of test oaths has frequently been made the subject of penalties of extreme severity.

In short, if it is admitted and fully realised that the controversy between the king and the pope in Henry VIII.'s time was simply a war carried on between rival powers claiming jurisdiction of an analogous though distinct kind over the same population, it can hardly be said that the legal weapons used were other than those which on such an occasion must be used if the war was to be effective and



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CH. XXIII. thoroughgoing. Whether Henry or the pope was in the right is a matter which I do not discuss, but I do not understand how any one can heartily take either side and yet blame the leader of that side for using to the utmost the weapons which he possessed—the pope for his excommunications and depositions, or the king for his racks, scaffolds, and gibbets. Questions of sovereignty can be determined only by force, and I cannot see how Henry was to make himself the sole ruler of the English people as he wished to do, and to a great extent actually did, without striking terrible blows against his antagonist and his adherents. After all, it was all that he, his son, and his daughter could do to carry their point.

As for the class of statutes which were intended to secure his succession, three successive acts were passed which thrice resettled the order of succession, and one which invalidated his marriage with Anne of Cleves. These were 25 Hen. 8, c. 22 (1534), which affirmed the divorce of Catherine of Aragon and the marriage with Anne Boleyn. The 28 Hen. 8, c. 7 (1536), which annulled the marriage with Anne Boleyn and settled the crown on the issue of Jane Seymour by the king, and in default of issue gave him power to appoint a successor by will. The 32 Hen. 8, c. 25 (1540), annulled Anne of Cleves' marriage, and made it treason to assert its validity.

The 35 Hen. 8, c. 1 (1543), made after the marriage with Catherine Parr, limited the crown after the death of the king and Edward VI., without heirs of their bodies, to Mary and the heirs of her body, with remainder to Elizabeth and the heirs of her body, with a final remainder to the persons appointed by the king's will.

Each of these statutes, in somewhat different forms of words, made it high treason to attempt to alter the settlement or to cast doubt on the validity of the marriages confirmed, or on the nullity of the marriages declared void.

The second and third provided stringent test oaths and made it treason obstinately to refuse to take the oath. The act of 1536 made it treason to refuse to answer interrogatories on the oath. Such laws were beyond all question of

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terrible severity. The provisions relating to the succession of the crown were consequences of Henry's repeated marriages, of which it would be out of place to speak here. No doubt the recollection of the Wars of the Roses and the result of a disputed succession must have been present to all minds and have exercised a powerful influence both on the king and on his counsellors. Much also must be ascribed to haughty self-will, and something to mere passion, though Henry's character was not that of a sensualist. However this may have been, I may observe that one of the treasons which he created cannot be excused or palliated upon any view of his conduct or position. It is an unqualified disgrace to his memory. I refer to 33 Hen. 8, c. 21 (1542), which after the execution of Catherine Howard made it treason in any woman "whom the king or his successors shall intend to "take to wife thinking her a pure and clean maid, if she be "not so" to marry the king without discovering it to him before marriage, and in any one knowing the fact not to reveal it to the king or one of his council.

As soon as Henry VIII. was dead his legislation on the subject of treason was repealed. The statute 1 Edw. 6, c. 12 (1547), enacted that nothing should be held to be treason except offences against 25 Edw. 3, and offences created by the new act. It made considerable changes in the criminal law, some of which connected with the law of benefit of clergy I have already referred to. It provided that it should be treason to deny the king's supremacy or to affirm that of the pope, or the right of any person other than Edward VI. to be king, but this was only on a third conviction, where the offence was by words, and in such cases (s. 18) the prosecution was to be within thirty days of the words spoken. Where the offence was by "writing, printing, overt act or deed," it was to be treason on the first offence. In 1549 it was made treason for twelve persons or more to make a riot with intent "to kill, take, or imprison, any of the Privy Council, or un- "lawfully to change or alter any laws established by Parlia- "ment for religion, or other laws, and to remain together for "an hour after a summons to disperse." [1] Riots for many

[1] Ss. 2 and 4.

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CH. XXIII. other specified purposes (breaking down enclosures, &c.) and raising or collecting unlawful assemblies with intent so to riot to the number of forty, such assemblies continuing together for two hours, were also made treason. Under Queen Mary these acts were [1] repealed (1 Mary, c. 1) but re-enacted in substance (1 Mary, sess. 2, c. 12), the offences being reduced from treason to clergyable felonies. Mary's act was temporary, but was re-enacted by 1 Eliz. c. 16, to continue during her life, and to the end of the next session after her death.

In 1551, by 5 & 6 Edw. 6, c. 11, it was made treason to allege that the king was a heretic, schismatic, tyrant, infidel, or usurper of the crown, either by words or "by writing, "printing, painting, carving, or graving." In the case of words on a third, and in the other cases on the first conviction.

In a few words, under King Edward VI. the only treasons except those contained in the act of Edward III. were (1) denying the king's supremacy; (2) alleging him by writing, &c., to be a heretic or usurper; (3) riots of a certain degree of importance.

On the accession of Mary the doctrine of the queen's ecclesiastical supremacy being repudiated and her title being undisputed, these acts ceased to be required, and the first act of her reign (1 Mary, c. 1) was to bring back the law of treason to the 25 Edw. 3. This was done by re-enacting the repealing section of the act of Edward VI., with the addition of words extending it to misprision of treason. Other felonies and *præmunire* made since the beginning of the reign of Henry VIII. were also abolished.

The Spanish marriage, however, introduced a necessity for the enactment of new treasons, and an act (1 & 2 Phil. & Mary, 10) was passed much resembling some of the acts of Henry VIII. and Edward VI. It made it treason on the first offence to display by writing any intent treasonable as against the king consort, or to affirm by writing that he ought not to have the title and style of king jointly with the queen. To commit the same offence by words spoken was made treason on a second conviction. A singular enactment was passed in the same session (1 & 2 Phil. & Mary, c. 9) making it treason "if

[1] 1 H. 293.

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"any by express words or sayings have prayed or shall pray "that God would shorten the queen's life, or take her out of "the way, or any such like malicious prayer, amounting to "the same effect."

Under Queen Elizabeth the act 1 & 2 Phil. & Mary, c. 10, was re-enacted (1 Eliz. c. 5) and applied to Elizabeth. It made attacks on the queen's title by writing treason on a first conviction, attacks by words treason on a second conviction. In 1571, after the pope had issued his Bull of Deposition, and when Queen Mary Stuart's presence in England, and the plots of which she was the object, had exposed the queen to grievous dangers, an act (13 Eliz. c. 1) was passed which made it treason to compass the death or bodily harm of the queen, or to deprive her of the imperial crown, or to levy war against her, and to declare such compassing by writing or by words. This act also made it treason to affirm the title of any other person, or to deny the power of Parliament to bind the succession.

By 23 Eliz. c. 1, passed in 1581, it was made treason for any person having or pretending to have power to absolve any subject from obedience to her Majesty, to do so, or practise to do so, or with that intent to withdraw them from the established religion to the Romish religion, or to move them to promise obedience to the See of Rome. This act was re-enacted in stricter terms in 1606 by 3 Jas. 1, c. 4.

In 1585 was passed 27 Eliz. c. 2, by which it was made high treason for any Jesuit or seminary priest born in the queen's dominions, to come into, be, or remain in any part of the realm, and for any subject brought up in any college or seminary beyond sea, not to return to England and take the oath of supremacy within six months after proclamation made in London.

James I. added nothing to the law of treason except the re-enactment of the law of 1581, already referred to. In the reign of Charles I. the only attempt to extend the law of treason proceeded from the Long Parliament, which treated Strafford and Laud as traitors on grounds closely resembling those on which their predecessors had proceeded under Richard II. In 1661 it was made treason by 13 Chas. 2,

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c. 1, [1] to display any treasonable intention by writing or by preaching, or malicious and advised speaking, during his Majesty's life. In 1698, by 9 Will. 3, c. 1, it was in substance made treason for the adherents of James II. who had followed him into France to return to England without licence. In 1701 (12 & 13 Will. 3, c. 3) it was made treason to correspond with "the pretended Prince of "Wales," and [2] several similar acts were passed under Queen Anne.

All these acts were either temporary, or have in one way or another long since expired, and they exercised little or no permanent influence on our law. I have referred to them so fully partly on account of their historical interest, partly because they illustrate in a striking manner the nature of one class of political offences. Convulsions and revolutions have occurred in the history of every nation. Each party in turn, and in particular every successful party, is from the nature of the case obliged to treat the prosecution by their antagonists of the political views and objects which they have at heart, and even in some cases the open avowal of those views, as crimes of the highest nature. It seems to me that such legislation can be fairly criticised only by considering two things, namely, first, the substantial merits of the quarrel, and secondly, the efficiency and approach to necessity of the means employed for the attainment of the end proposed. The Reformation and the great political revolutions which have followed it were the stormy periods in human history, and the legislation by which different parties have done their best to maintain their respective views in their own dominions, are like orders given by a military commander in time of war. To criticise them upon the false supposition that they were

[1] "Compass, imagine, invent, devise, or intend death or destruction, or "any bodily harm tending to death or destruction; maim, wounding, imprisonment, or restraint of the person of the king; or to deprive or depose him "from the style, &c.; or to levy war against his Majesty, within the realm or "without; or to move or stir up any foreigner, &c."

[2] 1 Anne, c. 17 (1702), treason to attempt to prevent the succession as established by Act of Settlement; 3 & 4 Anne, c. 14 (1705), returning without licence into England after going without licence into France, treason; 4 Anne, c. 8 (1705), treason to maintain by writing, title of Prince of Wales or others, re-enacted after the Union, 6 Anne, c. 7; 7 Anne, c. 4 (1709), treason for officers to hold correspondence with rebels or enemies.

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intended to last for an indefinite time, and to apply to the normal state of society, is to misunderstand them pedantically.

Coming to consider more closely and in a more technical way the long series of enactments which I have been describing, it will be found to have consisted of three different sets of enactments collateral and supplementary to the act 25 Edw. 3. First, there are the provisions which made it high treason to display by words or by writings such intentions as would if displayed by overt acts have been high treason by 25 Edw. 3, and some intentions which would not have been high treason within that act however displayed. Secondly, there are the provisions which made it high treason to interfere with the order of succession to the crown established by law. Thirdly, there are the provisions which made it high treason to recognize the authority claimed by the pope. Treasons of the second and third class are no longer likely to be committed, and it will therefore be unnecessary to notice further the enactments which refer to them. The enactments of the first class form the origin of our present law, and they must accordingly be somewhat more closely examined.

If we assume that the object of the statute of Edward III. was to confine high treason, regarded as a political offence, to three main branches, namely, actual attacks on the king's person, war actually levied against his authority, and adherence to his enemies, it must be admitted that it was worded too narrowly if it is to be construed literally. The expression, "compass and imagine the king's death," does not, as I have already observed, include by the mere force of the words the formation of an intent to depose the king, to imprison him, to do him bodily harm which would incapacitate him from exercising his royal power, as, for instance, by blinding or mutilating him. It is obvious that in many cases such measures would be better suited to carry out treasonable designs than the actual killing of the king. In fact few instances have occurred in the history of England in which treason took the form of an assassination plot. The plots against the life of Elizabeth, the Gunpowder treason, the Rye House plot, and the assassination plot in the reign of

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CH. XXIII. William III. form the only prominent exceptions. The attacks on the lives of George III., William IV., and her present Majesty, were nearly all the acts of madmen. The deaths of Edward II., Richard II., and Henry VI. followed their deposition; and the story of Edward V. is altogether doubtful and exceptional. On the other hand, in nearly every reign political conspiracies have occurred having for their object the deposition of the ruling sovereign. Such conspiracies, if he resisted, would of necessity involve, to say the least, his imprisonment, or his exposure to the chances of war. It is difficult to believe that this can have been entirely overlooked by the authors of the act of Edward III. especially when we remember the fate of Edward II. I am unable to suggest any explanation of this circumstance, unless it is to be found in the power reserved, by the proviso already referred to, for Parliament acting judicially to declare new treasons. Long afterwards the view was put forward, and repeatedly enforced by judicial decision, that the words were intended to have a wider signification than their literal one, and that they were meant to include all forcible attempts upon the person of the sovereign with a view to his deposition, imprisonment, or coercion.

The acts to which I have referred are neither inconsistent with, nor altogether favourable to, this view. On the one hand, several of the acts passed under Henry VIII. make it treason to [1] "attempt any bodily harm to the "king," [2] "by writing, printing, or *exterior act*, maliciously "do or procure anything to the peril of the king's person," or to the disturbance of the king's enjoyment of his crown; and it may be said that if the wider interpretation of the act of Edward III. had been the true one these provisions would have been unnecessary. On the other hand, it may be said that the statutes passed by [3] Elizabeth do not expressly provide that an attempt, or the display of an intention, to do bodily harm to the queen, or to imprison or depose her, shall be high treason, and the same may be said

[1] 6 Hen. 8, c. 13.
[2] 25 Hen. 8, c. 27. See 28 Hen. 8, c. 7, the words of which are similar.
[3] 1 Eliz. c. 5; 13 Eliz. c. 1.

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of the last statute of the kind, 13 Chas. 2, c. 1. This act makes it high treason to display by writing or words an intention to kill or destroy the king, or to do him "any bodily "harm, tending to death or destruction, maim, wounding, im-"prisonment or restraint of his person, or to deprive and "depose him," &c., but it is silent as to displaying any such intention by overt acts other than writing or speaking. As far as the wording of the statute goes it would have been treason to say, "I mean to try to imprison the king," but it would not have been treason to display such an intention by collecting a number of men and supplying them with arms for that purpose. It is, it may be said, very unlikely that an act should have been passed leading to this result, unless the conduct which it failed to notice had been regarded as treason under 25 Edw. 3. I think there is weight in this argument.

The probability is, that the wider interpretation of the statute of Edward III. had always been suggested as possible, but was in the reign of Elizabeth first considered sufficiently well established by legal decisions to warrant those who drafted her statutes in relying upon it. [1] In the great case of Lord Essex the judges advised the House of Lords, [2] "that "in case where a subject attempteth to put himself into such "strength as the king shall not be able to resist him, and to "force and compel the king to govern otherwise than accord-"ing to his own royal authority and direction, it is manifest "rebellion." Also, "that in every rebellion the law intendeth "as a consequent the compassing the death and deprivation "of the king as foreseeing that the rebel will never suffer that "king to live or reign who might punish or take revenge of "his treason or rebellion." It is true that Lord Essex's case was decided in 1600, whereas the statutes referred to were passed thirty years before, but the fact that the decision of the judges fills up the gap left by the wording of the statutes shows that they probably were declaring what had been the common opinion of the profession when the statutes were passed. If it is asked why this opinion did not prevail in the

[1] This is obscurely hinted in the *Third Institute*, 6, marginal note, and see Broke's Abridgment *Treason*.

[2] 24 *State Trials*, 1353.

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CH. XXIII. days of Henry VIII. the answer may probably be that it had not then been thought of; and that after his death the lavish severity of his legislation on this subject made his successors unwilling to multiply statutory treasons, whilst the attention drawn to the defects of the statute of Edward III. by the provisions of the repealed acts disposed lawyers to supply them by strained artificial constructions.

However this may have been, the fact is undoubted, that the wider construction of the words "imagine the king's "death," have prevailed, and are at this moment part of the law of England, though in a curious and intricate way. The following is the history of the definition and of the later enactments connected with it.

The earliest express decision which I have been able to find in which an unnatural sense is attached to the words "imagine "the king's death" is that of the Earl of Essex in 1600, already referred to. Referring to this case, and to the later one of Lord Cobham in the reign of James I., [1] Coke says, "He that declareth by overt act to depose the king is a "sufficient overt act to prove that he compasseth and ima-"gineth the death of the king. And so it is to imprison the "king or to take the king into his power, and to manifest "the same by some overt act." [2] He also says, "if a subject "conspire with a foreign prince beyond the seas to invade "the realm by open hostility, and prepare for the same by "some overt act, this is a sufficient overt act for the death of "the king."

[3] Hale repeats Coke, but makes some additions to what Coke says, for [4] he says that to levy war against the king directly is an overt act of compassing the king's death, that a conspiracy to levy such a war is an overt act to prove it, so that upon the whole he appears to think that conspiring to levy such war, though not in itself a substantive treason, is nevertheless an overt act of treason by compassing the king's death. He distinguishes, as I shall notice more fully hereafter, between different ways of levying war.

[1] *Third Institute*, 6, 12.
[2] *Ib.* 14.
[3] 1 Hale, *P.C.* 110.
[4] *Ib.* 151.

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This view of the law was acted upon, as I have already observed, in the case of Lord William Russell.

After the revolution of 1688 the fictitious interpretation of the offence of compassing the king's death was carried much further than it had been under the Stuarts. In [1] Lord Preston's case it was held that taking a boat at Surrey Stairs in Middlesex in order to go on board a ship in Kent for the purpose of conveying to Louis XIV. a number of papers informing him of the naval and military condition of England, and in order to help him to invade England and depose William and Mary, was an overt act of treason by compassing and imagining the death of William and Mary. But not to go through all the cases on the subject, I may observe that in Sir Michael Foster's discourse on high treason, published in the middle of the last century, the following glosses are put upon the words "imagine the king's death."

[2] "The care the law hath taken for the personal safety of "the king is not confined to actions or attempts of the more "flagitious kind, to assassination or poison, or other attempts "directly and immediately aiming at his life. It is extended "to everything not fully and deliberately done or attempted "whereby his life may be endangered; and therefore the "entering into measures for deposing or imprisoning him, or "to get his person into the power of the conspirators, these "offences are overt acts of treason within this branch of the "statute, for experience hath shown that between the prisons "and the graves of princes the distance is very small.

"Offences which are not so personal as those already men-"tioned have been with great propriety brought within the "same rule, as having a tendency, though not so immediate, "to the same fatal end; and therefore the entering into "measures in concert with foreigners and others in order to "an invasion of the kingdom, or going into a foreign country, "or even purposing to go thither to that end, and taking any "steps in order thereto, these offences are overt acts of com-"passing the king's death."

He then states Lord Preston's case, and proceeds to carry the law laid down in it a step further: "The offence of

[1] 12 *State Trials*, 646, A.D. 1691. [2] Foster, p. 195.

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"inciting foreigners to invade the kingdom is a treason of "signal enormity. In the lowest estimation of things, and "in all possible events, it is an attempt on the part of the "offender to render his country the seat of blood and desola-"tion, and yet unless the powers so incited happen to be "actually at war with us at the time of such incitement, the "offence will not fall within any branch of the statute of "treasons except that of compassing the king's death: *and "therefore since it hath a manifest tendency to endanger the "person of the king, it hath, in strict conformity to the statute, "and to every principle of substantial justice, been brought "within that species of treason of compassing the king's death— "ne quid detrimenti respublica capiat.*"

[1] Foster follows Coke and Hale in holding that "levying "war" is an overt act of compassing, and that conspiring to levy war in one sense of the expression is so too. Indeed, he goes so far as to say that "a treasonable correspondence "with the enemy" is an act of compassing the king's death, and he refers in support of this to Lord Preston's case, and also to the case of one [2] Harding, in which it was held on a special verdict that enlisting men in England and sending them abroad to join the French forces in an attempt to dethrone King William III. was an imagining of his death.

In short, various writers have held that to imagine the king's death means to intend anything whatever which under any circumstances may possibly have a tendency, however remote, to expose the king to personal danger or to the forcible deprivation of any part of the authority incidental to his office.

The words "levy war," in the statute of Edward III. have been made the occasion of nearly as strange interpretations as the words "imagine the king's death." As I have already observed, the difference between the commonest unlawful assembly and a civil war is one of degree, and no definite line can be drawn at which riot ends and war begins. There has been a double current of authority on this point from the date of the 25 Edw. 3, to our own days. On the one hand, the statute declares, and the commentators have

[1] Foster, p. 197.

[2] 12 *State Trials*, 645, *note*.

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been careful to insist on the declaration, that in order to be treason the war levied must be levied against the king. No amount of violence, however great, and with whatever circumstances of a warlike kind it may be attended, will make an attack by one subject on another high treason. On the other hand, any amount of violence, however insignificant, directed against the king will be high treason, and as soon as violence has any political object, it is impossible to say that it is not directed against the king, in the sense of being armed opposition to the lawful exercise of his power.

The words of the statute on the first of these propositions are express, and leave no room for doubt as to their object. "Et si per cas ascun homme de cest roialme chivach arme "[1] descovert ou secretement od gentz armees contre ascun "autre pur lui tuer ou derober ou pur lui prendre et retenir "tanqil face fyn ou raunceon pur son deliverance avoir, nest "pas lentent du roi et de son conseil qe en tiel cas soit ajugge "treson einz soit ajugge felonie ou trespass solone la lei de la "terre auncienement usee et solonc ceo qe le cas demand."

The object no doubt was to distinguish between private wars and attacks on the royal authority. [2] Hale collects from the Parliament Rolls many instances of insurrections amounting almost to private wars which took place in some cases before and in some after 25 Edw. 3. For instance, in 20 Edw. 1 (1292) there was a war between the Earls of Gloucester and Hereford, two great lords marchers.

As the royal power became more firmly and generally established, and especially as the habit of keeping up great military households fell into desuetude, such enterprises as these sank to the proportion of private frays and riots. But, on the other hand, risings of a distinctly political nature became more common and important. The great test employed to distinguish between the two classes of disturbances was the generality of their object. Thus, [3] Coke gives as an instance of an agreement to levy war an agreement to assemble at Enslowe Hill, in Oxfordshire, and to procure arms and to

[1] Translated "covertly or secretly," which is obviously wrong. It should be overtly.
[2] 1 Hale, *P.C.* 135, 140.
[3] *Third Institute*, 9, 10.

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rise, "and from thence to go from gentleman's house to "gentleman's house, and to cast down enclosures as well for "enlargement of highways as of errable lands." He also refers to riots for the purpose of reform in matters of law or religion. [1] Hale attempts, but fails as it seems to me, to draw a distinct line upon the subject. [2] He holds, however, upon the whole, that there are two ways of levying war, first, levying a war against the king or his army with a view to "do the king any bodily harm, or to imprison him, or to "restrain him of his liberty, or to get him into their power, "or to enforce him to put away his ministers or the like," in short, to employ violence against the government for the purpose of compelling or preventing legislation; and secondly, levying war for a public object, like throwing down enclosures generally, or raising wages. The only difference which he makes between these two forms of the offence of levying war is that every overt act of the former is also an overt act of imagining the king's death, which cannot be affirmed of the latter.

The law upon this subject was carried to a great length in [3] Messenger's case in 1668. In this case eight apprentices were found to have made a riot for the purpose of pulling down brothels. Some of them broke open Clerkenwell Prison and released the prisoners. Some refused to disperse when required to do so by the guards, and "very contemptuously slighted the king's guards." Ten judges to one (Sir M. Hale) held that this was treason. Seven years afterwards the judges were [4] equally divided (five against five) upon the question whether a riot by weavers for the destruction of engine-looms was high treason or not, and the offenders were accordingly prosecuted for a riot only.

The case of [5] Dammaree and others in 1710, was, however, I am inclined to think, the most severe ever decided upon this point. The prisoners, during the trial of Dr. Sacheverell, became riotous in support of his cause and pulled down four dissenting meeting-houses, crying, "Down with the Presby-

[1] 1 Hale, *P.C.* 143-146. [2] *Ib.* 152.

[3] 6 *State Trials*, 879. I have only indicated the points discussed in this case, which were numerous, and differed as to the different prisoners.

[4] 1 Hale, *P.C.* 143. [5] 15 *State Trials*, 521.

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terians." They were indicted for, and convicted of, treason, but Dammaree was afterwards pardoned and made (he was a waterman by trade) the steerer of the Queen's barge. If [1] Dammaree's case is good law it seems difficult to say that any riot excited by any unpopular measure, whether executive or legislative, is not high treason. It is, however, rather matter of curiosity than of practical importance in the present day to consider these cases. They have been practically superseded long since by legislation as to riots.

The Riot Act of 1 Geo. 1, st. 2, c. 5 (A.D. 1714), after reciting the frequency of rebellious riots and tumults (in connection with the question of Jacobite and Hanoverian) which had recently taken place, makes it felony, without benefit of clergy, for twelve persons to continue riotously assembled together for an hour after proclamation is made to them to disperse, and indemnifies those who may kill or wound them in order to their being dispersed. This act, for which there were earlier precedents in our history, especially in the reigns of Edward VI., Mary, and Elizabeth, as mentioned above, is still in force, though the punishment is no longer capital, and since it was passed such prosecutions as the one against Dammaree have been practically unknown.

The modern cases of treason by levying war are cases of such insurrections as those of Frost, in the year 1840, Smith O'Brien, in 1848, or the Fenians in 1867. On each of these occasions war was levied against the queen in the most direct and natural sense of the words, though in Frost's case there was little show of military discipline or equipment, and though in the case of the Irish risings the amount of force actually employed was small.

To return, however, to the history of the development of the law. By the middle of the eighteenth century both the clause of the statute of Edward III. which relates to imagining the king's death and that which relates to levying war against him had received a strained and technical interpreta-

[1] All these cases are elaborately considered by Mr. Luders in his *Considerations on the Law of Treason in the Article of Levying War*. Long extracts from it are published in the notes to Dammaree's case in the *State Trials*. There can, I think, be no doubt that the cases upon this as well as upon the other clause of the statute have stretched it far beyond its natural meaning.

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tion, but for a great length of time no occasion arose which made it necessary to put either branch of the statute in force except in its obvious sense. The rebellions of 1715 and 1745 were beyond all question levyings of war against George I. and George II., and it was not till George III. had been for many years on the throne that an occasion arose for testing the constructions which had been put upon the two leading branches of the statute of Edward III.

There is a common impression that the memorable cases of Lord George Gordon in 1780, and Hardy and others in 1794, tested and, for practical purposes, exploded the doctrines which by way of odium have been described as the law of constructive treason. In one sense this impression is ill-founded and proceeds upon a superficial view of the whole subject, but there is a sense in which it may be described as true.

In a strictly legal point of view the memorable cases in question are so far from being opposed to the constructions put by the earlier writers on the statute of Edward III. that they are strong and decisive authorities in their favour, but the legal view is not the only one which ought to be taken of a great State prosecution. On each of these occasions the prosecution for treason failed, and though to a lawyer the failure in each case shows merely that the evidence was not satisfactory, the two decisions undoubtedly did impress the popular imagination with the notion that an [1] arbitrary and oppressive doctrine, called the doctrine of constuctive treason, had been discredited by the failure of two great prosecutions for that offence. However incorrect and hasty such impressions may be, it would be idle to deny their importance. Still it will be well to point out that legally they are altogether unfounded.

[2] The facts of Lord George Gordon's case are well known. The riots took place between June 2 and June 6, 1780. Many houses were burnt in different parts of London. The gaols were broken open, and attempts were made upon the

[1] Dr. Johnson, for instance, said "he was glad Lord George Gordon had "escaped rather than a precedent should be established of hanging a man for "constructive treason."—Boswell, iv. 93.

[2] 21 *State Trials*, 485-652.

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Bank of England, and to cut off the New River Water by which the fires might be put out, and there could be no doubt that the object of the mob was to procure by force the repeal of 18 Geo. 3, c. 60, which mitigated the penalties to which Roman Catholics were then by law liable. It is not too much to say that in order to obtain this object the mob tried to burn down London.

It would have been impossible to imagine a case falling more distinctly within the definition of treason by levying of war given in the passages I have cited from Hale and Foster. If, therefore, the decisions had (as is sometimes supposed) been adverse to the views expressed by Hale and Foster, it would have decided that such acts did not amount to treason. In fact no such decision was given, nor did any one suggest that it possibly could be given. Erskine's celebrated speech on the occasion does not attempt to shake the doctrine laid down by the authorities I have referred to. [1] He hints, in passing, that he might in case of need attack Foster's view, but he accepts it as the basis of his argument. [2] He admits that "war may be levied against the king in his realm not "only by an insurrection to change or to destroy the funda- "mental constitution of the government itself by rebellious "war, but by the same war to endeavour to suppress the "execution of the laws it has enacted, or to violate and "overbear the protection they afford, not to individuals "(which is a private wrong), but to any general class or de- "scription of the community by premeditated open acts of "violence, hostility, and force." Further on he says, [3] "If it "had been proved that the same multitude under the direc- "tion of Lord George Gordon had afterwards" (*i.e.* after going down to Parliament with their petition, which Erskine admits, or practically admits, was a misdemeanour) "attacked "the Bank, broke open the prisons, and set London in a "conflagration, I should not now be addressing you. Do me "the justice to believe I am neither so foolish as to imagine I "could have defended him, nor so profligate as to wish it if I "could." In other words such acts would have been treason by levying of war, and actually were so in the case of those

[1] 21 *St. Tr.* 589. [2] *Ib.* 590. [3] *Ib.* 591.



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who did them. The point of the defence is that Lord George Gordon had nothing to do with the riots and with setting London on fire, that these events, which were treason by levy- of war, were, as far as he was concerned, the unintended and unexpected consequence of highly imprudent and even criminal conduct on his part in putting himself at the head of a mob for the purpose of tumultuous petitioning.

[1] Lord Mansfield, in summing up, after referring shortly and in a summary way to the authorities already noticed, [2] said, "I tell you the joint opinion of us all, that if this "multitude assembled with intent, by acts of force and "violence, to compel the legislature to repeal a law, it is "high treason." In leaving the question to the jury he repeated this in substance, and said, "If there was no such "intention either in the mob or the prisoner, he ought to be "acquitted; but if you think there was such an intent in "the multitude, incited, prompted, or encouraged by the "prisoner, then you ought to find him guilty."

My impression upon the facts is that the acquittal was right, and that, though high treason was committed on the occasion, Lord George Gordon was guilty of nothing more than hare-brained and criminal folly in heading an unlawful assembly. However this may be, the case considered only in its legal aspect is a strong and direct authority in favour of the views of Hale and Foster.

The [3] trials of 1794 were more remarkable than even the trial of Lord George Gordon. They turn upon the meaning attached to the words, "imagine the king's death."

The main features and the general results of these trials are well known, but their effect on the popular mind, constituting as they did failures in prosecutions promoted by all the power of the State, was of far greater importance than their legal value as precedents. Shortly, the case (for the facts in each prosecution were substantially the same) was this:

[1] 21 *St. Tr.* 644.
[2] The trial was at the King's Bench bar, before Lord Mansfield, C.-J., and Willes, Ashurst, and Buller, J.J., so that the direction is of the highest authority.
[3] Vol. xxiv. of the *State Trials*, from p. 199 to the end, contains the trial of Hardy; vol. xxv. pp. 1-748, contains the trial of Horne Tooke.

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The indictment charged a conspiracy to depose the king and put him to death, and alleged as overt acts consultations to procure a convention to be assembled with intent that the persons so assembled should subvert the government and depose the king; the circulation of books and pamphlets recommending the choice of delegates; consultations concerning the calling of the Convention; and the provision of arms for treasonable purposes. These acts were so varied as to amount in all to nine.

The facts proved in evidence were that two societies, the Constitutional Society, and the London Corresponding Society, which had branches all over the country, carried on an agitation for the establishment of universal suffrage and annual parliaments, in the course of which they called a Convention, consisting of representatives from a number of branch societies. Members of the societies wrote letters, and made speeches, and circulated books and pamphlets, and the Convention held meetings and passed resolutions, ostensibly and avowedly in order to further their political objects by constitutional means; really, according to the case for the Crown, in order to put themselves in a position to assume the powers of government, depose the king, and establish a Republic. That there was a failure on the part of the prosecution to prove any such intent on the part of the prisoners is well known. Whether, under all the circumstances of the case, it may not be reasonably supposed that the English reformers of that period would have been glad to establish a republic if they had seen their way to doing so, and had found the people at large disposed to assist them, and whether the result of these trials was not greatly to alarm the democratic party in Great Britain, and to retard for a considerable time the progress of democratic views, are questions which belong rather to the general than to the legal history of the country. The conflicting views of the law of treason put forward by Lord Eldon (then Sir John Scott) for the prosecution, and Lord Erskine (then Mr. Erskine) for the defence, were of necessity stated at great length, and with an amount of reiteration which was probably necessary to give the jury some sort of notion of the views which they were to



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be made to understand, and they are accordingly exceedingly tiresome reading. When, however, they are stripped of all that is superfluous, they may be reduced to two counter propositions which differ much less widely than, from the passionately emphatic character of the discussion and the importance which was attached to it, might be supposed.

[1] Lord Eldon's contention was, that in order that any act might be an overt act of treason by compassing the king's death, it must be an act satisfying the jury that the person who did it intended by deposing, or otherwise, "to put the "king in circumstances in which, according to the ordinary "experience of mankind, his life would be in danger."

[2] Lord Erskine contended that the treason consisted in forming the intention to kill the king in the literal sense of words. He admitted that an intent to depose the king was a fact from which a jury was at liberty to draw the inference that the prisoner intended to kill the king, but he said that unless they did draw such an inference they could not properly convict the prisoner, even if they thought he had, by an overt act, manifested an intention to depose the king.

[3] The judge in Hardy's case contented himself with giving the jury an analysis of the indictment and reading over the evidence to them, giving no general account of the law. [4] Nearly at the end, however, he says, "If they" (the Convention) "meant to put themselves into a condition to sustain "their convention by force against any attack which might be "made upon it, or upon them in defence of it—defence "becomes offence and treason." This observation, however, relates only to one of the overt acts—that which consisted in providing arms. The Chief Justice further observed that "it was a question what was in the minds of the people at "the time they proposed this Convention, and whether their "purpose was that which this prosecution charged; a purpose

[1] See 24 *State Trials*, 256; but Lord Eldon repeats himself in all sorts of forms of words, and with endless precautions and qualifications, and in sentences which neither begin nor end for many pages.

[2] Pp. 883-911. One of the most pointed passages is at the end of p. 894, "Whatever, therefore," &c. Erskine, like his antagonist, felt bound to drive his law into the heads of the jury as if it were a spike.

[3] In the summing-up. 24 *State Trials*, 1293-1384.

[4] Pp. 1379, 1380.

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"of subverting the government of the country, consequently "deposing the king, which is an overt act of compassing the "king's death."

It should be observed, however, that in his [1] charge to the Grand Jury the Lord Chief Justice had explained his views of the law very elaborately, but what he there says all comes to the same thing. The members of a convention intended to usurp the powers of parliament, to depose the king and institute a republic, commit high treason by imagining the king's death.

In summing up on Horne Tooke's trial, on substantially the same facts, the same judge laid down the law a little more boldly. [2] He said: "A jury ought to find that he who means "to depose the king compasses and imagines the death of "the king. It is in truth a presumption of fact arising from "the circumstance of intending to depose, so undeniable and "so conclusive that the law has adopted it and made it a "presumption of law; and it is in that manner that the law "has pronounced that he who means to depose the king has "compassed and imagined the death of the king."

This was the legal result of these memorable trials. How far the verdict of the jury proceeded upon a dislike to the doctrine of constructive treason, and how far it proceeded upon the failure of the prosecution to establish anything more than a political agitation unconnected with any intention to produce a forcible revolution, cannot be determined. I should think that if it could have been shown that there really was a plot to dethrone George III. and to establish a republic—if, for instance, a correspondence could have been produced containing a distinct plan for the king's capture and imprisonment, the scheme of a provisional government and draft proclamations to be issued on its establishment—Erskine's eloquence and argument would have been in vain, though legally it would have been quite as applicable to such a case as it was to the case actually set up.

[1] 24 *State Trials*, 199-210. A severe criticism on the charge to the Grand Jury had been written and published before the trial. It is reprinted at p. 210 of the *State Trials*. Its author was Mr. Felix Vaughan, a young and exceedingly promising barrister, who was assistant counsel in Hardy's case, and who greatly distinguished himself in other political cases about the same time. He died young.

[2] 25 *State Trials*, 725.

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The doctrine against which Erskine is supposed to have prevailed in the trials of 1794 was applied to many later cases without hesitation. This occurred in the trials for the Irish rebellion in 1798, and in particular in the case of the [1] two brothers, Henry and John Sheares. It was clearly proved (if the evidence was believed, and no doubt it was true) that the prisoners had entered into a conspiracy with others to raise an open rebellion in Ireland, which rebellion was actually raging at the time of the trial. The indictment charged an imagining of the king's death, some of the overt acts being a conspiracy to levy war, treasonable consultations, and the provision of arms. It was argued on behalf of the prisoners that, admitting that a conspiracy to levy war in England with a view to the king's deposition was an overt act of compassing his death, because a war in England might expose the king's person to danger, this could not be so in respect of levying war in Ireland, where the king never resided. The jury, however, were directed that such a conspiracy as was proved was an overt act of imagining the king's death, and that the fact that the king was not resident in Ireland made no difference. The prisoners were convicted and executed.

The same doctrine was applied in an instance even more remarkable. [2] David Maclane, an American, was, in 1797, indicted, convicted, and executed for treason by imagining the king's death, the overt acts charged being that he conspired with others to raise a rebellion in Lower Canada and to procure the invasion of the country by the French. In this case it was contended that even if Canada were separated from the king's dominions this could have no effect on his personal security, but the Court told the jury that the statute referred not to the natural life, but to the political existence of the king. Upon the whole, it must, I think, be said that the wide construction put upon the act of Edward III. by Coke, Hale, and Foster, has never been doubted by any court called upon to administer the law, though it no

[1] 27 *State Trials*, 255-398.
[2] 26 *Ib.* 721. The indictment also charged treason by adhering to the king's enemies.

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doubt has in a popular sense been more or less discredited by the trials of 1794. I do not believe, however, that even popular feeling would regard as too severe a view of the law which makes it high treason to enter into a real conspiracy, to excite a rebellion, or carry out a forcible revolution, even though the legal result may involve the use of a legal fiction.

However this may be, the law of treason has, since the year 1794, been put on a different footing from that on which it rested till that year. In the year 1795 an act was passed (36 Geo. 3, c. 7) which enacted that it should be treason to "compass, imagine, invent, devise, or intend "death, or destruction, or any bodily harm tending to death "or destruction, maim or wounding, imprisonment or re- "straint, to the person of his Majesty, or to depose him, "or to levy war against him, in order, by force or constraint, "to change his measures or counsels, or in order to put any "force or constraint upon, or to intimidate or overawe both "houses or either house of parliament, or to move or stir any "foreigner with force to invade this realm or any other of his "Majesty's dominions," such imagination being manifested either by printing, or writing, or by any overt act.

This act re-enacted that part of the act of Edward III. which relates to imagining the king's death in the sense in which it had been interpreted by Hale and Foster, and thus gave statutory authority to all their constructions. It did not however repeal the act of Edward III., which still continued to be the only source of the law of treason by levying war and adhering to the queen's enemies. The act of 1795 was at first limited to the life of George III. and the end of the first session after his death, but was, in 1817, made perpetual as to treason by 57 Geo. 3, c. 6.

The law thus settled remained unaltered till the year 1848, when the disturbances consequent on the Continental revolutions of that year were considered to require new legislation. Accordingly the act 11 & 12 Vic. c. 12, was passed, which repealed the provisions of the acts of George III., "save "such of the same respectively as relate to the compassing, "&c., death, or destruction, or any bodily harm tending to "death or destruction, maim or wounding, imprisonment or

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"restraint of the person" of the sovereign, and the expression of them by overt acts. It then proceeded to enact that the other compassings, &c., specified in the acts of George III. should be felony, subjecting the offender to a maximum punishment of penal servitude for life. It is provided by section 6 that the act is in no way to lessen the effect of the statute 25 Edw. 3. The act of 1848 has not been altered by subsequent legislation. It has been put in force not unfrequently both in England and in Ireland, and it has not been interpreted otherwise than according to the obvious meaning of its words. The last case tried under it was that of Walsh, tried and convicted before me at the Old Bailey, in July, 1882.

The result of this complicated legislation is as follows:—

1. The act 25 Edw. 3, st. 5, c. 1, is still the standard act on which the whole law of treason is based, and the constructions put upon its different members by Coke, Hale, Foster, and others, have been in many instances adopted by the Court, and must still be taken to be part of the law of the land.

2. Such of those constructions as extend "imagining the king's *death*" to imagining his death, destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint, have been turned into statute law by the joint operation of the acts of George III. and the act of 1848 (11 & 12 Vic. c. 12).

3. Such of the constructions as make the imagining of the deposition of the king, conspiring to levy war against him directly, and instigating foreigners to invade the realm, have not been abolished, but are left to rest on the authority of those who have stated them, and of the cases in which they have been recognised.

4. It is provided by statute, 11 & 12 Vic. c. 12, that all the imaginations and conspiracies lastly mentioned shall be felony punishable with secondary punishment as well as treason (if they are treason) punishable with death.

5. Treason, by the actual levying of war, and by adhering to the king's enemies, is left under the statute 25 Edw. 3, but by judicial construction levying war has been defined to

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mean in its natural sense, war meant either to depose the king or to compel legislation, and in its wider sense, a great riot for any public object. The result may be displayed in the form of a diagram, thus:—

25 Edw. 3, as construed by Coke, Hale, Foster, and judicial decisions.

36 Geo. 3, c. 7, perpetuated by 57 Geo. 3, c. 6, and recognised by 11 & 12 Vic. c. 12.

| 25 Edw. 3. | | Felonies by 11 Vic. c. 12. |
|---|---|---|
| A. Treason by imagining the king's death. | A′. Extended to imagining bodily harm or restraint of the king. | A″. Extended to (*a*) conspiracy to levy war in natural sense (see B.); (*b*) conspiracy to depose; and (*c*) instigating foreigners to invade the realm. |
| B. Treason by levying war. Natural sense defined to be levying war with intent to depose the king, or to compel legislation by force and terror. | B′. Extended to great riots for political objects. | |
| C. Treason by adhering to the king's enemies. | | |

A is high treason by 25 Edw. 3. A′ represents that part of the constructions put upon A by Coke, Hale, and Foster, to which statutory authority is given by 57 Geo. 3, c. 6, and by 11 & 12 Vic. c. 12. A″ represents that part of those constructions to which such authority was not given, but offences in A″ which according to judicial decisions amount to high treason are, under 11 & 12 Vic. c. 12, s. 2, at least felony, punishable with penal servitude for life.

B represents treason by levying of war in what has been defined to be the natural sense of the expression.

B′ represents the construction put upon B by various cases,

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CH. XXIII. of which Dammaree's is the best illustration, and which Lord George Gordon's case is popularly, but erroneously, supposed to have discredited.

I must, in conclusion, say a few words on C: Treason by adhering to the king's enemies. Instances of this offence have been very rare in our history. England, owing to its insular position, has not for centuries been the scene of war carried on with a foreign enemy. Indeed, since the march of Charles Edward to Derby in 1745, no military operations of any kind have been carried on here. Hence the offence of "adhering to the king's enemies"—an exceedingly vague expression—has been committed only by a few spies who have in the time of war been detected in giving information to foreign enemies. The case of [1] Stone in 1796 is an instance. He was tried for sending information to the French as to the prospects of an invasion, and acquitted. The case of [2] De la Motte may also be referred to. He sent many particulars as to the condition of the navy to France, in the latter part of the American war. No questions of legal or constitutional interest have arisen on this branch of the act of Edward III. to my knowledge.

A review of this long and intricate history shows, first, that the act of Edward III. was clearly defective, in not providing expressly for the case of personal injury to, or restraint of, the sovereign, but this defect was so obvious that the public acquiesced without difficulty in its being supplied, first by a construction of the statute which was undoubtedly strained and unnatural, and afterwards by express legislation.

A greater defect in the statute is that it altogether omits to deal with the case of conspiring to levy war. In treason it is obvious that the conspiracy is a more proper object of punishment than the actual offence, for when war is actually levied it must be met by armed force, not by legal punishment, and when a rebellion has suffered defeat in the field subsequent punishment may seem cruel. This defect was supplied in part by special legislation, making such a conspiracy treason, which was in force all through the reigns of Henry VIII., Edward VI., the greater part of the

[1] 25 *State Trials*, 1155.

[2] 21 *Ib.* 687.

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reign of Elizabeth, the reign of Charles II., and the period between 1796 and 1848. Most of the acts which were in force during these periods made it treason to display an intention to levy war by writing. Some of them extended to speaking. The defect was also supplied in part by the judicial constructions, which made the conspiracy to levy war an overt act of imagining the king's death. As the law now stands, such a conspiracy can be treated either as felony or as treason.

The general effect of the whole is that the statute which has been so much praised, is really a crude, clumsy performance, which has raised as many questions as it can have settled, and which has been successful only when it was not required to be put in force. It has been praised by one party because it does not, in terms, relate to treasonable conspiracies, and by another because they approved of the artificial constructions of which they said it was capable. The fact that it has been in force for 530 years seems to me to show only the extreme indifference of the public to the manner in which their laws are worded, and the attachment of the legal profession to phrases which have been long in use and to which an artificial meaning has been attached. If, however, we turn from the mode by which the present result has been arrived at, to the result itself, I do not think it can be said to be a bad one, except in so far as the levying of war has been interpreted to extend to great riots for a political object. [1] The Criminal Code Commission proposed to re-enact the existing law with a few unimportant exceptions —the clauses, namely, of the statute of Edward III. which relate to the violation of the king's eldest daughter, and the murder of the lord chancellor and the judges of the superior courts. The section in the draft code which defines high treason may thus be taken to represent the substance of the existing law free from all technicalities and from provisions obviously obsolete. The definition was as follows:—

SECTION 75.—HIGH TREASON DEFINED.—High treason is (*a*) The act of killing Her Majesty, or doing her any

[1] *Report*, p. 19.

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bodily harm tending to death or destruction, maim or wounding, and the act of imprisoning or restraining her; or

(*b*) The forming and manifesting by an overt act an intention to kill Her Majesty, or to do her any bodily harm tending to death or destruction, maim or wounding, or to imprison or to restrain her; or

(*c*) The act of killing the eldest son and heir apparent of Her Majesty, or the Queen consort of any King of the United Kingdom of Great Britain and Ireland; or

(*d*) The forming and manifesting by an overt act an intention to kill the eldest son and heir apparent of Her Majesty, or the Queen consort of any King of the United Kingdom of Great Britain and Ireland; or

(*e*) Conspiring with any person to kill Her Majesty, or to do her any bodily harm tending to death or destruction, maim or wounding, or conspiring with any person to imprison or restrain her; or

(*f*) Levying war against Her Majesty either

with intent to depose Her Majesty from the style, honour, and royal name of the Imperial Crown of the United Kingdom of Great Britain and Ireland or of any other of Her Majesty's dominions or countries; or

in order by force or constraint to compel Her Majesty to change her measures or counsels, or in order to intimidate or overawe both Houses or either House of Parliament; or

(*g*) Conspiring to levy war against Her Majesty with any such intent or for any such purpose as aforesaid; or

(*h*) Instigating any foreigner with force to invade this realm or any other of the dominions of Her Majesty; or

(*i*) Assisting any public enemy at war with Her Majesty in such war by any means whatsoever; or

(*j*) Violating, whether with her consent or not, a Queen consort, or the wife of the eldest son and heir apparent for the time being of the King or Queen regnant.

Some remarks arise on this definition:—(*a*) was intended to remove a strange defect in the law, already noticed, by which the actual murder of the sovereign is treason only because it

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is evidence of an intent to murder; (*f*) excludes Dammaree's case, and other cases referred to in the diagram under B'. Another section (79) re-enacts the provisions of 11 Vic. c. 12, so that if the Draft Code became law there would still be cases in which the definitions of treason and felony would overlap.

The provisions of the French and German Codes on the subject of high treason have some features of close resemblance to, and some of striking difference from, the law of England.

Each code recognises a distinction unknown to our law between the sovereign and the state. The first title of the third book of the *Code Pénal*, deals with "Crimes et délits "contre la chose publique," the first chapter with "Crimes et "délits contre la sureté de l'état," and this is subdivided into two sections, relating respectively to the "sûreté ex-"térieure" and the "sûreté interieure" of the state. The provisions as to the external safety of the state (Article 75—85) cover the ground which is covered in English law by the single phrase "adhering to the king's enemies, giving them "aid and comfort;" they are elaborate, and bear the traces of a history in which war has been far more frequent than in England, and of a period when the minds of the authors of the Code were much occupied by it, and were forced to be familiar with the questions arising out of warlike operations.

The following offences are punished with death. [1] A Frenchman bearing arms against France; every one subject to French law [2] intriguing with a foreign power or its agents to commit hostilities against or go to war with France, whether war actually follows or not; [3] intriguing with the enemies of the state with intent to facilitate their entrance on to the territory of the republic; or to give up (livrer) to them French strong places, &c. or ships; or to furnish them help in soldiers, men, money, provisions, arms, or ammunition, or to aid the progress of their arms in the French possessions, or against the French

[1] Art. 75.

[2] "Quiconque aura pratiqué des machinations ou entretenu des intelligences "avec," &c.—Art. 76.

[3] Art. 77. The words are the same as in art. 76.

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forces, military or naval, either by tampering with the fidelity of the troops, or in any other manner. [1] Correspondence with the enemy, not having in view any of these objects, "which "nevertheless has resulted in furnishing the enemy with in-"structions injurious to the military or political situation of "France, or its allies," is punishable with detention (*i.e.* confinement in a fortress for twenty years at most and five years at least) unless the instructions are given in consequence of an understanding with spies, in which case the punishment is death.

A person, who having official knowledge of [2] the secret of a negotiation or expedition betrays (l'aura livré) it to the agent of a foreign power, or an enemy, is liable to be punished by death.

This series of provisions is singularly contrasted with English law. Articles 75—82 are much more precise, detailed, and minute than the enactment as to adhering to the king's enemies.

The German Strafgesetzbuch distinguishes between Hoch Verrath—high treason, and Landes-verrath—treason against the state. Landes-verrath closely corresponds to the offences constituted by the Articles in the French Code just referred to. Indeed Articles 87—92 of the German Code are taken in many instances almost verbatim from the corresponding Articles of the French Code. It is worthy of remark that the general provision, "Tout Français qui aura porté les armes "contre la France sera puni de mort," which forms Article 75 of the French Code is elaborated into a provision of considerable length in Article 88 of the German Code. This article distinguishes between the case of a German, who, during a war against the German empire, takes service in the enemy's army, or bears arms against the empire; and the case of a German, who being in foreign service when the war breaks out, remains in the enemy's service or bears arms against the empire. In neither case is the crime capital, but in the first the punishment is imprisonment for life. Even if there are extenuating circumstances the punishment must be im-

[1] Art. 78.

[2] Art. 80.

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prisonment for at least five years. In the second case the punishment must be two to ten years' imprisonment, but in the case of extenuating circumstances may be less.

Each of these sets of provisions differs from English law in the recognition of the state as being the object of the crime, as distinguished from the king.

The offences in these Codes which correspond to treason by imagining the queen's death, and by levying of war, differ from the law of England chiefly in the circumstance that being modern they are expressed in plain words instead of being arrived at by legal fictions, but the general correspondence between the three systems is remarkable.

Since the establishment in France of a republican form of government in 1870, no particular provision has been in force for attacks upon the life or the person of the president, but under the empire the law was contained in Article 86, "L'attentat contre la vie ou contre la personne de l'empereur "est puni de la peine du parricide. L'attentat contre la vie "des membres de la famille impériale est puni de la peine "de mort. L'attentat contre la personne de la famille "impériale est puni de la peine de déportation, dans une "enceinte fortifiée."

The meaning of the word "attentat" in this provision was not, it seems, clear even to French lawyers. It was the subject of a [1] discussion by M. Hélie, who thought it meant

[1] "L'expression *d'attentat contre la vie* pérsente une idée nette et precise "c'est l'assassinat, l'empoisonnement, le meurtre même : ce sont tous les crimes "qui menacent l'existence même de la personne. Mais qu'est ce *qu'un* "*attentat contre la personne?* Il nous semble que les mots, mis en opposition "avec ceux *d'attentat contre la vie*, ne peuvent s'entendre que des blessures "ou de violences graves commises sans intention de tuer. Il faut d'ailleurs "rapprocher l'Article 86 de l'Article 305 du Code qui comprend sous la de-"nomination d'attentats contre les personnes non-seulement l'assassinat et "l'empoisonnement, mais les autres violences graves. Or quelle sera la gravité "des violences pour qu'elles soient qualifiées d'attentats? C'est là seulement "la difficulté, et la loi ne l'a point resolue." After pointing out the difficulty of supposing that a common assault upon the emperor or his family could be a capital crime, M. Hélie gives his own opinion : "Il nous semble qu'une "distinction doit être adoptée, ce serait de ne comprendre sous la qualification "d'attentat que les seules violences que la loi pénale range dans la classe des "crimes."

The word "*attentat*" must not be confounded with the "*tentative*" described in Article 2 of the *Code Pénal*, and regarded in French law as equivalent to the crime.

Article 88 of the Code, which relates to the "*attentats*" now under consideration, runs thus :—"L'execution ou la tentative constitueront seules

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personal violence, which in other cases would amount to a *crime* as distinguished from a *délit*.

The German Code treats the [1] following offences of this class as high treason:—The murder of, or an attempt made to murder, the emperor, the offender's own sovereign, or the sovereign of any confederate state in which the offender resides. (These offences are capital.) Also the undertaking (wer unternimmt) to kill a sovereign of the confederation or to take him prisoner, or to give him up to the enemy, or to make him incapable of reigning. This offence is punishable with imprisonment for life. Article 82 defines "unter-"nehmen." [2] Every act by which the scheme is brought close to execution, must be regarded as an undertaking constituting the crime of high treason. Each of these enactments has a striking resemblance to treason, by imagining the queen's death. The French "attentat," the German "unternehmen," and the English overt act, manifesting a treasonable intention, all resemble each other.

The crimes which in England would be called treason by levying of war are elaborately provided for and severely punished by the French *Code Pénal*, though the severity of the punishment has been considerably mitigated by the provision

l'attentat." This is interpreted as follows by M. Hélie :—"La tentative dont "il s'agit ici est celle qui est caracterisée par l'Article 2. De la il suit— "1. Qu'il n'y a pas crime d'attentat lorsqu'il y a eu désistement volontaire "même après commencement d'execution, puisque aux termes de l'Article 2 il "n'y a pas de tentative legale. 2. Que l'attentat n'existe qu'autant que les "actes de son exécution ont été commencés. 3. Qu'enfin l'exécution d'aprés "l'Art. 88 c'est la consommation même de l'attentat. Cette execution sup-"pose donc une agression violente, un acte de la force brutale, et cette attaque "constitue l'attentat, lors même qu'elle n'a pas reussi, lors même qu'elle a été "comprimée et que ses auteurs ont été disperses."—Hélie, *Pratique Criminelle*, ii. 404, and see *Théorie du Code Pénal*, ii. 97-100.

The word *attentat* means, according to Littré: 1. Entreprise criminelle, entreprise contre la loi. 2. En termes de droit attentat a la pudeur, tentative violente contre la personne d'une femme on d'un enfant.

*Tentative* is defined as "Action par laquelle on tente ou essaye de faire "réussir quelque chose." I have already referred to the definition of it given in the *Code Pénal*, art. 2.

[1] "80. Der Mord und der Versuch des Mordes, welche an dem Kaiser, an "dem Eigenen Landesherrn oder wahrend des Aufenthalts in einem Bundes "staate an dem Landesherrn dieses Staats verübt worden sind.

"81. Wer ausser den Fällen des s. 80 es unter nimmt (1) einen Bundes "Fursten zu tödten, gefangen zu nehmen, in Feindesgewalt zu liefern oder "zur Regierung unfahig zu machen."

[2] "82. Als ein unternehmen durch welches das Verbrechen des Hochverraths "vollendet wird, ist Jede Handlung Anzuschen, durch welche das Vorhaben "unmittelbar zur Ausfuhrung gebracht werden soll."

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of the constitution of 1848, which abolished the punishment of death, "en matière politique." [1] It seems that no precise definition of this general phrase has ever been given, though there are several crimes which are well recognised as falling within it. Amongst others all the crimes now to be referred to are regarded as political, though many of them are still described in the [2] Code as capital offences. In reference to them the meaning of the word "attentat," already referred to, must always be borne in mind. The offences then which correspond to treason by levying war, are [3] "L'attentat dont "le but est soit de détruire ou de changer le gouvernement "(ou l'ordre de successibilité au trône), soit d'exciter les "citoyens ou habitants à s'armer contre l'autorité [4] impériale." "[5] L'attentat dont le but sera soit d'exciter la guerre civile "en armant ou en portant les citoyens ou habitants à s'armer "les uns contre les autres, soit de porter la dévastation, le "massacre, et le pillage dans une ou plusieurs communes." "[6] Quiconque soit pour envahir des domaines, propriétés ou "deniers publics, places, villes, forteresses, postes, maga-"sins, arsenaux, ports, vaisseaux, ou bâtiments appartenant "à l'état, soit pour piller ou partager les propriétés publiques "ou nationales, ou celle d'une généralité de citoyens, soit "enfin pour faire attaque ou résistance envers la force publi-"que agissant contre les auteurs de ces crimes se sera mis à "la tête de bandes armées, ou y aura exercé une fonction "ou commandement quelconque." The last two offences are still on the face of the Code punishable by death.

As with us an intention or conspiracy to levy war is felony by the Act of 1848, so in France [7] "le complot ayant pour but," a forcible attempt to change the government is punished by transportation, if followed by an overt act, and by detention, if not. A proposal to enter into a conspiracy is punishable by imprisonment for from one to five years; [8] and this provision also applies to conspiracies and proposals to conspire to excite civil war.

There are various other offences short of high treason which

[1] Hélie, *Pratique Criminelle*, ii. pp. 20 and 23.
[2] *Codes et Lois Usuelles*, Roger and Sorel, 1879.
[3] Art. 3, s. 87. [4] Obsolete. [5] Art. 91.
[6] Art. 96. [7] Art. 89. [8] Art. 91.



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partake more or less of the same nature as constituting offences against the sovereign personally, or tending to disturb the internal tranquillity of the state. No one of them can be said to have a distinct legal history of any special interest or importance. I will accordingly content myself with a short enumeration of them, referring to my *Digest* for the details of the offences. It will be better, on the present occasion, to notice them in the order of their dates than in the order of their importance or precise nature.

The only offence against the king personally, other than high treason, known to the common law, was that of [1]contempt, either of his person or of his authority. I have no doubt that if any such offence had taken place in early times, in a form gross enough to attract special attention, it would have been punished with cruel severity. Probably a blow given to the king's person would have been interpreted to be high treason. It would, at the very least, have been punished by mutilation, for a blow given to any one in the king's court or palace, or even in the court at Westminster in which he was supposed to be in some mystical way present in the person of the judges, was punished [2] by amputation of the right hand, and the discretionary power of the courts as to whipping and pillory would, no doubt, have been used to the utmost if an occasion had occurred to call for it.

It is remarkable that it did not become necessary to make specific statutory provision for personal insults to the sovereign till the reign of the most popular monarch who ever sat on the throne of this country had lasted for several years. In the early part of her Majesty's reign, two foolish boys, Oxford and Francis, fired pistols at the Queen, loaded or not.

One was, with cruel mercy, acquitted of high treason on

[1] *Digest*, p. 38, article 65.

[2] All the particulars of the execution are set forth with extreme minuteness in 33 Hen. 8, c. 12, ss. 10-18 inclusive, *e.g.* "S. 9. And the serjeant of "the pantry . . . shall be also then and there ready to give bread to the "party that shall have his hand so stricken off. . . . S. 13. And the master "cook for the time being . . . shall also be then and there ready, and bring "with him a dressing-knife, and shall deliver the same knife at the place of "execution to the serjeant of the larder . . . who shall be also then and "there ready, and hold upright the dressing-knife till execution be done."

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the ground of insanity, and though unquestionably sane [1] was confined in criminal lunatic asylums for upwards of thirty years. The other was convicted and sentenced to death, but his sentence was commuted to transportation for life. Soon afterwards (in July 1842) [2] the Act 5 & 6 Vic. c. 51, was passed, which provides for such offences a maximum punishment of seven years' penal servitude and whipping. There have been several prosecutions under it.

[3] The Royal Marriage Act, passed in 1772, creates the only other offence relating to the royal family. [4] It was passed, as is well-known, on the occasion of the marriage of the Duke of Cumberland to Mrs. Horton, and the marriage of the Duke of Gloucester to Lady Waldegrave.

It was regarded at the time as a great stretch of power and as highly oppressive, and was the subject of [5] two protests by twenty-one peers.

Passing to isolated offences against the public peace in their historical order, the following offences may be noticed.

1. [6] Tumultuous petitioning. This offence was created by an act passed immediately after the Restoration, namely in 1661. The preamble recites that "it hath been found by sad "experience that tumultuous and other disorderly soliciting "and procuring of hands" for petitions on political matters "have been a great means of the late unhappy wars," and proceeds to define and punish the offence. [7] The act was not repealed by the Bill of Rights (as was once suggested), nor can it be regarded as altogether obsolete, though part of it, which in certain cases requires the assent of justices to a petition, is now never enforced.

2. The Riot Act (1 Geo. 1, st. 2. c. 5, A.D. 1714) and its

[1] This was, I think, the most severe punishment, with one exception, ever inflicted in England. The exception to which I refer is not a case of death by torture, or even Oates's case, which virtually was flogging to death, but the case of Bernardi, who was imprisoned in Newgate for a supposed share in the Assassination Plot for forty years, 1696-1736. See his case, 13 *State Trials*, 759-788.

[2] *Digest*, p. 38, art. 65.

[3] 12 Geo. 3, c. 11. See *Digest*, p. 39, art. 66.

[4] *Annual Register for* 1772, pp. 83-84.

[5] *Ib.* p. 232.

[6] *Digest*, p. 47, art. 81; 13 Chas. 2, c. 5.

[7] R. *v.* Lord George Gordon. 23 *State Trials*, 650.



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relation to treason by levying war, I have already referred to. The part of it which related to beginning to demolish buildings was repealed by 7 & 8 Geo. 4, c. 27, and re-enacted by the 7 & 8 Geo. 4, c. 30, s. 8, which was itself repealed and re-enacted by 24 & 25 Vic. c. 97, s. 11, with some additions. Its wording is a good instance of the way in which statutes gain by re-enactment. The subjects of the offence under the enactment last mentioned are as follows: [1] "CHURCH, CHAPEL, MEETING-HOUSE, OR OTHER PLACE OF "DIVINE WORSHIP, dwelling-HOUSE, STABLE, coach-house, OUT-"HOUSE, warehouse, office, shop, mill, malt-house, hop-oast, "BARN, granary, *shed, hovel, or fold*, or any building or erec-"tion used *in farming land or* in carrying on any trade or "manufacture, or any manner thereof, *or any building other "than such as are in this section before mentioned, belonging to "the Queen, or to any county, riding, division, city, borough, "poor-law union, parish, or place, or belonging to any uni-"versity, or college, or hall of any university, or to any inn of "court, or devoted or dedicated to public use or ornament, or "erected or maintained by public subscription or contribution.* "or any machinery whether fixed or movable, prepared for "or employed in any manufacture or in any branch thereof, "or any steam-engine or other engine for sinking, working, "*ventilating*, or draining any mine, or any staith, building, "or erection used in conducting the business of any mine, or "any bridge, waggon-way, or tank for conveying minerals from "any mine."

The act would not be materially altered by substituting for all this verbiage "any building whatever, or any machinery "whatever, or any erection, structure, or work used in or in "connection with any mine;" but there are differences of style in Acts of Parliament as in all other kinds of literary composition. The Riot Act constituted a number of new capital felonies, and the authors thought principally of the destruction of dissenting chapels, which was the particular evil which occasioned the Act. In 1827 the offences were

[1] The words in small capitals are those of the original Riot Act. The words in ordinary type are those of 7 & 8 Geo. 4, c. 30, s. 8. The words in italics are those which were introduced in 24 & 25 Vic. c. 97, s. 11.

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still capital, and a definite enumeration of a number of particular things was therefore considered necessary. The [1] authors of the Act of 1861 were all educated under and accustomed to the style of drafting which prevailed from say 1810 to 1830, and though the punishment was diminished in severity, and the greatest discretion as to mitigating it left to the judges, it did not occur to them to extend the terms of the act by abridging and generalising its language. Finding it defective they altered it by adding an immense mass of new particulars, and so produced the unwieldy enactment now in force.

3. A considerable number of offences against public tranquillity were created during the reign of George III. The first in point of time is setting fire to dockyards, public stores, &c., which was made felony without benefit of clergy, [2] by 12 Geo. 3, c. 24, in 1772. I am unable to say on what occasion the act was passed, but it was put in force some years afterwards, in the case of a person known as [3] Jack the Painter, who at the instigation, as he said, of some distinguished Americans, set fire to part of the dockyard at Portsmouth.

The rest of the offences which still remain reflect the experience of two periods, separated from each other by a considerable interval, at each of which great fears were entertained as to the peace of the country. The first was about the year 1797, the second about the year 1817.

In 1797, on the occasion of the mutiny at the Nore, was passed the [4] Act, punishing as a felony without benefit of clergy, the incitement of soldiers or sailors to mutiny. It was at first a temporary measure, intended to expire at the end of the first month of the then next session, but it was several times re-enacted, and [5] was in force till August 1, 1807, when it was suffered to expire, but it was revived and made perpetual in 1817 by 57 Geo. 3, c. 7. The offence is

[1] Amongst others, Lord Campbell, Sir Fitzroy Kelly, and especially Mr. Greaves. A curious essay might be written on the styles of drafting employed at different times.

[2] *Digest*, p. 298, art. 376.

[3] See his trial, 20 *St. Tr.* 1317.

[4] 37 Geo. 3, c. 70 ; *Digest*, p. 37, art. 63.

[5] See 41 Geo. 3, c. 29.

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CH. XXIII. obviously one which requires the severest punishment, and the facts that it was so long unknown to the law, and that when it was thought of it was provided for by a temporary act, which after being in force for ten years was allowed to expire for ten more, are remarkable. [1] The act against administering unlawful oaths belongs to the same year, and appears from the [2] preamble to have been directed against offences of the same class. Indeed the first set of unlawful oaths, which it mentions are "oaths to engage in any mutinous or seditious purpose." It was not a temporary act, and the maximum punishment was seven years' transportation. It is singular that what appears to be the more general crime, and the one most likely to be committed, should have been treated as special and exceptional, and the more special and occasional offence as the one which required a permanent provision. In 1812, after an interval of fifteen years, the Unlawful Oaths Act of 1797 was followed by an [3] act of greater severity, punishing oaths to commit treason, murder, and other capital crimes.

In 1799 and 1817 [4] two acts were passed for the suppression of secret societies. The character of these acts, and the occasions of passing them, appear from the preamble. The preamble of the Act of 1799 is as follows: "Whereas a traitorous conspiracy has long been carried on in conjunction "with the persons from time to time exercising the powers of "government in France to overturn the laws, constitution, "and government, and every existing establishment, civil and "ecclesiastical, in Great Britain and Ireland, and to dissolve "the connection between the two kingdoms so necessary to "the security and prosperity of both; and whereas, in pur-"suance of the said design, and in order to carry the same "into effect, divers societies have been of late years instituted "in this kingdom and in the kingdom of Ireland, of a new "and dangerous nature, inconsistent with public tranquillity "and with the existence of regular government, particularly

[1] 37 Geo. 3, c. 123; *Digest*, p. 49, art. 84.

[2] "Whereas divers wicked and ill-disposed persons have of late attempted "to seduce persons serving in his Majesty's forces by sea and land," &c.

[3] 52 Geo. 3, c. 104; *Digest*, p. 49, art. 83.

[4] 39 Geo. 3, c. 79; 57 Geo. 3, c. 19; *Digest*, pp. 51-54, articles 86-89, inclusive.

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"certain societies calling themselves societies of United "Englishmen, United Scotsmen, United Britons, United "Irishmen, and the London Corresponding Society, and "whereas the members of many such societies have taken "unlawful oaths and engagements of fidelity and secrecy, "and used secret signs, and appointed committees, secretaries, "and other officers in a secret manner, and many of such "societies are composed of different divisions, bands, or parts, "which communicate with each other by secretaries, dele-"gates, or otherwise, and by means thereof maintain an "influence over large bodies of men, and delude many igno-"rant and unwary persons into the commission of acts highly "criminal; and whereas it is expedient and necessary that all "such societies as aforesaid, and all societies of the like "nature, should be utterly suppressed and prohibited," &c. It then proceeds to make many provisions against societies, the proceedings or officers of which are secret.

The Act of 1817 (57 Geo. 3, c. 19) was passed at a time of great political excitement, partly in consequence of reports issued by secret committees of each House of Parliament, appointed in consequence of a message from the Prince Regent. [1] Shortly before the Act was passed a meeting took place in Spa Fields which led to the trial of Watson and others for high treason. Shortly after it was passed occurred the outbreak of the Luddites in Derbyshire and Nottinghamshire which led to the trial of Brandreth and others for high treason. The act contains a number of extremely severe provisions for the suppression of seditious meetings, and for other objects. Most of them have been repealed, some however still continue to form a part of the criminal law. S. 25 relates to unlawful societies. It is introduced by s. 24, which is as follows: "And whereas divers societies or clubs "have been instituted in the metropolis and in various parts "of this kingdom of a dangerous nature and tendency, incon-"sistent with the public tranquillity and the existence of the "established government, laws, and constitution of the king-"dom, and the members of many of such societies or clubs

[1] Martineau's *Thirty Years' Peace*, i. 129-141; for Watson's trial see 32 *State Trials*, 1; for Brandreth's, *ibid.* p. 755.

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"have taken unlawful oaths and engagements of fidelity and "secrecy, and have taken, or subscribed, or assented to illegal "tests, and declarations, and many of the said societies or "clubs elect, appoint, or employ committees, delegates, "representatives, or missionaries of such societies and clubs "to meet, confer, communicate, or correspond with other "societies or clubs, or with delegates, representatives, or mis-"sionaries of such other societies or clubs, and to induce and "persuade other persons to become members thereof, and by "such means maintain an influence over large bodies of men, "and delude many ignorant and unwary persons into the com-"mission of acts highly criminal; and whereas certain "societies or clubs calling themselves Spenceans or Spencean "Philanthropists, hold and profess for their object the con-"fiscation and division of the land, and the extinction of the "funded property of the kingdom; and whereas it is expedi-"ent and necessary that all such clubs should be utterly "suppressed and prohibited as unlawful combinations and "confederacies," &c.

[1] The same act forbids political meetings within a mile of Westminster Hall when Parliament or the Courts of Law are sitting.

The last act of this period to be referred to, and the last which I need mention in relation to this subject is the [2] act which forbids unlawful drilling. It was passed under the impression which then prevailed, that unlawful drilling with a view to an insurrection was carried on at night in different parts of England, especially in the northern counties. In Bamford's *Memoirs of a Radical*, there is an account of the drilling which took place, and which, if he is to be believed, was a matter of little importance. Probably it was not in itself formidable; but as a way of keeping up excitement and disaffection, and of preparing the minds of large classes of people for insurrection, and accustoming them to the idea, it may have had more importance than he admits.

I have now concluded my account of the first class of political offences known to the law of England. The second

[1] S. 23, *Digest*, p. 47, art. 80.
[2] 60 Geo. 3, and 1 Geo. 4, c. 1, s. 1.

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class, including the offence of seditious libels, words and conspiracies, will form the subject of the next chapter.

The history of those to which I have already referred may be very shortly summed up.

High treason was an offence known to the law from the earliest times. The latitude which its indefinite character left to the judges being regarded as a grievance it was defined by the 25 Edw. 3. This definition was considered insufficient, and was supplemented at first by declarations of treason made in Parliament, and afterwards, especially during the reigns of Henry VIII. and his three children, by additional Acts of Parliament. Under the Stuarts the supplementary legislation on the subject was, to a great extent, suffered to expire, and till late in the reign of George III. no statutory addition was made to the list of treasons, except in a few instances soon after the Revolution of 1688. But the place of new legislation was taken by artificial extension of the old law. Early in the reign of Elizabeth the judges appear to have begun to extend the literal meaning of the statute of Edward III. by artificial constructions put upon its most important clauses. This process reached its height in the middle of the eighteenth century. In 1780 and 1794 trials took place which were popularly supposed to have shaken the authority of these constructions. They were confirmed in part, first by an act of 1795, and afterwards less fully by the Act of 1848. Such of the constructions as were not made treason by the Act of 1848 were made felony by that act, but without prejudice to the authority of the constructions.

Of the other political offences described, the oldest is the Riot Act, the earliest form of which goes back to 1714, and the rest are memorials of the violent political agitation which resulted in England, first from the first French Revolution, and afterwards from the discontent and suffering which, in consequence of the cessation of war expenditure, and the revival of questions connected with internal political and social changes followed the peace of 1815.

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# CHAPTER XXIV.

## SEDITIOUS OFFENCES—SEDITIOUS WORDS—LIBELS—CONSPIRACIES.

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THE second class of offences against internal public tranquillity consists of offences not accompanied by or leading to open violence. They may be classified under the general head of seditious offences, and more particularly as seditious words, seditious libels, and seditious conspiracies. All these offences presuppose dissatisfaction with the existing government, and censure more or less express upon those by whom its authority is exercised, and the offences themselves consist in the display of this dissatisfaction in the various manners enumerated. As for sedition itself I do not think that any such offence is known to English law. It is, indeed, difficult to understand how a seditious purpose could be carried out otherwise than by one or more of the three methods enumerated.

The word "seditio" seems to have been more appropriately used in Latin to signify an actual riot than an act displaying a seditious intention.

[1] The articles from my *Digest* reprinted in the note state

"ART. 91. SEDITIOUS WORDS AND LIBELS. Every one commits a mis-"demeanour who publishes verbally or otherwise any words or any document "with a seditious intention. If the matter so published consists of words "spoken, the offence is called the speaking of seditious words. If the matter "so published is contained in anything capable of being a libel, the offence "is called the publication of a seditious libel.

"ART. 92. SEDITIOUS CONSPIRACY. Every one commits a misdemeanour "who agrees with any other person or persons to do any act for the further-"ance of any seditious intention common to both or all of them. Such an "offence is called a seditious conspiracy.

"ART. 93. SEDITIOUS INTENTION DEFINED. A seditious intention is an "intention to bring into hatred or contempt, or to excite disaffection against

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the present law on this subject as I understand it, and I may observe that these articles were adopted by the Criminal Code Commission almost *verbatim* in their Draft Code, in which they form section 102. In the report the Commissioners say that this section appears to them "to state "accurately the existing law."

Hardly any branch of the law has a longer or more interesting history than this. Two different views may be taken of the relation between rulers and their subjects. If the ruler is regarded as the superior of the subject, as being by the nature of his position presumably wise and good, the rightful ruler and guide of the whole population, it must necessarily follow that it is wrong to censure him openly, that even if he is mistaken his mistakes should be pointed out with the utmost respect, and that whether mistaken or not no censure should be cast upon him likely or designed to diminish his authority.

If on the other hand the ruler is regarded as the agent and servant, and the subject as the wise and good master who is obliged to delegate his power to the so-called ruler because being a multitude he cannot use it himself, it is obvious that this sentiment must be reversed. Every member of the public who censures the ruler for the time being exercises in his own person the right which belongs to the whole of which he forms a part. He is finding fault with

"the person of Her Majesty, her heirs and successors, or the Government and "Constitution of the United Kingdom, as by law established, or either House "of Parliament, or the administration of justice, or to excite Her Majesty's "subjects to attempt otherwise than by lawful means the alteration of any "matter in Church or State by law established, or to raise discontent or dis- "affection amongst Her Majesty's subjects, or to promote feelings of ill-will and "hostility between different classes of Her Majesty's subjects.

"An intention to show that Her Majesty has been misled or mistaken in her "measures, or to point out errors or defects in the Government or Constitution "as by law established, with a view to their reformation, or to excite Her "Majesty's subjects to attempt by lawful means the alteration of any matter "in Church or State by law established, or to point out, in order to their re- "moval, matters which are producing or have a tendency to produce feelings "of hatred and ill-will between different classes of Her Majesty's subjects "is not a seditious intention.

"ART. 94. PRESUMPTION AS TO INTENTION. In determining whether the "intention with which any words were spoken, any document was published, "or any agreement was made, was or was not seditious, every person must be "deemed to intend the consequences which would naturally follow from his "conduct at the time and under the circumstances in which he so conducted "himself."

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his servant. If others think differently they can take the other side of the dispute, and the utmost that can happen is that the servant will be dismissed and another put in his place, or perhaps that the arrangements of the household will be modified. To those who hold this view fully and carry it out to all its consequences there can be no such offence as sedition. There may indeed be breaches of the peace which may destroy or endanger life, limb, or property, and there may be incitements to such offences, but no imaginable censure of the government, short of a censure which has an immediate tendency to produce such a breach of the peace, ought to be regarded as criminal.

These are the extreme views, each of which has had a considerable share in moulding the law of England with the practical result of producing the compromise which I have tried to express in the articles of my *Digest*. It has no claim to that quasi-mathematical precision which even in the most careful legal writings is rarely, if ever, attainable, but I think it is sufficiently distinct to afford a practical guide to judges and juries in the discharge of duties which are now seldom imposed upon them.

I will now attempt to sketch the history of the various legal controversies which have for the present ended in this compromise. The interest of the history lies in the gradual character of the process by which with hardly any legislative interference the law was modified in the course of a long series of years by the changes which took place in public sentiment on the matter to which it relates.

The main stages in the history are as follows. Under the Plantagenets the law of libel was comparatively unimportant, though the offence of libel defined in the most general terms as a defamatory writing was known to the law. Under the Tudors and Charles I. the law of libel became highly important and prominent. The definition of the offence was stringent though vague, and the law was administered by the Star Chamber, which decided both the law and the fact. During the latter part of the seventeenth century and into the eighteenth the Court of King's Bench adopted

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the doctrines of the Court of Star Chamber, but as the mode of trial was by jury efforts were made by very distinguished advocates—and especially towards the end of the century by Erskine—to get juries to adopt for practical purposes a definition of the offence of libel different from the one acted upon in earlier times. This caused the famous controversy finally ended by Fox's Libel Act, passed in 1792. The successors of Lord Mansfield and Mr. Justice Buller never gave up the view of the law which their predecessors had adopted, though they modified the practice in obedience to the directions of the Libel Act, but the change of public sentiment as to the free discussion of political affairs has practically rendered the law as to political libels unimportant, inasmuch as it has practically restricted prosecutions for libel to cases in which a libel amounts either to a direct incitement to crime, or to false imputations upon an individual, of disgraceful conduct in relation to either public or private affairs. This history I now propose to relate in detail.

The offence of libel is mentioned by Bracton in the most cursory manner. In a [1] general enumeration of crimes and punishments near the beginning of the book *De Corona*, he observes, [2] "facta puniuntur, ut furta, homicidia, scripta "ut falsa et libelli famosi." In his chapter on misdemeanours "minora et leviora crimina" he [3] observes "fit autem injuria "non solum cum quis pugno percussus fuerit verberatus "vel fustibus cæsus, verum cum ei convitium dictum fuerit, "vel de eo carmen famosum vel hujusmodi." The next definite instance I have found of any law relating to a quasi-seditious offence is a provision of the Statute of Westminster the First, 3 Edw. 1, c. 34 (1275). It is as follows: "Forasmuch as "there have been oftentimes found in the country [devisers] "of tales whereby discord or occasion of discord has many "times arisen between the king and his people or great men "of this realm, for the damage that hath and may therefore

[1] Lib. iii. chaps. v. and vi. vol. ii. pp. 150-160.
[2] P. 154. Sir H. Twiss, by a slip of the pen, translates "writings such "as false and infamous libels." It means "forgeries and defamatory "libels."
[3] P. 544.

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"ensue, it is commanded that from henceforth none be so "hardy to cite or publish any false news or tales whereby "discord or occasion of discord or slander may grow between "the king and his people or the great men of the realm; "and he that doth so shall be taken and kept in prison until "he hath brought him into the court which was the first "author of the tale." I can say nothing as to the way in which this enactment may have been used.

[1] Coke mentions "two notable records," one of 10 Edw. 3, (1337), in which Adam de Ravensworth was convicted on an indictment for calling Richard of Snowshall "Roy de Raveners;" the other of 18 Edw. 3 (1345), in which John de Northampton, an attorney, wrote a letter to Ferrers, one of the King's Council, saying that neither the judges of the Court of King's Bench nor their clerks "any great thing "would do by the commandment of our lord the king, nor of "Queen Philip (Philippa) in that place more than of any "other of the realm." The mention as notable of these two cases which seem in no other way notable, looks as if they were the only cases of libel which Coke had met with in his study of the records.

Be this as it may, there is no reason to doubt that practically libels attracted comparatively little attention till the Court of Star Chamber was at the height of its power, by which time the invention of printing, and the great intellectual movement of which it was one symptom, had given an importance to political writings which they did not possess before. It must, however, be remembered that for a long time the offences which were afterwards treated as seditious libels were dealt with in a different manner and with much greater severity, for though words were not regarded as an overt act of treason by themselves, [2] writings were, if they were considered to display a treasonable intention, so that what would now be regarded at most as libels may in earlier times have been punished as treason.

But apart from this the great subjects of discussion in all ages are religion and politics. From the latter part of the reign of Edward III., when the Lollards came into notice, to

[1] *Third Institute*, 174. [2] *Ib.* 14; 1 Hale, *P. C.* 112.

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the Reformation—a period of about 150 years,—and especially after the statutes of Henry IV. and Henry V., writings upon religious subjects which were regarded as objectionable could be dealt with as heresy or as some minor ecclesiastical offence. Under Henry VIII., Edward VI., Mary, and Elizabeth, any discussion in a sense hostile to the government for the time being of political questions of real importance would be likely to bring the disputant within one of the [1] many statutes by which new treasons and felonies were from time to time created.

I may refer by way of illustration to a single instance of the sort, the details of which have been preserved by an account written by the offender [2] Udall. Udall was a Puritan who was reputed to be, and probably was, the author of the work called *Martin Marprelate*. He was examined as to his authorship before the Privy Council in 1589, and was afterwards tried at Croydon under 23 Eliz. c. 2 (1581) for felony in writing the book. This statute enacted, amongst other things, that it should be felony to "devise, write, print, or set forth any book, &c., "to the defamation of the queen or the stirring or moving of "any rebellion." The evidence given against Udall was, according to his own account, entirely that of depositions, and much of the matter deposed to was hearsay. There is, however, little doubt that he wrote the book, for he was pressed to say whether he did or not, and was offered an acquittal if he would deny it. He refused to answer, on the ground that his denial of it would be a step towards the discovery of the true author—an obvious evasion. He justified the contents of the book, however, with some exceptions as to its style, and declared that it did not come within the act, as it was written without any malicious intent, and attacked, not the queen, but the bishops. The judge, according to Udall, said first: [3] "You of the jury have not to inquire whether he be guilty "of the felony, but whether he be the author of the book, "for it is already set down by the judgment of all the judges

[1] See the account given above of the statutes creating treasons. There were others which created analogous felonies.
[2] 1 *State Trials*, 1271.
[3] *Ib.* 1283.

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"in the land that whosoever was author of that book was "guilty by the statute of felony." He [1] afterwards said: "I "will prove this book to be against her Majesty's person; for "her Majesty, being the supreme governor of all persons and "causes in these her dominions, hath established this kind of "government in the hands of bishops which thou and thy "fellows so strive against; and they being set in authority "for the exercising of this government by her Majesty, thou "dost not strive against them, but her Majesty's person, "seeing they cannot alter the government which the queen "hath laid upon them." The jury found him guilty of felony, but not (if his account is correct) without repeated admonitions from the judge that they had nothing to do with any question except the publication of the book, the judges having decided on its guilt. [2] A Mr. Fuller (who he was does not appear; probably an officer of the court) said: "You are to find "him author of the book, and also guilty of a malicious "intent in making it." Mr. Fuller was reproved for speaking by [3] Dalton, counsel for the Crown.

We see in this case the germs of controversies which afterwards became highly important.

Side by side with prosecutions of this kind under special statutes, there were in progress the prosecutions before the Star Chamber of which I have already given specimens. It was upon these that Sir E. Coke founded his report of the case *de famosis libellis.* The cases relating to libel in Coke's *Reports* are: the case [4] *de famosis libellis,* and [5] Lamb's case. These are the earliest authorities upon the law of libel of any importance, and even in Coke it would be difficult to find anything less satisfactory. Neither attempts to define a libel. The case *de libellis famosis* lays down the following points. It distinguishes libels made against a private person, and libels made against magistrates or public persons. In reference to libels against public persons it says: "If it be against a magis-"trate or other public person it is a greater offence" (than if

[1] 1 *State Trials,* 1286.
[2] *Ib.* 1289.
[3] Probably the author of Dalton's *Justice.*
[4] Part v. fol. 125, or vol. iii. p. 254.
[5] Part ix. fol. 59, or vol. iv. p. 108.

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against a private person) "for it concerns not only the breach "of the peace, but also the scandal of government: for what "greater scandal of government can there be than to have corrupt or wicked magistrates to be appointed and constituted "by the king to govern his subjects under him? and greater "imputation to the State cannot be than to suffer such corrupt "men to sit in the sacred seat of justice, or to have any "meddling in or concerning the administration of justice." It is said that libels against the dead are punishable (which has never been acted upon), that a libeller may be punished by indictment at common law or "*ore tenus* on his confession "in the Star Chamber" by fine and imprisonment, and "if "the case be exorbitant by pillory and loss of ears." It adds, that "it is not material whether the libel be true or whether "the party against whom it is made be of good or ill fame, "for in a settled state of government the party grieved ought "to complain for every injury done him in an ordinary course "of law, and not by any means to revenge himself either by "the odious course of libelling or otherwise." It mentions various forms of libel, as writings, emblems, and pictures, and it says that when a man finds a private libel he should either burn it or give it to a magistrate, and when he finds a public libel give it to a magistrate that the author may be discovered. Lamb's case decides that "every one who shall be convicted "ought to be a contriver, procurer, or publisher of it knowing "it to be a libel."

The inference from all this seems to be that Coke's idea of a libel was, speaking generally, written blame, true or false, of any man public or private, the blame of public men being a more serious matter than the blame of a private man.

A passage in Hudson's treatise on the Star Chamber contains a remarkable commentary upon these cases. After noticing some other offences of which the Court took cognizance, he comes to libel. [1] "In all ages libels have been "severely punished in this court, but most especially they "began to be frequent about 42 & 43 Elizabeth" (1600) "when "Sir Edward Coke was her attorney-general. But it must "not be understood of libels which touch the alteration of

[1] Hudson, pp. 100-104.



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CH. XXIV. "government" (I suppose he means that they were dealt with under special acts as treason or felony) "as—

"'The Cat, the Rat, and Lovell the Dog,
"'Rule all England under a hog;'

"or the work of [1] Mr. Williams of the Temple not long since "executed at Charing Cross; but libels against the king's "person and nobles have been here examined. So was that "in 7 Hen. 8" (1515), "at which time for the discovery of "the hand the books of all the tradesmen in London were "to be viewed with two aldermen and a knight appointed by "the council to confer the hands and manner of writing at "the Guildhall, whither they were brought sealed for that "purpose only, and this done for the discovery of the "author."

Hudson then proceeds to refer to a number of cases which show that the law of libel administered by the Court of Star Chamber was by no means confined "to libels against the king's person and nobles." "For scandalous letters the "precedents are infinite. One of the first sent to the person "himself was Lloide, register of the Bishop of St. Asaph, "against Peter Breveston, clerk, sentenced M. 2 Jac." (1604), "and yet the defendant would have undertaken to have "proved the contents of the letter to have been true, he "thereby charging him with bribery and extortion in his "place. There was Sir William Hale's case against Ellis, a "scoffing letter, and severely punished. A scurrilous letter "from one mean man to another was M. 12 Jac." (1615) "sentenced at the suit of Barrows *v.* Snelling, and the cause "only sent to the party himself. Nay, Naton Roper 1 Jac.

[1] He was executed in 1619 for writing two books called "*Balaam's Ass*, and *Speculum Regale*, "in which he took upon himself the office of a prophet, and "affirms that the king which now is will die in the year 1621, which opinion "was founded on the prophecy of Daniel, where that prophet speaks of a "time, and times, and half a time. . . . And he also says this land is the "abomination of desolation mentioned in Daniel, and that it is full fraught "with desolation, and that it is an habitation of devils, and the anti-mark of "Christ's church." "All the court clearly agreed he was guilty of high "treason at common law, for these words import the end and destruction of "the king and his realm," although "he inclosed his book in a box sealed "up, and so secretly conveyed it to the king, and never published it."—2 *State Trials*, 1685-6, quoting from 2 Rolle, 88. Poor Williams!

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"was sentenced for writing a scoffing letter by one rival to "another."



He adds, "There are two gross errors crept into the world "concerning libels. 1. That it is no libel if the party put "his hand unto it, and the other that it is not a libel if it be "true; both which have been long since expelled out of this "court." The reason given why both of these opinions are erroneous is that libels are punished "for that they intend to "raise a breach of the peace." Hudson adds this curious remark. "I could spend much time in the discourse of the "libels of these days, but Sir Edward Coke hath shortly and "pithily set down the diversities, who (I think) in his time "was as well exercised in that case, as all the attorneys that "ever were before him."

In the early part of the seventeenth century prosecutions for seditious words were as common as prosecutions for libels, and sometimes even more important. I will refer only to two, one of which was memorable in the general history of the country.

In 1629, on the dissolution of Charles I.'s third parliament, [1] Sir John Elliot, Denzil Holles, and Benjamin Valentine were prosecuted on a criminal information for seditious speeches in Parliament. [2] The information charged not only words spoken with a seditious intention but also a seditious conspiracy to disturb Parliament. The defendants were convicted and Elliot was fined and imprisoned, but the conviction was quashed on

[1] See proceedings against them in 3 *State Trials*, 293-336.

[2] The language of the information is a strange composition. Parts of it are as follows:—"Quod præfatus J. E. machinans et intendens omnibus viis et "modis quibus poterit discord. malevolenc. murmuraciones et seditiones tam "int. pred. dom. regem et magnat. prælatos proceres et justic. suos hujus "regni quam. int. pred. magnat. prælat. proceres et justiciar. dicti dom. regis "et reliquos subdit. suos seminare et excitare et regimen et gubernation. "hujus regni Angl. tam in pred. dom. rege quam in consiliar. et majest. suis "cujuscumque generis totalit. deprivare et enervare et tumult. et confusion. in "omnibus statibus et partibus hujus regni Angl. introducere . . . hæc falsa "ficta malitiosa et scandalosa verba Anglicana altâ voce dixit et populavit. "videlicet 'The king's Privy Council, all his judges, and his counsel learned, "'have conspired together to trample under their feet the liberty of the "'subjects of this realm and the privileges of this house."

In another count the information charges that "J. E., B. V., et D. H. eodem "secundo die Martii anno quarto supradict. apud West. pred. maliciose "agreaver. et inter eos conspiraver. ad disturband. milites cives et burgens. de "pred. domo commun. parliament. in eadem domo apud Westm. pred. "adtunc et ibidem assemblat."



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a writ of error brought by Lord Hollis in 1668. The case is a leading authority for the proposition that the courts of common law have no jurisdiction over offences committed in Parliament by members of Parliament in their character as members.[1]

The other case to be mentioned is deserving of notice as it established a rule which has never since been doubted, and which was in those days creditable to the judges who established it. This was [2] Pine's case. Pine had spoken disrespectfully of Charles I., saying that he was "as unwise a "king as ever was, and so governed as never king was, for he "is carried as a man would carry a child with an apple. Also, "before God he is no more fit to be king than Hickwright" (Pine's shepherd). The judges being according to the fashion of the time consulted beforehand had before them twenty-one cases, from the time of Henry VI. downwards, of prosecutions for words and unpublished writings, "upon consideration of "all which precedents and of the statutes of treason it was "resolved by [3] fourteen judges, and so certified to His Majesty, "that the speaking of the words before mentioned, though "they were as wicked as might be, was not treason. For they "resolved that unless it were by some particular statute no words will be treason." . . . "The words spoken here can "be but evidence to discover the corrupt heart of him that "spake them; but of themselves they are not treason, neither "can any indictment be passed upon them." Probably the last expression means no indictment for treason. They would have been punishable at that time not only in the Star Chamber, but as a contempt against the king at common law.

I have already, for another purpose, given instances of the extreme severity of the Star Chamber proceedings in respect

[1] Upon this point see the case of Sir W. Williams (13 *State Trials*, 1369). He as Speaker published by order of the House of Commons Dangerfield's narrative, which contained many reflections on the Duke of York of a gross nature. He was convicted and fined £10,000. Several attempts were made to get the judgment reversed in the reign of William III., but they all failed. The whole subject is discussed in Stockdale *v.* Hansard, 9 A. & E. 1.

[2] 3 *State Trials*, 359.

[3] At that time there were four puisne judges of the Court of Common Pleas, and four barons of the exchequer, besides the chief baron.

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of libels and words regarded as seditious, and in particular I have noticed the two prosecutions of Prynne, one of which was also directed against Bastwick and Burton. There were many others, to which it is needless to refer more particularly. It ought, however, to be observed, as a point of considerable importance in the history of the law of libel, that in the Star Chamber it was impossible for any question to arise as to the respective provinces of the court and the jury, as the court decided the whole matter without the assistance of a jury. The importance of this will appear when I come to describe the cases decided in the eighteenth century.

In connection with this subject it is necessary to notice shortly the law relating to the licensing of books. Printing did not become at all general in England before the middle of the sixteenth century. [1] The Stationers' Company was established by a charter of Philip and Mary, the declared object of the Crown being to prevent the propagation of the Reformed religion. "About this time there are several "decrees and ordinances of the Star Chamber regulating the "manner of printing, the number of presses throughout "the kingdom, and prohibiting all printing against the force "and meaning of any of the statutes or laws of the realm. "Until the year 1640 the Crown, through the instrumentality "of the Star Chamber, exercised this restrictive jurisdiction "without limit, enforcing by the summary powers of search, "confiscation, and imprisonment, its decrees, without the "least obstruction from Westminster Hall or the Parliament "in any instance." The powers of the Star Chamber and its ordinances came to an end on its abolition in 1640, and the system of licensing books was introduced by an ordinance of the Long Parliament, against which Milton wrote the *Areopagitica* in 1644. In 1662 the system was continued by the Licensing Act, 13 & 14 Chas. 2, c. 33, which forbade all printing without license, and gave power to the king and secretaries of state to search all houses and shops where they suspected unlicensed books to be printed, and to seize them. This act was enacted at first for two years, but it was continued by 16 Chas. 2, c. 8, by 1 Jas. 2, c. 17, s. 15 (1685), and again, in 1692,

[1] Copinger on *Copyright*, pp. 11-13.

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by 4 & 5 Will. & Mary, c. 24, s. 14, which continued it for a year, and thence to the end of the next session. It expired finally in 1694. Apart from the provisions relating to licensing, the first section enacts that "no person shall presume to "print, &c., any heretical, seditious, schismatical, or offensive "books or pamphlets wherein any doctrine or opinion shall "be asserted or maintained which is contrary to the Christian "faith, or the doctrine or discipline of the Church of England, "or which shall or may tend or be to the scandal of religion, "or the Church, or the government or governors of the "Church, State, or Commonwealth, or of any corporation or "particular person or persons whatsoever," or import any such work, or publish, sell, or disperse it, or cause it to be bound or stitched. The effect of this was to make all such acts misdemeanours, and this gave to the law of libel an extent which it never had at any other period except perhaps under the Star Chamber.

However, both under the Commonwealth and under Charles II. the details of the law of libel were less likely to be made the subject of discussion or judicial decision than they afterwards came to be. In the first place, special laws were in force which exposed political libellers to the chance of a prosecution for treason, as appeared in the cases of John Lilburne under the Commonwealth, and Twyn the printer, FitzHarris, and others under Charles II. Moreover, the system of licensing books must have made it difficult for any one to publish a pamphlet which was objectionable to the Government unless he was prepared to take the risk of doing it secretly, the effect of which was to bring him at once into conflict with the law. Until the right to publish without a license is conceded, the question of the limits of the right cannot be discussed. Moreover, all difficulty is likely to be removed by the bitterness which is natural to unlicensed publications and the tameness enforced upon licensed ones. Abundant proof, however, remains that in the reigns of Charles II. and James II. the prosecutions for libel were at once common and highly important, and the punishments cruelly severe.

Though the trials for libel during this period reported in

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the *State Trials* are [1] not numerous, they are characteristic as showing how the law was administered. The most important of them in a legal point of view are the trial of [2] Carr for publishing a paper called *The Weekly Packet of Advice from Rome.* The passage for which he was indicted said: "There "is lately found out by an experienced physician an in- "comparable medicine" (gold—described with some little wit as a medicine). It is said, amongst other things, that "it "will make justice deaf as well as blind," and "stifles a plot "as certainly as the itch is destroyed by butter and brim- "stone." These passages no doubt imputed corruption to Scroggs. After evidence had been given of Carr's being the author, on which his counsel (Sir F. Winnington) addressed the jury, Winnington added—to the court: [3] "The informa- "tion says 'false, illicite, et maliciose.' I know there are "things that do imply malice in themselves. Truly, my "lord, I am upon a tender point, and know not how to "express myself. I say, supposing it should fall out that "this man wrote this book, and he might have some "little extravagances in his head in writing, whether this "man did it maliciously to scandalise the Government, as "this information says, is a question. Truly, my lord, there "is many an indiscreet act a man may be guilty of that "cannot be called a malicious act." This I suppose means to suggest, as delicately as might be, that Carr was only chuckling over rumours he had heard of Scroggs's corruption, without seriously imputing to him that offence—an act which Winnington hints might be indiscreet without being malicious.

In summing up, Chief Justice Scroggs said upon this: "As for those words *illicite, maliciose,* I must recite what "Mr. Recorder" (Jeffreys) "told you of at first, what all "the judges of England have declared under their hands. "The words, I remember, are these. When by the king's "command we were to give in our opinion what was to be "done in point of the regulation of the press, we did all

[1] Several of them are curious, historically and otherwise. See *e.g.* Mrs. Cellier's case in 1680, 7 *State Trials*, 1183.

[2] *Ib.* 1114.

[3] *Ib.* 1122.

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"subscribe that to print or publish any newspapers or "pamphlets of news whatsoever is illegal; that it is a "manifest intent to the breach of the peace, and they may "be proceeded against by law for an illegal thing. Suppose "now that this thing is not scandalous, what then? If there "had been no reflection in this book at all, yet it is *illicite* "and the author ought to be convicted for it. And that is "for a public notice to all people, and especially printers and "booksellers, that they ought to print no book or pamphlet "of news whatsoever without authority. So as he is to be "convicted for it as a thing *illicite* done, not having autho-"rity." . . . . "Therefore this book, if it be made by him to "be published, it is unlawful whether it be malicious or not." . . . . "If you find him guilty and say what he is guilty of, "we will judge whether the thing imports malice or no. Sir "Francis Winnington hath told you there are some things "that do not necessarily imply malice in them. If this "thing doth not imply it then the judges will go according "to sentence; [1] if it doth—so that it concerns you not one "farthing whether malicious or not malicious, that is plain." In the [2] case of Benjamin Harris, tried in the same year, the same judge made the same statement as to the opinion given by the judges. I have no doubt that the opinion was actually given, and it is remarkable, considering what we should regard as its overwhelming importance, that it should have passed with so little notice or disapprobation. [3] In the year in which these trials took place proceedings were instituted in Parliament against Scroggs, and a committee was appointed "to examine the proceedings of the judges in Westminster "Hall." Their [4] report gives many instances of judicial misconduct, and in particular censures Scroggs and the other judges of the King's Bench for having made an [5] order in the case of Carr, and before his conviction, for the suppression of

[1] These words are unmeaning, or at least incomplete.

[2] 7 *State Trials*, 927.

[3] See these proceedings in the report of the committee and the articles of impeachment in 8 *State Trials*, 174-224.

[4] P. 184, &c.

[5] "Ordinatum est quod liber intitulat. *The Weekly Packet of Advice from* "*Rome*, non ulterius imprimatur vel publicetur per aliquam personam "quamcunque."—P. 187.

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the *Weekly Packet.* The House of Commons voted this "most illegal and arbitrary," and made his conduct in respect of it the subject of the third article of his impeachment. The committee enumerate many arbitrary proceedings on the part of Scroggs and his brethren, and in particular [1] report that "a very great latitude had been taken of late by the "judges" in the matter of punishments, showing great severity in some instances and undue lenity in others. Nothing, however, is said of the opinion expressed by the judges above referred to. This is most remarkable, for if Scroggs had falsely made the statement that such an opinion was given, he would have been guilty of an offence which could neither be denied nor palliated, and if the opinion itself had been at that time regarded as an act of subserviency to the king and of tyranny as against the people at large, it would have formed a natural subject for impeachment, or at all events for [2] proceedings like those taken in 1640 against the judges who had given extra-judicial opinions in favour of ship-money.

These reasons seem to me to go far to show that monstrous as the opinion of the judges appears to us, it may not have appeared so when it was delivered.

The great frequency of prosecutions for political libels and seditious words at this time, appears not only from passages in the report of the Parliamentary Committee referred to above, but from a [3] passage in Luttrell's *Diary* for the year 1684, which enumerates sixteen trials for those offences between April 30 and November 28 in that year.

Their extravagant cruelty is illustrated by several cases reported in the *State Trials,* in each of which the doctrine that the court and not the jury are to determine the character of the matter published is asserted and acted upon in the most uncompromising way. The first of these is the case of [4] Sir Samuel Barnardiston, who was tried for seditious libel in writing his friend, Sir Philip Skippon, four private letters containing the rumours of the day. He expressed opinions

[1] Pp. 187-190.
[2] 3 *State Trials,* 1300, &c.
[3] Printed at 10 *Ib.* 125-129.
[4] 9 *Ib.* 1334.

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favourable to Russell and Sydney, and said (*inter alia*) that "the Papists and high Tories are quite down in the mouth," and that "Sir George" (Jeffreys) "is grown very humble." He also repeated various rumours then current to the effect that a turn in affairs favourable to the Whigs had taken place. Jeffreys (in whom it was gross indecency to try the case, as he was himself supposed to be libelled) scouted the notion that there was any necessity to show that the letters were written with a seditious intent, and that there was or could be any doubt that the act in itself was seditious, and he [1] directed the jury to that effect. The question whether there was any evidence of malice was afterwards argued on a motion in arrest of judgment, and the court [2] affirmed in the most unqualified way the law which Jeffreys laid down at the trial. Finally the defendant was sentenced to pay the monstrous fine of £10,000 for the mere expression of political opinions to a private friend in a private letter. Another case was that of Richard [3] Baxter, who was fined £500 for certain passages in his paraphrase of the New Testament which were said to refer to the bishops of the Church of England and their persecutions of the Nonconformists. The behaviour of Jeffreys on this trial was, if it is correctly reported, as to which there may be a doubt, as infamous as his behaviour to Lady Lisle. It is impossible to exaggerate its brutality and ferocity. It must however, I think, be admitted that Baxter's reflections were intended for the then bishops of the Church of England, and not, as his counsel contended, for the persecutors of other ages and countries; and it must also be said that they were neither unnatural nor altogether unjust at the time. Baxter's own conduct and that of his counsel in trying to give them a meaning which they did not bear, seems to me disingenuous and timid, and this to some extent shakes my confidence in the correctness of the report of Jeffreys' behaviour. A brutal, cruel, grossly unjust judge is hardly likely to be treated with scrupulous justice by bitter partisans of a theological

[1] 9 *State Trials*, 1551-1552.
[2] *Ib.* 1366.
[3] 11 *Ib.* 493.

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writer who himself was not acting quite up to his own standard.

The last of these cases is that of [1] Samuel Johnson. He was sentenced to be fined 500 marks, to be thrice pilloried, and to be whipped from Newgate to Tyburn for two libels: one "An humble and hearty address to all "the English Protestants in the present army," calling upon them not to assist Papists illegally enlisted and commissioned, in tyrannising over Protestants. The other asserted "that resistance may be used in case our religion and rights "should be invaded." The sentence was cruel in any view of the case, but the address was practically a direct incitement to mutiny, though, on the other hand, there was much force in what Johnson urged as to the illegality of assembling an army partly composed of Roman Catholics, and he was certainly right in saying that the commissions of Roman Catholic officers were illegal and void. His libel, in short, was in the nature of an act of hostility against acts of power on the king's part, some of which were clearly illegal. In this, as in the other cases, [2] the rule was laid down that the jury ought not to consider whether the libel was seditious, but to determine only whether or not it was written or published by the prisoner.

Of the [3] trial of the seven bishops for libel, in 1688, I have already spoken. It seems to me, for the reasons already given, impossible to appeal to it as a precedent for any legal proposition whatever. The judges contradicted each other, and the whole proceeding was coloured by passionate political excitement. It ought, however, to be remarked, whatever may be the legal inference, if any, that as a fact the whole matter, including the character of the matter published, was left to the jury. The alleged libel consisted in the suggestion made by the bishops that the king's declaration was illegal, because it was founded upon a dispensing power which did not exist. The defence in great part was, that in fact the dispensing power did not exist, and in proof

[1] 11 *State Trials*, 1339.
[2] *Ib.* 1349-1350.
[3] 12 *Ib.* 183-521.

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CH. XXIV. of this many records were put in evidence. [1] Some of these being in Latin and Norman French, an interpreter was sworn to read them into English for the benefit of the jury. This was after Sir R. Sawyer had said: "Mr. Attorney has been "pleased to charge in his information that this is a false, "malicious, and seditious libel: both the falsity of it and "that it was malicious and seditious are all matters of fact "which, with submission, they have offered the jury no proof "of, and I make no question but easily to demonstrate quite "the contrary." The question whether or not the king had a dispensing power was clearly a question of law and not of fact, nevertheless the records were allowed to go to the jury as evidence that the law was as the bishops said it was. This carries the powers of the jury even further than they would be carried in the present day.

For many years after the Revolution of 1688 the law as to seditious offences received little addition or development by judicial decisions. A full history of its development from the Revolution to 1783 is given by Lord Mansfield in his judgment in the Dean of St. Asaph's case. I shall take it as my guide, giving, however, somewhat more fully the descriptions of the trials to which Lord Mansfield refers in a summary way. It begins thus: "We know "there were many trials for libels in the reign of King "William. There is no trace that I know of of any report "that at all bears upon the question" (of the powers of juries) "during that reign but the case of R. *v.* Bere, which "is in Salkeld: that was in the reign of King William, and "the only thing there applicable to the present question is "that the writing complained of must be set out *according to* "*the tenour*. Why? That the court may judge of the very "words themselves; whereas if it was to be *according to the* "*effect* that judgment must be left to the jury." . . . "During "the reign of Queen Anne we know several trials were had

[1] 12 *State Trials*, 374-375. "*L. C.-J.:* Read it in English for the jury to "understand it. (Then Mr. Halstead was sworn to interpret the Record into "English.)" In R. *v.* Burdett (4 B. & A. 181) Abbott, C.-J., refers to this, saying that "The evidence was addressed to the court rather than to the jury," but I think this is not accurate, at least if the report in the *State Trials* is correct.

[2] 21 *State Trials*, 1036-1038.

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"for libels, but the only one cited is in the year 1704, and "there the direction (though Lord Holt, who is said to have "done it in several cases, goes into the enormity of the libel) "to the jury was, if you find the publication in London you "must find the prisoner guilty. Thus it stands as to all "that can be found precisely and particularly in the reigns of "King William and Queen Anne."

One case, not here referred to, may be mentioned, because it looks at first sight as if a defendant had been not only permitted but challenged to prove the truth of a libel. A man named [1] Fuller published a statement that one Jones had made a deposition on oath stating that he (Jones) had in the interest of James II. distributed £180,000 in bribes to various statesmen. Being called upon by the House of Lords to produce Jones, he was unable to do so, and was ordered to be prosecuted for a libel. An information was accordingly filed against Fuller, which averred, *inter alia,* that "the said scandalous libels were and are false and feigned "and altogether contrary to the truth." [2] Holt at the time asked Fuller (who had no counsel), "Can you make it appear "that they" (the facts stated) "are true?" Fuller was unable to do so, and was convicted. [3] In this case the falsehood was the gist of the charge, and the defendant was regarded rather as a cheat and impostor than as a libeller.

Soon afterwards (in 1704) occurred the case to which Lord Mansfield refers. [4] One Tutchin was convicted of libel for articles in a periodical called the *Observator,* which in these days would be described as opposition articles. They said,

[1] 14 *State Trials,* 517.

[2] *Ib.* 534.

[3] In R. *v.* Burdett (4 B. & A. 146-147) it was held that the truth of a libel could not be in any way given in evidence, not even in mitigation of punishment, but Bayley, J., says that there might conceivably be cases in which the question of the truth of a statement would make the difference between libel and no libel, and he mentioned as an illustration the assertion that a man was at a definite time and place convicted of a crime. Here the truth of the alleged fact might, he said, afford a defence to a charge of libel, but he does not explain his views fully. Fuller's case might afford an illustration.

[4] 14 *State Trials,* 1095-1200. Tutchin had been sentenced by Jeffreys, after Monmouth's rebellion, to be imprisoned for seven years, and whipped every year through every market town in Dorsetshire, which, it was observed, made a whipping every fortnight for seven years. He escaped his sentence by catching the small-pox, and after his recovery by purchasing a pardon. He went through other adventures, and was finally beaten so severely for one of his libels that he died of it.—14 *State Trials,* pp. 1197-1200.

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in substance, that the ministry was corrupt and the navy ill-managed. Lord Holt was the presiding judge. The fair way of describing his charge seems to me to be that it shows that the question how far the jury were to judge of the character of a libel, and how far it was a question of law for the court, had not at that time been fully raised or appreciated. Holt does not pointedly say that the jury are to take the law from him. His charge seems to assume it, but some expressions in it may be taken otherwise. His words, as reported, are as follows:—[1] "They say they are innocent "papers and no libels, and they say nothing is a libel but "what reflects upon some particular person. But this is a "very strange doctrine to say it is not a libel reflecting on "the government, endeavouring to possess the people that "the government is mal-administered by corrupt persons "that are employed in such or such stations either in the "navy or army. To say that corrupt officers are appointed "to administer affairs is certainly a reflection upon the "government. If people should not be called to account "for possessing the people with an ill opinion of the govern-"ment no government can subsist. For it is very necessary "for all governments that the people should have a good "opinion of it. And nothing can be worse to any govern-"ment than to endeavour to produce animosities as to the "management of it; this has always been looked upon as "a crime, and no government can be safe without it is "punished.

"*Now you are to consider whether these words I have read to* "*you do not tend to beget an ill opinion of the administration* "*of the government?* To tell us that those that are employed "know nothing of the matter, and those that do know are not "employed. Men are not adapted to offices, but offices to "men, out of a particular regard to their interest and not to "their fitness for their places. This is the purport of these "papers."

The words italicised do certainly look as if Holt meant to leave to the jury the character of the writing, but if the passage is read as a whole it seems to me that Lord Mansfield's

[1] P. 1128.

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view of it is quite correct. Holt directs the jury positively as matter of law, that the paper is a libel. This is confirmed by the concluding words of the charge. After some observations on the evidence of publication (small quibbles on this subject formed the principal part of the defence) the charge ends thus: "Gentlemen, I must leave it to you. If you are satisfied that "he is guilty of composing and publishing these papers in "London you are to find him guilty."

For many years after Tutchin's case nothing of importance occurred upon this subject, though one trial took place which is in itself too characteristic and also too amusing to be passed over in silence. In the year 1719 [1] W. Hendley, the vicar of Islington, and some of his friends who were probably Jacobites, "lucri avidi et nequiter et injuste intendentes grandes denariorum summas illicite lucrari et obtinere," took into the country a number of school children, to wit, twenty boys and thirty girls, and "inter sese et quam plurimas alias male dispositas personas juratoribus prædictis

[1] "Willelmus Hendley, nuper de Chislehurst in comitatu Kanciæ, Clericus; "Georgius Campman, nuper de eâdem, Painter; Robertus Hicks, nuper de "eâdem, Labourer; et Filliar Harding, nuper de eâdem, Packer; et Watterinus "Pratt, nuper de eâdem, Upholsterer; existentes personæ, seditiose, et male "disposite ad gubernationem hujus regni, sub excellentissimo Domino Georgio "nunc regi feliciter stabilito, maxime aversi." Both law Latin and law French became increasingly barbarous as time went on. Mediæval Latin and Norman French were pointed and expressive languages, but as English assumed a classical form, and the use of French and Latin survived merely for a few technical purposes, the English forms of them became jargon of the most barbarous kind. This change had reached its height by the middle of the seventeenth century. Compare *e.g.* these specimens:—

1663.

"Fuit agree per les Justices sur "conference touchant ceux queux "assemble eux in Farley Wood in "Yorkshire 1663 que sur indictment "pur compassing mort le roy overt "fait poet estre layd in consulting a "levyer guerre contre lui (que est "overt act de soymesme) et actual "assembling et levying guerre. . . "Le Count de Essex et South' in"tended daler al Court daver prise "la reigne en lour power et remover "ascun de councel, et a ceo force as"sembled multitude de people."—1 Hale, *P. C.* 120-121.

1353.

"Aussint est ordene et etabli qe "touz marchantz Gascons et autres "estranges pussent amener sauve"ment leur vins en Engleterre a queu "port qe lour plerra et faire ent lour "profit. Issint totes foitz qe le "botiller le Roi purra faire le pur"veance le Roi de vins des aliens "quant besogne serra faisant paiement "pur meismes les vins deinz XL. "jours en manere come ad este usee "dauncien temps."—27 Edw. 3, st. 1, c. 6.

Or compare the Latin of Magna Charta with the miserable stuff in the text.

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CH. XXIV.

"ignotas conspiravere et confederavere cum prædictis pueris et "puellis *pro* oberrare (*for* to wander), itinerari, et vagari ad "diversas parochias in comitatu Kanciæ prædicto, et in aliis "comitatibus Angliæ in parochialibus ecclesiis et aliis parochiis "illicite et infeste lucrari colligere, et obtinere diversas grandes "denariorum Summas colore et prætextu colligendi ellemosinas "et charitatis dona pro sustentatione et mantenatione præ-"dictorum puerorum puellarumque." In other words they were indicted for going about with school children and preaching charity sermons on their behalf. This, it was suggested, was seditious, and a wicked attempt to tax people illegally. "The sum of £3 was raised even in that little "parish (Chislehurst), and suppose ten thousand parishes in "England, from each of which, if that sum were raised, it "would be enough to bear the Chevalier's charges into Italy, "and help him to consummate the marriage with the Princess "Sobieski upon whom he might get new pretenders to the great "disquiet of the Protestant interest." The judge (Powys, J.) thought that "the manner of collecting had some resemblance "with that of Cardinal Alberoni's, for he laid a tax on the people "which they were forced to pay, and gave it the specious "name of a free gift, *alias* charity. If this stratagem was to "spread the nation is in danger of paying double taxes." The defendants were convicted, and the judge fined them 6*s*. 8*d*. each, and told them if they did not like the verdict they might try a writ of error. [1] They seem to have preferred paying their 6*s*. 8*d*. to incurring that expense. This case is the foundation of the following curt report. [2] "It is unlawful for "people to go about the country and collect charity unless "they have letters patent. Per Powell, J." (it should be Powys) "anon."

The case has a more serious interest as an illustration of

[1] The judge wrote an elaborate account of this ludicrous proceeding to the Lord Chancellor (Macclesfield), pp. 1414-1419. He treats the case with the greatest gravity. It lasted, he says, from 6 A.M. till noon, and he observes: "This case, if under a general consideration, is of a vast extent and mighty "consequence. . . . The levying of money is the tenderest part of our con-"stitution . . . and though it be said it is all but voluntary giving, yet it is "a sort of compulsion, by the solemnity in the church, and vying with "others, and being marked out if refusing or giving meanly."

[2] 11 Mod. 221.

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the extent to which it was possible, up to a very recent date, to increase by judicial decisions the number of offences known to the law.

To return to Lord Mansfield's history of the law as to political libels. He continues, "We know that in the reign "of George I. there were several trials for libels, but I have "seen no note or traces of them, nor any question concerning "them. In the reign of George II. there are others, but the "first of which I have a note was in February, 1729, [1] R. "v. Clarke, which was tried before L. C. J. Raymond, and "there he lays it down expressly (there being no ques- "tion about an excuse or about the meaning), he lays it "down the fact of printing and publishing only is in issue." Lord Mansfield then proceeds to give a picturesque account of the trial, in 1731, of Francklin for publishing the *Craftsman*. He says, "The *Craftsman* was a celebrated party paper "written in opposition to the party of Sir Robert Wal- "pole, by many men of high rank and great talents. The "whole party espoused it. It was thought proper to prose- "cute the famous Hague letter. I was present at the trial. "It was in the year 1731. It happens to be printed in the "*State Trials*. There was a great concourse of people; it was "a matter of great expectation and many persons of high "rank were present to countenance the defendant. They "started every objection and laboured every point. When "the judge overruled them he usually said, 'If I am wrong, "'you know where to apply.' The judge was my Lord Ray- "mond, C. J., who had been eminent at the bar in the reign "of Queen Anne, and had been Solicitor and Attorney General "in the reign of George I., and was intimately connected with "Sir Edward Northey, so that he must have known the ancient "practice."

The Hague letter is said to have been written by Lord Bolingbroke. The *Craftsman* censured the foreign policy of the then government in reference to a treaty concluded with Spain, and charged them in language by no means violent with incapacity and bad faith. At the trial the argument of the counsel turned mainly upon the question whether the

[1] 17 *State Trials*, 667, *note*. It is of no interest.



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expression "certain ministers" meant the king's ministers (which it obviously did). The judge ruled most emphatically that the only questions for the jury were publication and the truth of the innuendoes. "[1] Then there is a third thing, to "wit, whether these defamatory expressions amount to a libel "or not? This does not belong to the office of the jury, but "to the office of the court." He also said that if the innuendoes were proven, "I must say they are very scandalous and reflect-"ing expressions, because they charge them with perfidy in "breaking of treaties, ruining in a manner their country, &c., as "you may see at large in the letter, and it is very evident that "these treaties could not be made without the knowledge and "direction of his Majesty... So, gentlemen, if you are sensible "and convinced that the defendant published that *Craftsman* "of the 2nd of January last, and that the defamatory expres-"sions in the letter refer to the ministers of Great Britain, "you ought to find the defendant guilty." Francklin was accordingly convicted.

This case is remarkable as marking the point at which the judges laid down the principle afterwards so strongly contested in a perfectly definite, uncompromising way. [2] An attempt was made to set aside the verdict on highly technical grounds, but the Chief Justice's direction was never complained of. Lord Mansfield says, "Mr. Fazakerly and Mr. Bootle were, as "we all know, able lawyers, they were connected in party "with the writers of the *Craftsman*, they never thought of "complaining to the court of a misdirection, they would not "say it was not law. They never did complain. It never was "complained of, nor did any idea enter their heads that it "was not agreeable to law." He adds, "Except that case in "1729 that is mentioned and this, the trials for libels before "my Lord Raymond are not printed, nor to be found in any "notes. But to be sure his direction in all was to the same "effect. There are no notes that I know of, and I think the "bar would have found them out on this occasion if there had "been any that were material; there are no notes of the trials "for libels before my Lord Hardwicke; I am sure there are "none before L. C. J. Lee, till the year 1752, when the case of

[1] 17 *State Trials*, 672.

[2] 22 *Ib.* 973, *note*.

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"The King *v.* Owen came before him. This happens to be "printed in the *State Trials*, though it is incorrect, but "sufficient for the present purpose. I attended that trial "as Solicitor General."

The case of [1] R. *v.* Owen was a prosecution for a libel upon the House of Commons. The purport of Owen's publication was that Alexander Macdonald had been unjustly and oppressively committed by the House on account of his behaviour at the Westminster election. [2] The defendant's counsel urged the jury to acquit, on the ground that the publication was not malicious or proved to be false. The judge (Lee, L. C. J.) directed a conviction if the jury thought the publication proved. "L. C. J. Lee," says [3] Lord Mansfield, "was the most "scrupulous observer and follower of precedents, and he "directed the jury *as of course*." The jury persisted in acquitting the defendant generally, though they were asked specially whether they thought he had published the pamphlet.

This was, I believe, the first case (unless the case of the seven bishops be regarded as an instance of the same thing) in which a jury [4] in England exercised their undoubted power to return a general verdict of not guilty in a case of libel, when the court told them that they had no moral right to do so, that the question of libel or not was for the court, and that the publication under consideration was libellous.

Lord Mansfield continues his history thus: "When I was "Attorney General" ([5] from 1754 to 1756) "I prosecuted some "libels: one I remember, from the condition and circumstances "of the defendant. He was found guilty. He was a common-"councilman of the city of London; and I remember another

[1] 18 *State Trials*, 1203.

[2] Pratt, afterwards Lord Camden, was one of them.

[3] Lord Campbell says of him, "Highly honourable and respectable, he was "the dullest of the dull during the whole course of his life."—*Lives of the Chief Justices*, ii. 214.

[4] A remarkable case had occurred in New York. See the case of Zenger, 17 *State Trials*, 675, A.D. 1735. The speech of Zenger's counsel, Hamilton, was singularly able, bold, and powerful, though full of doubtful, not to say bad, law, which is brought out in some very able letters published at the end of the case. I may observe that the author of those letters would have found it difficult to defend himself on his own principles if he had been tried for a libel on Hamilton.

[5] Campbell, *Lives of Chief Justices*, ii. 381. Lord Mansfield was Solicitor General for twelve years.



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"circumstance: it was the first conviction in the city of London "that had been had for twenty-seven years. It was the case "of R. *v.* Nutt, and there he was convicted under the very same "direction before Lord Chief Justice Ryder. In the year 1756 "I came into the office I now hold. Upon the first prosecution "for a libel which stood in my paper, I think (but I am not "sure), but I think it was the case of R. *v.* Shebbeare, I made "up my mind as to the direction I ought to give. I have "uniformly given the same direction in all, almost in the same "form of words. No counsel ever complained of it to the "court. Upon every defendant being brought up for judg- "ment, I have always stated the direction I gave, and the "court has always assented to it."

The most remarkable of the decisions referred to by Lord Mansfield in this striking passage were given in the cases of the prosecutions of the publishers of Junius's celebrated letter to the king in 1770. They were the cases of [1] Almon, Miller, and Woodfall. Almon was convicted, Miller was acquitted, and in Woodfall's case the jury returned a verdict of "guilty "of publishing only." Upon this last verdict a new trial was granted, but the proceedings were dropped. In Almon's case the great contest was as to the defendant's responsibility for the publication. The paper was proved to have been sold by his servant in his shop, but it did not appear that Almon himself knew of or authorised the sale. Lord Mansfield's direction upon this was that such a sale [2] "was sufficient "evidence to convict the master of the house or shop, though "there was no privity or concurrence in him, unless he proves "the [3] contrary or that there was some trick or collusion."

In the case of Miller there was no question as to publication, for the letter had been republished in the paper (the *Evening Post*) published by him, but the counsel respectively attacked and defended the letter itself, Lord Thurlow describing it as

[1] 20 *State Trials*, 803, 870, and 895.
[2] *Ib.* 838.
[3] This expression is obviously wrong, as it implies that the publisher ought to prove his privity or concurrence in the publication in order to relieve himself from responsibility for it. The meaning is plain from other passages, and is that the sale in the shop in the ordinary course of business throws on the shopkeeper the burden of proving that the sale was without his privity or concurrence.

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seditious and malignant, and Serjeant Glynn defending it as a piece of manly, wholesome, and dutiful advice to the king. [1] Lord Mansfield with great elaboration stated to the jury the doctrine that they had to determine nothing except the question of publishing and that of the innuendoes. He admitted that they had a legal power to give a general verdict of not guilty, but denied their moral right to do so unless they doubted the publication or the truth of the innuendoes. In this case the jury acquitted the defendant generally. In Woodfall's case the direction was similar. The result I have already stated.

Though Lord Mansfield's direction in these cases was not questioned by a motion for a new trial, it [2] was vehemently attacked in both Houses of Parliament. In particular, Lord Chatham and Lord Camden censured him vehemently in the House of Lords. Lord Camden finally proposed questions to him which he refused to answer. Lord Mansfield had, by way of reply to the criticisms, made on his judgment, left with the clerk of the House of Lords a "Copy of the unanimous "opinion of the Court of King's Bench in the case of The "King against Woodfall."

The questions which Lord Camden asked upon it were these :—

1. Does the opinion mean to declare that, upon the general issue of not guilty in the case of a seditious libel, the jury have no right by law to examine the innocence or criminality of the paper if they think fit, and to form their verdict upon such examination?

2. Does the opinion mean to declare in the case above mentioned, where the jury have delivered in their verdict guilty, their verdict has found the fact only and not the law?

3. Is it to be understood by this opinion that, if the jury come to the bar and say that they find the printing and publishing but that the paper is no libel, the jury are to be taken to have found the defendant guilty generally, and the verdict must be so entered up?

4. Whether the opinion means to say that, if the judge, after giving his opinion of the innocence or criminality of

[1] 20 *State Trials*, 893, 894.
[2] Campbell's *Chief Justices*, ii. 480-490. See especially 488, 489.

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the paper, should leave the consideration of that matter, together with the printing and publishing, to the jury, such a direction would be contrary to law?

Upon this Lord Mansfield observed that this mode of questioning took him by surprise, that it was unfair, that he would not answer interrogatories. Lord Camden replied, "I "am willing that the noble and learned lord on the woolsack "should have whatever time he deems requisite to prepare him-"self, but let him name a day when his answers may be given "in, and I shall then be ready to meet him." Lord Mansfield said he was not bound to answer, and would not answer, the questions so astutely framed and irregularly administered, but he pledged himself the matter should be discussed. He refused, however, to fix a day for the discussion, and the matter was carried no further. After telling this story, Lord Campbell adds, "There is no denying that Lord Mansfield "did on this occasion show a great want of moral courage." I think he showed an equal want of presence of mind. His answer surely ought to have been that it would be wholly inconsistent with his duty as Lord Chief Justice to discuss in a Parliamentary debate the merits of a judgment given in the Court of King's Bench; that the proper way of calling in question the propriety of the law so laid down was by proceedings in error in a case admitting of such proceedings; and that if the House of Lords wished for advice from him as a judge they ought to propose their questions solemnly to the whole body of judges. To engage a judge in a Parliamentary discussion of abstract legal questions is to place an almost insuperable difficulty in the way of his deciding them fairly and with an unbiased mind if they should be argued before him judicially.

Seven years afterwards, in 1777, [1] Horne Tooke was tried for libel in charging the troops employed against the Americans with murder. The libel was described as seditious, and as being "of and concerning his Majesty's government and the "employment of his troops." The trial is remarkable mainly for the extraordinary impudence and random hare-brained cleverness of the defendant. In a legal point of view it is

[1] 20 *State Trials*, 651.

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interesting as showing how, under certain circumstances, the law as to libel, as understood before the Libel Act, allowed a defendant to give what might be easily mistaken for evidence in proof of the innocence of his intentions, which would involve the consequence that the jury were to judge not only of the facts of publication and the truth of the innuendoes, but of the character of the publication as being libellous or not.

One defence upon which Horne insisted was that his statements were true, and in support of them he called Gould, an officer who had been engaged in the action at Lexington, and who gave an account of it. [1] The evidence was admitted by Lord Mansfield, on grounds which he explained both upon a motion for arrest of judgment and at the trial itself. On the motion in arrest of judgment, he said: "It is most certain "that at the trial the information was considered to be" [for] "words spoke of and concerning the king's government, and "his employment of his troops, that is the employment of the "troops by government. Upon that ground the defendant "called a witness—Mr. Gould. The Attorney General rose to "object to him, but it was very clear that he was a proper "witness, and he" [the Attorney General] "acquiesced im-"mediately, because it was extremely material to show what "the subject matter was to which the libel related; if it was "the employment of the troops under proper authority that "came within the charge in the information. Had it been "a lawless fray ([2] which I believe I said at the trial), it would "not; though the saying so might have been a libel of" [on] "the individuals, yet it would not have been this libel: it "would not have been this libel of the king's troops employed "by him. Now at first and at present it seems to me that 'of "'and concerning the king's government and the employment "'of his troops' pins it down. But I doubt a little upon it. "There is some weight in the objection whether in the form "of drawing there should not have been innuendoes." [3] It was afterwards held that this mode of statement was unnecessary.

[1] 20 *State Trials*, p. 778.
[2] He did so. See 20 *State Trials*, 760.
[3] *Ib.* 774.

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CH. XXIV. This decision certainly operated under particular circumstances to open a much larger field to the defence than was commonly conceded in cases of libel, and I think it explains the celebrated case of R. *v.* Stockdale, which was the last trial of any importance for a political libel before Fox's Act came into force. I will accordingly mention it here, though out of the order of time. [1] Stockdale was tried for publishing a pamphlet by Logan (a minister of the Scotch Church, who died before the trial) in defence of Warren Hastings. It contains several passages which censured the prosecution warmly. The strongest expressions complained of were that certain charges "originate "from misrepresentation and falsehood," that "an impeach-"ment of error in judgment . . . characterises a tribunal of "inquisition rather than a court of Parliament," and that "the world has every reason to suppose that the impeach-"ment is carried on from motives of personal animosity, not "from regard to public justice." On the motion of Fox, carried unanimously in the House of Commons, the publisher of the pamphlet which contained these passages (it was a pamphlet of 150 pages) was prosecuted for a libel on the House of Commons, by imputing to them injustice to Hastings. Erskine's defence was that when the pamphlet was read as a whole it would be seen that it referred, not to the House of Commons as a whole, nor to their public conduct, but to the proceedings of some particular persons. This, he argued at great length, appeared from reading not only the passages informed against but the context in which they were introduced, and [2] he availed himself with immense effect of this opportunity

[1] 22 *State Trials*, 237.

[2] This is the speech in which Erskine introduced the famous Indian chief, who "raised the war-sound of his nation" (p. 279). The argument into which he is introduced is extremely powerful as an appeal *ad homines*, though, as Erskine said himself, it constitutes "an anomalous kind of defence."—If you will govern India, you ought not to quarrel with a man who carries out your instructions in the only way in which they can be effectually carried out. It seems to me, however, to be greatly weakened by its unworthy admissions, and by the contradiction between what, after all, does amount to a defence of Hastings (though Erskine tried to avoid that inference) and the admission that "he may and must have offended against the laws of God and "nature if he was the faithful viceroy of an empire wrested in blood from the "people to whom God and nature had given it." To whom, I should like to know, had either God or nature given the Diwani of Bengal? In whatever sense God gave it first to the great Mogul, and afterwards to the subadars, of whom Suraja Dowlah was a fair specimen, he may be said to have taken it away

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to dilate on many topics of a general nature. The logical connection of these topics with the main purpose of his speech was this: Mr. Logan's purpose when he said this, that, and the other, was not to attack the House of Commons but to defend Warren Hastings. Therefore the averments which must be established before the information can be proved are not true. This was how Lord Kenyon, who tried the case, understood it. [1] He said: "In applying "the innuendoes, I accede entirely to what was said by "the counsel for the defendant, and which was admitted "yesterday by the Attorney General as counsel for the Crown, "that you must upon this information make up your minds "that this was meant as an aspersion upon the House of "Commons, and I admit also that in forming your opinion "you are not bound to confine your inquiry to those detached "passages which the Attorney General has selected as offensive "matter, and the subject of prosecution." The defendant was acquitted.

I am particular upon this point because it appears to me to have been misunderstood by so great an authority as Lord Campbell. [2] He says that, according to the old doctrine, "the "defendant ought certainly to have been convicted, for the "act of publication was admitted, and the technical innuendoes "were proved, so that the acquittal proceeded upon the ground "that the intention of the pamphlet was fairly to discuss the "merits of the impeachment, not to asperse the House of "Commons, or in other words that the pamphlet was not a "libel."

The acquittal appears to me to have proceeded on the ground that the introductory averment (which was equivalent to an innuendo) that the words related to the House of Commons was not made out. Practically, in this particular case, the result was the same as if the jury had considered

from them and given it to Clive and the East India Company. As to nature, its maxim is *Væ victis*. As to the Indian chief and his war-whoop, what would the tribes whom he scalped have said about God's giving him the rivers and the forests of which Erskine talked? If God gave North America as a prize to be fought for by a set of prowling tribes of savage hunters, how can we say that he did not mean white men to join in the scramble?

[1] 22 *State Trials*, 292.

[2] *Lives of Chief Justices*, iii. 48-49.

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CH. XXIV. the whole matter; but I think that Lord Kenyon trod exactly in the footsteps of his predecessors.

To return, however, to the order of time. The directions given by Lord Mansfield in the cases already referred to continued to be accepted as the law till the year 1783, when the Dean of St. Asaph's (Shipley) was prosecuted for publishing a pamphlet called *A Dialogue between a Gentleman and a Farmer.* It was written at a time when the disastrous results of the American War had led to the first great general agitation in favour of recasting the representative system. Its author was Sir William Jones (the Dean's brother-in-law), and the subject was the principles of government. It was prosecuted as a seditious libel on indictment by a private person (also called Jones, as also was the principal witness) on the ground apparently that towards the end of the pamphlet the right of subjects to bear arms was noticed in a manner capable of being represented by a hasty reader as advice to them to rebel.

The case was tried at Shrewsbury Assizes before Buller, J., and the defendant was defended by Erskine on the ground that the pamphlet was innocent, and that it was the province of the jury to judge of its guilt or innocence. The judge, after referring to the earlier decisions already mentioned, told the jury, as his predecessors had done, that the only questions for them were the fact of publication and the meaning of the innuendoes. He also abstained from giving any opinion whatever of his own as to whether the pamphlet was libellous or not, telling the jury that if they found a verdict of guilty it would be open to the defendant to move in arrest of judgment on the ground that there was no criminality in the paper. The jury found a verdict of "guilty of publishing "only," and a scene thereupon ensued between the judge, the counsel, and the jury, which has become celebrated, though I do not think it is properly understood. The question was what verdict the jury meant to give. The judge pointed out to them that the legal effect of "guilty of publishing only" would be to negative the innuendoes, which was not their intention, and Erskine insisted that whatever might be its legal effect the word "only" should be recorded as part of the verdict.

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There are two different reports of the dispute, but they are much to the same [1] effect. The following is the important part of one of them :—

"*Mr. Justice Buller:* Gentlemen, if you add the word "*only,* it will be negativing or at all events not finding the "truth of the innuendoes; that, I understand, you do not mean "to do. *Mr. Erskine:* [2]That has the effect of a general "verdict of guilty. I desire your lordship, sitting here as judge, "to record the verdict as given by the jury. If the jury depart "from the word *only* they alter their verdict. *Mr. Justice* "*Buller:* I will take their verdict as they mean to give it; "it shall not be altered. Gentlemen, do you mean to find "him guilty of publishing the libel? *One of the Jury:* "Of publishing the pamphlet; we don't decide upon its "being a libel or not. *Mr. Justice Buller:* And the meaning "of the innuendoes as is stated in the indictment? *One* "*of the Jury:* Yes; certainly. *Mr. Erskine:* Would you "have the word *only* recorded? *One of the Jury:* Yes. "*Mr. Erskine:* Then I insist that it shall be recorded. "[3]*Mr. Justice Buller:* Mr. Erskine, sit down, or I shall be "obliged to interpose in some other way. *Mr. Erskine:* "Your lordship may interpose in any manner you think "fit."

It certainly seems to me that Erskine overstepped the limits of his duty, and forgot (for once in his life) what was due to the judge when he insisted that the word *only* should be recorded. It was the judge's clear duty to make the jury

[1] 21 *State Trials*, 953. The other account is in the footnote on the same and the preceding page. It is a little more dramatic.

[2] What? But shorthand-writer's notes are often inaccurate as well as the grammar which they record. The reporter's ear and finger act mechanically, but a man who does not hear with his mind necessarily hears wrong in many cases. I once told a jury that under given circumstances it was the duty of a railway servant "to act with caution, and, of course, with humanity." In the shorthand note this became, "to act with caution in the cause of "humanity." Which, by the way, would be very good advice to many enthusiasts.

[3] The other report goes on thus :—"*Mr. Justice Buller:* Then the verdict "must be misunderstood. Let me understand the jury. *Erskine:* The jury "do understand their verdict. *Mr. Justice Buller:* Sir, I will not be interrupted. *Erskine:* I stand here as an advocate for a brother citizen, and I "desire that the word *only* may be recorded. *Mr. Justice Buller:* Sit down, "sir, or I shall be obliged to proceed in another manner. *Erskine:* Your "lordship may proceed in what manner you think fit: I know my duty as "well as your lordship knows yours. I shall not alter my conduct."

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understand that the verdict given in these terms would be imperfect, and make a new trial necessary. This had been formally decided in Woodfall's case. On the other hand, a gentle reproof to Erskine, a simple observation that he was improperly interrupting the judge in giving the jury information necessary for the proper discharge of their duty, would have been more effective than an abortive threat to commit, and more proper in dealing with a man of Erskine's great eminence and remarkable generosity of temper. This essentially small [1] incident has been invested with a constitutional halo. For myself I can see in it nothing but an unimportant skirmish between a rather short-tempered judge and a most eminent advocate, in which neither was absolutely free from blame, especially if Erskine talked about "standing here as advocate "for a brother citizen," and boasted of "knowing his duty."

The discussion continued for a considerable time, and with good humour, as the following short extract will show:—

"*Mr. Erskine:* I desire with great submission, the jury "having said guilty only of publishing, that it may be so "recorded. *Mr. Justice Buller:* Whether you say guilty "*only* of publishing, or guilty of publishing *only*, that "amounts to the same thing. You may put it thus: 'Guilty "'of publishing, but whether it is a libel or not you don't "'know,' if that is your intention. *One of the Jury:* That "is our intention."

[1] "The learned judge took no notice of this reply, and quailing under the "rebuke of his pupil" (say rather having recovered his temper), "did not "repeat the menace of commitment. This noble stand for the independence "of the bar would of itself have entitled Erskine to the statue which," &c.—Campbell's *Chancellors*, viii. 277. I do not see how Erskine vindicated the independence of the bar on this occasion, or how it was in question at all; I see no rebuke on the one side, and no quailing on the other, but some temper on both sides. Apart from this, what did Erskine risk by "defying" the judge? If Buller had been so ill-advised as to commit him, he would have given him for all the rest of his life a better topic for eloquence and pathos than even his noble descent and the fervour of his religious belief. By being committed, Erskine would have suffered no inconvenience greater than a few nights rather uncomfortable lodging, and he would have moved for a new trial on the ground of the misconduct of the judge, with all his political partisans shouting at his heels. Whatever may have been the case in the days of the Star Chamber, it required, in 1783, more courage to give offence to one attorney in large practice, or to say what the newspapers did not like, than to assert the independence of the bar before all the judges in England, a performance which never since 1688 has required much courage. I am not aware that Erskine ever put in peril either his practice or his popularity, or that he was ever called upon to do either, except perhaps in Paine's case, mentioned below.

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After some further discussion the verdict was entered accordingly. It is thus a mistake to suppose that on this occasion Erskine triumphed over his former tutor; on the contrary, the jury accepted the judge's statement of their verdict, and not the one which Erskine suggested.

In the ensuing term Erskine moved for a new trial on the ground of misdirection, and his argument on that motion, and the rule which was granted in consequence, occasioned the first and indeed the only solemn judicial discussion which ever took place on the doctrines connected with the old law of political libels. Erskine's argument is regarded as one of his greatest efforts, and it seems to me to deserve its reputation, though like some other celebrated performances it has been praised in an exaggerated way by [1] zealous partisans.

[1] Fox declared it to be "the finest argument in the English language." Lord Campbell says, "Erskine's addresses display beyond all comparison the "most perfect union of argument and eloquence ever exhibited in Westminster "Hall. He laid down five propositions, most logically framed and connected, "which, if true, completely established his case, and he supported them with "a depth of learning which would have done honour to Selden or Hale." It is one of the peculiarities of this remarkable argument, which undoubtedly is admirable in matter (except an egotistical peroration), manner, and arrangement, that it is by no means learned. Erskine's history, as he calls it, of trial by jury, is given in absolute ignorance of the fact, which for many years has been undoubted, that jurors were originally witnesses, and not judges at all. He cannot be blamed for not knowing this, but the fact that he did not know it shows that he was not a profoundly learned man. The only authorities he quotes on the subject are Blackstone and Bracton. This quotation from Bracton seems to me to be misunderstood and inaccurate. Erskine's words are, "Bracton says the curia and the pares were necessarily "the judges in all cases of life, limb, crime, and disherizon of the heir in "capite. The king could not decide, for then he would have been prosecutor "and judge; neither could his justices, for they represent him." The passage to which I suppose he referred (no reference is given) is part of Bracton's account of the law of treason, and is in these words: "Et tunc videndum "quis possit et debeat judicare, et sciendum, quod non ipse rex, quia sic esset "in querelâ propriâ actor et judex in judicio vitæ membrorum et exhæredationis "quod quidem non esset si querela esset aliorum. Item justitiarii? non cum "in judiciis personam domini regis cujus vicem gerit, repræsentet" (sic). "Quis "ergo judicabit? Videtur sine præjudicio melioris sententiæ quod curia et pares "judicabunt ne maleficia remaneant impunita, et maxime ubi periculum vitæ "fuerit et membrorum et exhæredationis cum ipse rex pars actrix debeat esse "in judicio."—Bracton, ii. 265, 266. It appears from this (1) that Bracton referred only to treason; (2) that he expressly says that his remark does not apply to common offences in which the king had no direct interest; (3) that he speaks with doubt, as of a matter not well established. The "*curia et* "*pares*" I believe to be the *curia regis* and the peers, Bracton having in his mind the case, which no doubt was in those days the common one, of treason by some peer who levied war on the king. Bracton's references to juries or inquests I have already considered in detail.

Besides this slight and incorrect reference to Bracton, Erskine produces a few very obvious authorities, R. *v.* Oneby (2 Lord Raymond), *Coke upon*

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In his motion on the rule *nisi* he laid down five propositions on which in the main his subsequent argument was founded. They were these:—

1. [1] When a bill of indictment is found, or an information filed, charging any crime or misdemeanour known to the law of England, and the party accused puts himself upon the country by pleading the general issue not guilty, the jury are generally charged with his deliverance from that crime, and not specially from the fact or facts in the commission of which the indictment or information charges the crime to consist; much less from any single fact to the exclusion of others charged upon the same record.

2. [2] I mean to maintain that no act which the law in its general theory holds to be criminal constitutes in itself a crime abstracted from the mischievous intention of the actor; and that the intention, even when it becomes a simple inference of reason from a fact or facts established, may and ought to be collected by the jury with the judge's assistance, because the act charged, though established as a fact in a trial on the general issue, does not necessarily and unavoidably establish the criminal intention by any abstract conclusion of

*Lyttelton*, Bushell's case, and a few other recent cases, which he uses rather as illustrations than as authorities. His junior (Welsh) showed more reading, and founded some highly ingenious arguments on ancient authorities. I suspect he suggested to Erskine an argument about the Statute of Westminster the Second, for it appears from his argument that he had thought a great deal about the meaning of it, which I do not think was the case with Erskine. Welsh very likely gave him the scrap of Bracton which he quotes. Erskine had much more important gifts than learning, and no competent judge would ever undervalue his logical power or his legal knowledge merely because of the brilliancy of his rhetoric, which ignorant persons suppose to be inconsistent with those qualities, but to compare him in point of learning to students like Selden and Hale seems to me extravagant. I do not think any man who had even superficially looked into history would have said as Erskine did: "No fact, my lord, is of more easy demonstration" (than the rights of juries), "for "the history and laws of a free country lie open, even to vulgar inspection." The history of juries is obscure and imperfect in the highest degree, and the history and laws of countries which Erskine would not have called free are often more open to vulgar inspection than those of countries which he would have called free, by which he meant no doubt possessing popular government. The laws of Rome were not made generally "open to vulgar inspection," till long after the fall of the republic. British India has no parliamentary institutions, but its laws are open to every one, and so is its history. The study of French law and history was probably a less difficult matter in 1783 than the study of English law and history. Despotism in politics and religion is by no means unfavourable to learning. Where in England were more learned men to be found than the French Benedictines?

[1] 21 *State Trials*, 961. [2] *Ib.*

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law, the establishment of the fact being still no more than evidence of the crime, but not the crime itself, unless the jury render [1] it so themselves by referring it voluntarily to the court by special verdict.

3. [2] An indictment for a libel, even where the slander of an individual is the object of it (which is capable of "being "measured by precedents of justice), forms no exception to "the jurisdiction or duties of juries, or the practice of judges "in other criminal cases; that the argument for the difference, "viz. because the whole crime appears upon the record, is "false in fact, and even if true would form no solid or "substantial difference in law."

4. [3] A seditious libel contains no question of law.

5. "In all cases where the mischievous intention (which "is agreed to be the essence of the crime) cannot be col- "lected by simple inference from the fact charged, because "the defendant goes into evidence to rebut such inference, "the intention becomes then a pure unmixed question of fact "for the consideration of the jury."

The propositions are no doubt intelligible and logically connected, but there is no great literary skill in the way in which they are worded. Of the first and second of them Erskine said, that "though worded with cautious precision "and in technical language to prevent the subtlety of "legal disputation in opposition to the plain understanding of "the word, they neither do nor were intended to convey any "other sentiment than this, viz., that, in all cases where the "law either permits or directs a person accused of a crime to "throw himself upon a jury for deliverance by pleading gene- "rally that he is not guilty, the jury thus legally applied to

[1] These words are very obscure. What is meant by "it," and what by "so?" Besides, by finding a special verdict the jury do not turn facts into a crime (as Erskine seems to say), but express a doubt whether they constitute a crime or not. At p. 271, Erskine speaks of these propositions as "written "and maturely considered propositions," which he had delivered to the court, so that the confused language is not the fault of the reporter.

[2] 21 *State Trials*, 963.

[3] *Ib.* 966. This proposition is very obscurely worded. I suppose it means, "The question whether a given composition is a seditious libel is "a question of fact and not of law." This makes it fit to the fifth proposition. Erskine in his argument states this proposition much more fully and clearly. See below.

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"may deliver him from the accusation by a general verdict "of acquittal founded (as in common sense it evidently must "be) upon an investigation as general and comprehensive as 'the charge itself, from which it is a general deliverance." He[1] adds, "Having said this, I freely confess to the court that "I am much at a loss for any further illustration of my sub-"ject." No doubt these propositions do convey the gist of great part of his argument. He goes, however, into a history of the law of trial by jury, on which I have already made some remarks, quotes some well-known authorities, and answers some not very striking arguments which may have been advanced by his opponents, of whose arguments no report has been published.

After this he restates his general argument in a new form, to the following effect. Granting, for the sake of argument, that the question of the publisher's intention ought not to be left to the jury, it is nevertheless a misdirection to direct the jury to find the defendant guilty upon proof of the publication and of the innuendoes. Such a direction must be taken to be a direction either to find a general verdict or a special verdict. If it is regarded as a general verdict, it is open to the objection that the jury are directed to affirm the guilt of the prisoner, whilst one essential element of his guilt, namely, the criminal intention which is necessary to the offence, is not only not determined by them, or by any one else, but is withdrawn from their consideration. If it is regarded as a special verdict, it is open to the objection that their finding does not enable the court to pronounce the prisoner to be guilty. The essence of a special verdict is that it must contain a set of statements which, taken together, exclude the possibility of the innocence of the accused person, but the statements that A published any writing you please, and that that writing bore any sense you please, do not exclude the possibility of A's innocence, for he may have published it innocently. For instance (the illustration is not Erskine's), it is found by a special verdict that A published a writing in these words, "The king (meaning thereby King George III.) is a monster "of wickedness;" such a special verdict would be consistent

[1] 21 *State Trials*, 973, 974.

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with the publication having consisted in the reading of the libel in court by the clerk of assize upon the trial of the author.

From this Erskine infers that the criminal intention of the author is a fact to be found, like any other, by the jury. If they find a general verdict of guilty, the intention is affirmed, together with the other elements of the crime. If they find a special verdict, the intention must be set out specially upon the face of it, or the court cannot infer the defendant's guilt.

Erskine's [1] third proposition is that the case of a libel forms no legal exception to the general principles which govern the trials of all other crimes, that the argument for the difference, viz. because the whole charge always appears on the record, is false in fact, and that even if true it would form no substantial difference in law.

As to the first, the whole case does by no means necessarily appear on the record. The Crown may indict part of the publication which may bear a criminal construction when separated from the context, and the context omitted having no place in the indictment, the defendant can neither demur to it nor arrest the judgment after a verdict of guilty, because the court is absolutely circumscribed by what appears on the record, and the record contains a legal charge of a libel.

He is equally shut out from any such defence before the jury, for though he may read the explanatory context in evidence, yet he can derive no advantage from reading it, if they are tied down to find him guilty of publishing the matter which is contained in the indictment however its innocence may be established by a view of the whole work. The only operation which looking at the context can have upon a jury is to convince them that the matter upon the record, however libellous when taken by itself, was not intended to convey the meaning which the words indicted import when separated from the general scope of the writing. But, upon the principle contended for, they could not acquit the

[1] In what precedes I have given what I conceive to be the effect of Erskine's argument in a condensed form. He elaborates, illustrates, and repeats, as counsel usually do, and indeed must; but here I have taken the very words of Erskine's argument, subject to some insignificant exceptions. It is impossible to put his argument into a shorter or plainer form than that in which he is said to have put it himself.



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defendant upon any such opinion, for that would be to take upon them the prohibited question of libel, which is said to be matter of law for the court.

Erskine supported this proposition by the celebrated illustration first suggested by Algernon Sidney. A is indicted for publishing a blasphemous libel in these words, "There is no "God." Evidence is given that he sold a Bible which contains the words, "The fool hath said in his heart, There is no God." No innuendo being required, the jury would, he says, be bound upon the old view of the law to convict the defendant, because they had nothing to do with his intention, and when he moved in arrest of judgment he would be met with the answer that the indictment was good on its face, as the words were blasphemous in themselves, and the jury had found their publication. Lord Mansfield in the course of the argument met this by saying, "To be sure they (the jury) may judge from "the whole work." To which Erskine replied, "And what is "this, my lord, but determining the question of libel which "is denied to-day?" "*Lord Mansfield:* They certainly may in "all cases go into the whole context. *Mr. Erskine:* And why "may they go into the context? Clearly, my lord, to enable "them to form a correct judgment of [1] the meaning of the "part indicted, even though no particular meaning be submitted to them by averments in the indictment."

[2] Erskine passes insensibly from his third to his fourth proposition, and argues at great length and with many illustrations that it is a question of fact and not of law whether a libel is or is not seditious. Towards the end of this part of his argument he restates his fourth proposition more fully and perspicuously than he had stated it before, "[3] Where a writing "indicted as a libel neither contains, nor is averred by the in-

[1] Yes, but not of the intention of the author in the sense in which Erskine uses the words. The jury may look at the whole to see whether the words "there is no God" mean to deny the existence of God, but it does not follow that they are at liberty to consider what object the author had in view, or by what motives he was actuated when he made the assertion, if he did make it. This confusion between the meaning of the words and the intention and the motives of the author in using the words in that sense, in my opinion, pervades the whole of Erskine's argument, and vitiates great part of it, as I shall attempt to show more fully below.

[2] 21 *State Trials*, 1003.

[3] *Ib.* 1009.

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"dictment to contain, any slander of an individual, so as to fall "within those rules of law which protect personal reputation, "but whose criminality is charged to consist (as in the present "instance) in its tendency to stir up general discontent, that "the trial of such an indictment neither involves, nor can in "its obvious nature involve, any abstract question of law for "the judgment of a court, but must wholly depend upon the "judgment of the jury on the tendency of the writing itself "to produce such consequences, when connected with all "the circumstances which attend the publication."

His most striking arguments are as follows. Suppose a man writes another a letter said to be an overt act of compassing the king's death, and suppose it was set out verbatim in an indictment as such an overt act, would the court tell the jury that the treasonable intention which made it an overt act of high treason was a mere inference of law, and not a matter of fact to be found by them? If yes, the inference follows that a man may be capitally convicted and executed without having had his guilt established by a jury, which, says Erskine, is absurd. If no, why apply to libel a rule which is not applicable to treason? This view struck Erskine so forcibly that he said, "I will rest my whole argument "upon the analogy between these two cases, and give up "every objection to the doctrine when applied to the one if "upon the strictest examination it shall not be found to apply "equally to the other."[1]

He also argued that the question of seditious intention was and must in the nature of things be a question of fact and not of law, inasmuch as it must from the nature of the case depend upon a variety of circumstances which do not and cannot appear on the record to which the court is confined. Words indifferent, temperate, or even conciliatory in their literal meaning might be seditious if spoken or written under special circumstances. "Behold also the gallows which "Haman hath made" is, as far as the words go, an inoffensive remark, but Ahasuerus understood them as they

[1] The answer is that the imagining of the king's death is the very definition of treason, but that publishing with a seditious or other illegal intention was no part of the definition of libel when Erskine spoke, though it has now in a sense become part of it.



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were probably meant when he said, "Hang him thereon." To use Erskine's own striking language, "Circumscribed by "the record, your lordship can form no judgment of the ten-"dency of this dialogue to excite sedition by anything but "the mere words. You must look at it as if it were an old "manuscript dug out of the ruins of Herculaneum; you "can collect nothing from the time when or the circum-"stances under which it was published, the person by whom, "and those amongst whom, it was circulated; yet these may "render a paper at one time and under some circumstances "dangerously wicked and seditious, which at another time "and under different circumstances might be innocent and "highly meritorious."

He further asks how "the tendency of a paper to stir up "discontent against Government, separated from all the cir-"cumstances which are for ever shut out from the record," can be "considered as an abstract question of law." His antagonists, he says, "have not told us where we are to find "any matter in the books to enable us to argue such ques-"tions before the court, or where your lordships yourselves "are to find a rule for your judgments on such subjects."

[1] Finally, he observes that the counsel for the Crown always argued to the jury to show that the libels they prosecuted were seditious, and that no one had ever been prevented as counsel for the defendant from arguing that they were not, and he asked why, if all this was mere surplusage, it was permitted by the court? He concludes this part of his argument by citing and examining several authorities. I have noticed most of them already. Speaking generally, I may say that his account of them naturally lays stress upon a few incidental observations and qualifying remarks which fell from different judges, and omits or slurs over the main points decided. I do not think he meets, or could meet, the assertion that they were all directly opposed to his view. Many certainly were, and he was no doubt

[1] No answer can be suggested to this, except the answer that for popular purposes a great deal of surplusage is usually admitted, and that if it is admitted on one side it must in fairness be admitted on both. Perhaps the true answer is, that in this, as in so many other cases, the law, under an appearance of clearness, was really crude and uncertain to the last degree.

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aware of this. [1] Lord Campbell says: "In a copy of the tract "which had formerly belonged to Lord Erskine himself, I "find in his own handwriting, after the verdict at Shrews-"bury, the following memorandum:—'In Michaelmas T., "'which immediately followed, I moved the Court of King's "'Bench for a new trial for a misdirection of the judge, and "'misconduct after the verdict was returned into court. I "'made the motion from no hope of success, but from a "'fixed resolution to expose to public contempt the doctrines "'fastened on the public as law by Lord Chief Justice Mans-"'field, and to excite, if possible, the attention of Parliament "'to so great an object of national freedom.'" In his argument he [2] claims Lord Mansfield's decisions in R. *v.* Woodfall and R. *v.* Almon as authorities in his favour. If he had said that each case contained matter which was favourable to his view he would have spoken the exact truth, though I think he not unnaturally or improperly overestimated the importance of that matter.

Erskine's last proposition was, "that in all cases where the "mischievous intention which is agreed to be the essence of "the crime cannot be collected by simple inference from the "fact charged because the defendant goes into evidence to "rebut such inference, the intention becomes then a pure, "unmixed question of fact for the consideration of the jury."

The relevancy of this to the case in hand was that Dean Shipley had given evidence at the trial to show that he published the pamphlet, not in order to promote sedition, but in order to clear his own character from the charge of having wished to promote sedition. The evidence was that he had prefixed to the pamphlet [3] an advertisement to the effect that he, and a committee of which he was a member, had been charged with "having testified their approbation of "the following Dialogue which had been publicly branded "with the most injurious epithets, and it is conceived that "the one way to vindicate this little tract from so unjust a "character will be as publicly to produce it. The friends of "the Revolution will instantly see that it contains no prin-"ciple which has not the support of the highest authority as

[1] *Chancellors*, vii. 277*n*. [2] 21 *State Trials*, 1017. [3] *Ib.* 892.

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"well as the clearest reason." The advertisement went on to justify the tract. The contents of this advertisement, says Erskine, ought to have been left to the jury as evidence of the purity of the publisher's intentions or of his "motive for "publishing" (which Erskine does not distinguish from intention), and the omission to do this was, he contended, a misdirection. In support of this view he [1] cited Lord Hale on the subject of intention, and some cases of no great importance or interest. He ended this most elaborate and justly celebrated argument with [2] an absurd peroration about himself.

I have anticipated the greater part of Lord Mansfield's judgment, by making the history of the law of libel since

[1] The passages apparently intended to be referred to are 1 Hale, *P. C.* 508, 509, and 229. The passage first referred to relates only to larceny, and the other only to a statute of Philip and Mary, which made the importation of counterfeit coin, with intent to utter, felony.

[2] "They, however, who may be disposed to censure me" (which nobody was) "for the zeal which has animated me in this cause, will at least, "I hope, have the candour to give me credit for the sincerity of my "intentions: it is surely not my interest to stir up opposition to the "decided authorities of the court in which I practise; with a seat here "within the bar at my time of life" (thirty-three years and ten months), "and looking no further than myself, I should have been contented "with the law as I found it" (a remark which gave up a great part of his argument), "and have considered how little might be said with decency "rather than how much; but, feeling as I have ever done upon the subject, "it was impossible I should act otherwise. It was the first command and "counsel to my youth always to do what my conscience told me to be my "duty, and to leave the consequences to God. I shall carry with me the "memory and, I hope, the practice of this parental lesson to the grave. I "have hitherto followed it, and have no reason to complain that the adherence "to it has been even a temporal sacrifice. I have found it, on the contrary, the "road to prosperity and wealth, and shall point it out as such to my children. "It is impossible in this country to hurt an honest man, but, even if it were "possible, I should little deserve that title if I could upon any principle have "consented to tamper or temporise with a question which involves in its "determination and its consequences the liberty of the press; and in that "liberty the very existence of every part of the public freedom." There are twenty-four personal pronouns in these twenty-two lines. Erskine must have known, and each of his hearers must have known that he knew, the absurdity of the suggestion conveyed by this passage, that he risked something by the argument he delivered, and made some sort of sacrifice to duty by delivering it. In fact he had had two special retainers in the case, each worth 300 guineas, and this particular argument gave him an opportunity for distinction which could hardly be valued in money. The vanity, which is one of the besetting sins of distinguished lawyers, and the vein of devotional fervour which was always breaking out in Erskine, mix oddly and most characteristically in this paraphrase of the doctrine that godliness is great riches, and has the promise of this world. There is another instance of his pleasure in expressing religious sentiment in the argument. "No man believes more firmly than I do "that God governs the whole universe by the gracious dispensations of his "providence," &c.—21 *State Trials*, 1015.

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1688, which formed a considerable part of it, the foundation of my own account of the matter. In two words it amounted to this—that Buller, J., had in his summing up followed the practice of all his predecessors since the Revolution. This was undoubtedly true, and, as I have shown, it would have been easy to show that the practice had prevailed from much earlier times. After stating this, Lord Mansfield observed: "Such a judicial practice in the precise point from the Revo-"lution, as I think, down to the present day, is not to "be shaken by arguments of general theory or popular "declamation."

In speaking of this judgment, in his defence of Paine, some years afterwards, Erskine said of Lord Mansfield: "He treated "me not with contempt indeed, for of that his nature was "incapable, but he put me aside with indulgence, as you do "a child when it is lisping its prattle out of season." This is just the impression which the judgment conveys.

Erskine afterwards moved in arrest of judgment, on the ground that the matter set forth in the indictment was not libellous. In this the court agreed, and judgment was arrested accordingly.

The decision of the court on the main question led, after an interval of nine years, to the passing of Fox's Libel Act, 32 Geo. 3, c. 60. There were no trials in the interval to which I need refer except that of Stockdale in 1789, which has been already noticed. When this act was under the consideration of Parliament, [1] seven questions were put by the House of Lords to the judges as to the existing state of the law. The result of the questions and answers, which were given unanimously, was to affirm the following propositions:—

1. The criminality or innocence of any act done (which includes any paper written) is the result of the judgment which the law pronounces upon that act, and must therefore be in all cases, and under all circumstances, matter of law and not matter of fact, and this as well where evidence is given for the defendant as where it is not given.

2. The truth or falsehood of a written or printed paper [charged to be a libel] is not material, or to be left to the

[1] 22 *State Trials*, 296-304.

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jury upon the trial of an indictment or information for libel. The word "false" in an indictment or information is at most a word of form. "In point of substance the alteration in the "description of the offence would hardly be felt if the epithet "were *verus* instead of *falsus.*"

3. [1] If the judge, on a trial for libel, is quite clear that the matter alleged to be libellous is not libellous, he may direct an acquittal although the publication and innuendoes are proved, but he ought to be very sure indeed; and, as a general rule, the safer course is to leave the matter to the court upon the record.

4. [2] The criminal intention charged upon the defendant in legal proceedings upon libel is generally matter of form, requiring no proof on the part of the prosecutor and admitting of no proof on the part of the defendant to rebut it. The crime consists in publishing a libel. A criminal intention in the writer is no part of the definition of libel at the common law. "He who scattereth firebrands, arrows, and "death," which, if not a definition, is a very intelligible description of a libel, is *eâ ratione* criminal; it is not incumbent on the prosecutor to prove his intent, and on his part he shall not be heard to say, "Am I not in sport?"

Notwithstanding these opinions, the Libel Act became law. It is in these words:—

"An Act to remove doubts respecting the functions of "juries in cases of libel.

"Whereas doubts have arisen whether, on the trial of an "indictment or information for the making or publishing "any libel, where an issue or issues are joined between the "King and the defendant or defendants on the plea of not "guilty pleaded, it be competent to the jury impanneled to "try the same to give their verdict upon the whole matter "in issue: Be it therefore declared and enacted by the King's "most excellent Majesty, by and with the consent of the Lords "spiritual and temporal, and Commons, in this present Par- "liament assembled, and by the authority of the same, that "on every such trial the jury sworn to try the issue may

[1] This answer is given at much greater length.
[2] This is only part of the answer given, which embraces some other matters.

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"give a general verdict of guilty or not guilty upon the "whole matter put in issue upon such indictment and information; and shall not be required or directed by the court "or judge before whom such indictment or information shall "be tried to find the defendant or defendants guilty merely "on the proof of the publication by such defendant or "defendants of the paper charged to be a libel, and of "the sense ascribed to the same in such indictment or "information.

"Provided always that on every such trial the court or "judge before whom such indictment or information shall "be tried shall, according to their or his discretion, give their "or his opinion and directions to the jury on the matter in "issue between the King and the defendant or defendants "in like manner as in other criminal cases."

It was also provided that the act was not to interfere with the jury's right to find a special verdict or the defendant's right to move in arrest of judgment.

The first section of this famous act consists of three parts. The first and most important provision was undoubtedly intended, in general terms, to overrule the law as laid down by the Court of King's Bench, and to establish the principles contended for by Erskine. It does this by *declaring* and enacting that the jury may give a general verdict on the whole matter put in issue by the indictment or information. What part of the indictment or information is put in issue by a plea of not guilty—in other words, which of its averments were matter of substance and which matter of form—the statute does not declare, but leaves to the decision of the court, and this, be it observed, after the judges had given their opinion that "the criminal intention charged upon the "defendant in legal proceedings for libel is generally matter "of form, requiring no proof on the part of the prosecutor "and admitting of no proof on the part of the defendant to "rebut it."

The provision that the jury are not to be required or directed to find a verdict of guilty merely on proof of the publication and innuendoes means that the jury not only have a legal power to return a general verdict, but that they have

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also a moral right, and that it is their duty to do so if they see their way to it, and that the judge is not to tell them the contrary.

The provision that the judge shall, according to his discretion, give his opinion and direction to the jury on the matter in issue in like manner as in other criminal cases has, I think, been not unfrequently misunderstood. [1] It was no doubt, meant to prevent the notion that the Act was intended to alter, in regard to libel, the duties which the judge has to discharge in criminal cases in general, but this, I think, was only part of its meaning. For a considerable time after the Libel Act passed, the judges were in the habit of treating this enactment as a statutory direction to them to give the jury their opinion on the question whether the matter charged was libellous or not. For instance, in the famous trial of Hone, in 1817, for a blasphemous libel, Lord Ellenborough said: "I will deliver to you my solemn opinion, "as I am required by Act of Parliament to do." But the practice was not uniform. [2] Lord Kenyon in several cases expressed no opinion at all. In later times judges have, I think, more frequently abstained from such declarations, considering that the words "in his discretion," and "as in other "criminal cases," justify them in so doing.

I think that this particular clause must have had some reference to one of Erskine's contentions in the Dean of St. Asaph's case. He was confident that the pamphlet prosecuted was not libellous, and that the judge would not assert that it was, and he accordingly pressed him strongly to declare his opinion upon the subject to the jury. If the judge had done so, there can be no doubt that he would have said then, as he afterwards did on the motion in arrest of judgment, that the indictment was bad on the face of it, and the result would have been a general verdict of acquittal. Wishing, however, to follow precedent strictly, and perhaps to put the responsibility of a final decision on the court in *banc*, he expressed no opinion whatever upon the subject. In

[1] The proviso was introduced by Lord Eldon, then Solicitor-General. See Twiss's *Life of Eldon*, i. 207.

[2] *E.g.* in the case of Eaton, 22 *State Trials*, 785 (1793), and in the case of Reeve, 26 *State Trials*, 529 (1796).

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various stages of the case Erskine earnestly complained of this, and no doubt the course taken did put the defendant in a less favourable position than he would have been in if the judge had given a direction, for if the direction had been favourable it would practically have ensured an acquittal, and if it was unfavourable it would (if the jury were also directed to convict on proof of the publication and innuendoes) do no harm. I think therefore that the direction means substantially this—the judge's position in trials for libel is the same as in other cases, and if he thinks the jury ought to acquit the defendant he ought to say so, and so contribute to the immediate determination of the case in his favour instead of leaving him to move in arrest of judgment.

It ought to be noticed that the act is wholly silent as to proving the truth of a libel.

This celebrated act, and the discussions which led to it, are perhaps the most interesting and characteristic passage in the whole history of the criminal law.

It would be intricate and tedious to go through all the arguments on the subject, and to say specifically what degree of weight appears to me to attach to each of them. I will give my own view of the matter, and will leave those who think it worth while to compare it in detail with the arguments and authorities above referred to. Speaking generally, I think that the whole discussion consists, on the part of the judges, of attempts to state in an inoffensive and somewhat indistinct way a view of the law which was unpopular though correct. In doing so I think they were led in at least one point into a considerable technical difficulty.

On the part of Erskine and others who took the popular side, the discussion consists of arguments most of which appear to me to be fallacies, though some are highly ingenious fallacies intended to show that the law actually was what they thought it ought to be. These arguments appear to me to rest to some extent upon a confusion of ideas between motive and intention, from which however the judges were not free, and which they certainly did not expose.

The Libel Act is no doubt on its face declaratory, but I look upon this simply as a statement put in the mouth of

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CH. XXIV.

Parliament by draftsmen who used that form of expression as a way of saying that the law which the Courts had in fact made ought to have been made otherwise than it was.

The first question to be considered is, What, in the latter part of the eighteenth century, was the proper definition of a seditious libel? Omitting technicalities, I think it might at that time have been correctly defined as written censure upon public men for their conduct as such, or upon the laws, or upon the institutions of the country. This is the substance of Coke's case, "De libellis famosis," which is the nearest approach to a definition of the crime with which I am acquainted. It was a definition on which the Star Chamber acted invariably, and which was adopted after the Restoration by the Court of King's Bench. It is in harmony with the whole spirit of the period in which it originated, and in particular with the law as to the licensing of books and other publications which then and afterwards prevailed. It was in substance recognised and repeated far into the eighteenth century, and was never altered by any decision of the Courts or any Act of Parliament.

That the practical enforcement of this doctrine was wholly inconsistent with any serious public discussion of political affairs is obvious, and so long as it was recognised as the law of the land all such discussion existed only on sufferance. This, however, by no means shows that it was not the law. If, however, it was the law, it would undoubtedly follow that the law and common practice had come into direct contradiction to each other. All through the eighteenth century political controversy was common and ardent, and on all occasions the freedom of the press was made the subject of boasts and applauses inferior only to those which were connected with trial by jury. Even the counsel for the Crown in prosecutions for political libels and the [1] judges who were most opposed to the popular view of the subject used to join in extolling the

[1] *E.g.* "The liberty of the press is dear to England. The licentiousness of "the press is odious to England. The liberty of it can never be so well pro- "tected as by beating down the licentiousness. . . . I said that the liberty of "the press was dear to Englishmen, and I will say that nothing can put that "in danger but the licentiousness of the press."—Lord Kenyon, in R. *v.* Cuthill, 27 *State Trials*, 674. A little further on Lord Kenyon defines the

liberty of the press as an invaluable part of the British constitution, though they used always to contrast it with the license of the press, which was likened to Pandora's box.

I do not know that any one ever attempted to distinguish between liberty and license; but the expression liberty of the press had a definite legal meaning and also a definite popular meaning. Lord Mansfield before the Libel Act and Lord Kenyon after it gave correct and clear definitions of its legal meaning. It consisted, according to Lord Mansfield, in the power of publishing without a license, subject to the law of libel. It consisted, according to Lord Kenyon (after the Libel Act, which, however, in his opinion made no change in the law), in the power of publishing without a license, subject to the chance that a jury might think the publisher deserving of punishment. Each definition was in a legal point of view complete and accurate, but what the public at large understood by the expression was something altogether different,—namely, the right of unrestricted discussion of public affairs, carrying with it the right of finding fault with public personages of whose conduct the writer might disapprove.

It seems to me to follow from the history just given that this was absolutely opposed to the law, and I think that the rhetoric commonly used about the liberty of the press derived some part of its energy and vivacity from the consciousness which the lawyers who employed it must have had of the insecurity of its legal foundations—a circumstance which

liberty of the press thus: "It is neither more nor less than this, that a man "may publish any thing which twelve of his countrymen think is not "blamable, but that he ought to be punished if he publishes that which is "blamable." The definition is admirably terse and correct from a legal point of view, but how does it distinguish liberty from license? If the definition given is substituted for "liberty of the press" the thing defined, the result is strange. "The fact that a man is permitted to publish with "impunity any thing which twelve of his countrymen afterwards regard "as not blamable, is dear to Englishmen, but that permission can "never be so well protected as by punishing severely every one who miscal-"culates what juries will like." In other words,—The jury are *ex post facto* censors of the press. If they wish to make the power of publishing without any other license really valuable, they ought to be severe censors. A severe censorship is the best guardian of the liberty of the press. A very odd conclusion, practically not differing much from this—the press ought to be put under a severe censorship. This may or may not be true, but it is inconsistent with the doctrine that the liberty of the press is dear to Englishmen. Hobbes is nearly the only writer who seems to me capable of using the word "liberty" without talking nonsense.

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exercised influence in more ways than one over much of that inordinate appetite for rhetoric which was characteristic of the eighteenth century.

If the leading principle, that a seditious libel means written censure upon any public man whatever for any conduct whatever, or upon any law or institution whatever, is fully understood and admitted, it becomes comparatively easy to solve the questions which were debated with so much vehemence as to the elements of the offence, and the provinces of the judge and the jury respectively in determining upon their existence. The maxim (said by Lord Mansfield to be the only one in the whole law to which there is [1] no exception) that questions of law are for the judge and questions of fact for the jury is sufficient for the solution of all of them,—nor is it, I think, difficult to say what are questions of law and what questions of fact.

In their answers to the questions put to them by the House of Lords, the judges said, I think unanswerably, that the criminality of any act whatever is, and from the nature of the case must be, the result of the judgment of the law upon a state of facts. Hence, questions of law being for the judge, and questions of fact for the jury, the judge's duty must be to tell the jury what judgment the law would pass upon a given state of facts suggested to the jury, supposing them to find its existence. Whether or not A wrote on a sheet of paper the words, "King George III. is a wicked man "and deserves general detestation"? is a question of fact. Whether, having written those words on a piece of paper, A gave the piece of paper to B? is a question of fact. Whether, when A gave the paper to B, A knew what was written on it? is a question of fact. Whether to give a piece of paper so inscribed to another with such knowledge is an act of publication? is a question of law. Whether such a publication of such words amounts to the crime of seditious libel? must surely be a question of law also. It is precisely like such

[1] A captious critic might say that the question whether the law of a foreign country is this or that—whether, *e.g.* a marriage in Scotland can be contracted without any ceremony—is for the jury, and not for the judge. There are some remarks upon this in Lord Blackburn's charge to the grand jury of Middlesex in R. *v.* Eyre. See Mr. Finlason's *Report*, pp. 60, 61.

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questions as the following: "If A killed B under such and "such circumstances, did A murder B?" "If A, intending to "deprive B permanently of his horse, and to appropriate it to "himself fraudulently and without claim of right, rode the "horse away, did A steal B's horse?" "If A, with intent to "steal, broke into B's house at twelve at night, did A commit "burglary?" Surely each of these is a question of law, and has never been supposed to be anything else. How, then, can the question, Whether the publication of particular words is or is not a crime, be anything but a question of law?

It may be gathered from the controversy of which I have given the history what was the answer to this question. It was that the great test of criminality is the presence of a criminal intention. This principle, and the maxim supposed to embody it, "Actus non facit reum, nisi mens sit rea," is the principal and favourite topic of Erskine's declamations. Mere killing, mere taking away a horse, mere breaking and entering a house at night, do not, he said in substance, amount to murder, theft, or burglary, respectively. The jury must find, in addition malice aforethought, an intent to steal, an intent to commit a felony, respectively, before a man can be convicted of any of these crimes. So the jury must in libel find not only the fact of publication, but the wicked intention charged in the indictment or information, before they can convict of libel. This, in a few words, is the substance of nearly the whole of his argument, and of all that was said on that side of the question by many writers and speakers.

The argument is I think perfectly sound, but it cannot be applied unless it is clearly understood.

It is undoubtedly true that the definition of libel, like the definitions of nearly all other crimes, contains a mental element the existence of which must be found by a jury before a defendant can be convicted, but the important question is, What is that mental element? What is the intention which makes the act of publishing criminal? Is it the mere intention to publish written blame, or is it an intention to produce by such a publication some particular evil effect? Is the definition of libel like the definition of malicious wounding, which involves no other intention than an intention to strike or

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wound not justified or excused by law; or is it like the definition of wounding with intent to do grievous bodily harm, an offence which consists of the act specified coupled with the particular intention specified?

If the view of the definition of libel already given is correct, if all written blame of public men, laws, or institutions, amounted to seditious libel, then the only intention required to make the publication of a libel criminal was an intention to publish in a defamatory sense, and without legal excuse. Such an intention is undoubtedly required in nearly every case (though even now there is a remarkable exception to it, to be noticed hereafter), and its existence must undoubtedly at all times have been found as a fact by the jury.

It never was the law of England that a man committed the offence of publishing a seditious libel by accidentally dropping one out of his pocket, or by handing, in ignorance of its contents, a closed letter containing one to the person to whom it was addressed. To be a crime, the publication of a libel must always have been intentional. Moreover, the meaning of the whole of the words published taken together must always have been defamatory. It never was doubted that (to take Algernon Sydney's famous illustrations) a man accused of publishing the blasphemous libel, "There is no God," might, upon its being proved that he had sold a Bible, point out that the alleged blasphemy was preceded by the words, "The fool hath said in his heart"; or that a man charged with publishing the immoral libel, "Go and sin," might show that he added the words "no more." Again, it was never doubted that certain circumstances not only justified or excused a man who published a libel, but made it his legal duty to do so. Bracton states that when a man found a libel his duty was to take it to the king or his council, but to do so would be a publication, and so would the act of reading the libel in court when the libeller was put on his trial.

When, however, it is admitted that the questions, Whether the publication was intentional? Whether the indictment or information fairly represents the defamatory character of the matter published? Whether or not the publication was justified or excused by circumstances? are questions of fact for the jury,

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the further question arises, Whether there is any authority for saying that the presence of any other specific intention is necessary in order to constitute the crime of publishing a seditious libel? I know of no authority for any such proposition before the passing of the Libel Act. The question may be tested thus. Would an indictment for a seditious libel have been good which, omitting formal parts, ran thus: "The jurors for "our lord the king present that A intentionally and without "justification or excuse published a seditious libel in these "words, 'King George III. is a wicked man deserving of "public execration'"? or might such an indictment have been demurred to on the ground that it did not aver that A intended to bring the king into contempt and to excite an insurrection and to promote disaffection or the like?

The answer to this question depends on the question already discussed. What is, or rather what was, the proper definition of a seditious libel? If a seditious libel is defined as the intentional publication, without lawful excuse or justification, of written blame of any public man, or of the law, or of any institution established by law, then the averment of any intention on the part of the defendant other than an intention to publish the blame is mere surplusage which need not be proved. If any further intention, such as, *e.g.*, an intention to produce disaffection or to excite an insurrection, is necessary to constitute the offence, then, no doubt, the averment of such an intention would be essential to the validity of the indictment.

I have given my reasons already for thinking that the first of these definitions was the true one, and it follows that the simpler form of indictment would have been sufficient. It is, however, undoubtedly true that the practice always was to fill indictments and informations with averments of every sort of bad intention on the part of the defendant. It is no exaggeration to say that they loaded him with abuse, as [1] the illustration in the note will show. My own opinion is

[1] "*The jurors, &c., present that W. D. S., &c.*, being a person of a wicked "and turbulent disposition, and maliciously designing and intending to "excite and diffuse among the subjects of this realm, discontents, jealousies, and "suspicions of our lord the king and his government, and disaffection and dis-"loyalty to the person and government of our lord the now king, and to raise



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that nearly the whole of the matter thus introduced was surplusage, and that the indictment against Dean Shipley (for instance) would have been good if it had consisted only of the matter printed in italics and the necessary formal averments, but of course the introduction of the unnecessary averments afforded to Erskine and others a plausible argument in support of their view of the question. If the question whether Dean Shipley intended by publishing his pamphlet "to excite discontent and disaffection" or "to "raise very dangerous seditions and tumults within this king-"dom" was material, it was impossible to deny that it was a question of fact for the jury as much as the fact of publication and the fact that F. meant farmer and G. gentleman, and it was natural and obvious to ask why these averments were introduced if they were wholly immaterial and were on a level with the averments in indictments for murder that the prisoner acted at the special instigation of the devil? It would hardly have been considered decorous in that age to give the true answers, which would have been that the indictments preserved the style and temper of an age when round, full-mouthed abuse of people who gave offence to the government was thought natural and proper; that the law being vague and ill-ascertained, and perhaps if clearly ascertained likely to be extremely unpopular, it was best to err on the side of averring too much, so as to make the defendant look, at all events on the face of the proceedings, not only like a criminal, but like an extremely wicked man; that the draftsman was paid by the folio; and, above all, that in formal documents slavish adherence to precedents is the safest course.

"very dangerous seditions and tumults within this kingdom, and to draw the "government of this kingdom into great scandal, infamy, and disgrace, and "to incite the subjects of our lord the king to attempt by force and vio-"lence, and with arms, to make alteration in the government, state, and con-"stitution of the kingdom, *on*, &c., *at*, &c., wickedly and seditiously *pub-"lished, and caused and procured to be published, a certain* false, wicked, "malicious, *seditious*, and scandalous *libel of and concerning our said lord the "king, and the government of this realm*, in the form of a supposed dialogue "between a supposed gentleman and a supposed farmer, wherein the part of "the supposed gentleman is denoted by the letter G., and the part of the "supposed farmer in such supposed dialogue is denoted by the letter F., "entitled, &c., *in which* said *libel is* (*sic.*) *contained the* false, wicked, mali-"cious, *seditious*, and scandalous *matters* following, to wit," &c.

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The inference is that the matter really in issue on an indictment for seditious libel was as follows, namely: (1) the fact of publication; (2) the defendant's intention to publish the matter imputed to him in the sense ascribed to it by the indictment or information; (3) it was open to the defendant to prove under the plea of not guilty any matter of legal excuse or justification. Upon each of these points observations arise.

As to (1), [1] publication of course meant an intentional publication. In practice this was tacitly assumed. The controversy never refers to it.

As to (2), the prosecutor had to prove the truth of the innuendoes, and it was open to the defendant to show by reference to the context either that the words published were published in a different sense from that imputed to them or that they related to a different subject-matter. He might show either that "There is no God" was part of the sentence, "The fool has said in his heart there is no God," or that the whole scheme of the work in which the sentence occurred showed that the words related not to the God of Christianity, but to the gods of heathenism, and that the sentence meant to say that no such god was a real being. Stockdale's case and Horne Tooke's case both show that under circumstances this might practically raise the question of the intention of the author in publishing as distinguished from the intention of the words published.

As to (3), the possibility that there might be such a thing as excuse or justification for the publication of a libel is admitted by Lord Mansfield in the case of Woodfall, and this admission was made great use of by Erskine in his subsequent arguments.

This is practically equivalent to saying that in all common cases the fact of publication and the truth of the innuendoes were the only points for the jury to decide.

If it is asked whether it would not be a question for the jury whether the language used did in fact impute blame either to public men or to existing laws, or to institutions,

[1] I pass over for the present the question of a bookseller's responsibility for acts done by his servant without his knowledge.



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the answer I think is No, subject to what has already been said as to the right of the jury to determine the meaning of the words used by reference if necessary to the context and by finding the truth of the innuendoes. Assuming the words to be clear in themselves and to be fairly quoted in the indictment or information, it is difficult to see what question of fact there can be as to their meaning. They must speak for themselves. It would surely not be the duty of a judge to say to the jury, "You must consider whether the words 'George III. is an "'execrable tyrant' do or do not impute blame to him. If you "think they do, they are a seditious libel." It would be the judge's duty I think to say positively these words do impute blame to George III., just as it would be his duty to say positively the words "George III. rode in Windsor Park" do not impute blame to him on their face, though by proper averments, which would be for the jury, and in connection with other matter, they might be shown to be seditious or even treasonable.

This view of the law as it stood before the Libel Act is supported by the analogy of civil actions for defamation and of the definitions of all other crimes.

In all common crimes it is the duty of the judge to decide in minute detail upon the criminality of acts said to have been done. In an indictment for wounding, for instance, it is a question of law and not of fact what amounts to a wound; whether, for instance, a [1] blow with a hammer on the face breaking the jaw in two places and making an extensive bruise inflicts a wound, if the surface of the body is not actually divided, and whether a division of an internal surface such as the skin of the inside of the mouth is sufficient to constitute a wound. So it is a question of law whether a man commits an assault by presenting a pistol at another, or by making threatening gestures with a stick. In cases of murder it is the duty of the judge to tell the jury whether any state of mind suggested to have existed when the act was done did or did not amount to what the law means by malice aforethought, and so of the mental elements of all other crimes whatever.

[1] 1 *Russ. Cr.* 921.

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Perhaps, however, the most remarkable and instructive analogy is to be found in the law as to civil actions for defamation. In actions for defamatory words it is undoubtedly a question of law whether given words are or are not actionable, and in [1] old writers long lists of decisions (often grotesque) upon the subject are to be found.

Moreover, in all actions for defamation, whether by way of slander or by way of libel, a long series of decisions has established the circumstances under which blame is admissible. A statement of the result of them in the form of a set of seven propositions which collectively define what is meant by malice in relation to a libel on a private person will be found in [2] my *Digest*. These propositions all proceed upon the supposition, which indeed seems to me plain in itself, that language either does or does not convey blame, and that it cannot properly be said to be a question for either judge or jury whether it does so or not. Take *e.g.* the doctrine as to what is called [3] fair comment. Its terms imply that the defamatory nature of the comment speaks for itself. Suppose *e.g.* an action were to be brought against a critic for saying of a book "This is an excellent book"—no innuendo or other averment being used to show that the word was used ironically. It would be absurd to leave to the jury the question whether these words were defamatory. They were clearly not defamatory, and the proper answer to the action would be a demurrer. If the words were, "This is a wicked book," it would be equally plain that the words were defamatory, and the question for the jury would be whether the comment contained in them was fair. It is, however, perfectly

[1] See, *e.g.*, Comyn's *Digest*, title "Action on the Case for Defamation." To charge a woman with prostitution in the city of London is said to be actionable, because of certain customs of the city; *aliter* of the imputation applies to the city of Westminster (*Digest*, 10). It is actionable to say of a barrister, "He has no more *law* than a jackanapes," but not to say "He has "no more *wit* than a jackanapes" (*Digest*, 22).

[2] Arts. 271-277, both inclusive.

[3] "The publication of a libel is not a misdemeanor if the defamatory matter "consists of comments upon persons who submit themselves, or upon things "submitted by their authors or owners, to public criticism, provided that such "comments are fair.

"A fair comment is a comment which is either true, or which, if false, "expresses the real opinion of its author (as to the existence of matter of fact "or otherwise), such opinion having been formed with a reasonable degree of "care, and on reasonable grounds."—*Digest*, art. 247, p. 189.

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true that when the jury have to decide such questions as that of fair comment and the like they are obliged to form their own opinions as to the whole subject, the character of the language used as well as the rest.

Upon these grounds it appears to me that on the main question at issue between them the judges were right and Erskine wrong, in reference to the law as it then stood. At the same time the law was so harsh, indeed in reference to the state of things which even then existed so intolerable, that the judges did not state it nakedly and logically, but put it in a form which exposed them at particular points to arguments to which I see no answer. If they had contented themselves with saying that it was the duty of the judge to tell the jury whether the language imputed to the defendant did or did not constitute a seditious libel if it was published intentionally and without lawful excuse or justification, and if its meaning was fairly represented by the indictment, and that it was the duty of the jury to find a verdict accordingly; and if they had said that every writing which, under any pretence, censured any public man, or any law or institution, was seditious, I think they would have been right, assuming that they had no other duty than that of acting upon the law as it stood according to existing authorities. But they did not do this. They tried to make the verdict of guilty in trials for libel an imperfect special verdict, which would have the effect of convicting the defendant even if he was innocent in the opinion of the judge who tried him, subject to his getting the court to quash his conviction upon a motion in arrest of judgment. Erskine's arguments in Dean Shipley's case set the objections to this in all points of view in so clear a light that I need only refer to them. Shipley's case was in itself an unanswerable proof of the hardship to which defendants were exposed by it. He was convicted, held to bail, and put to all manner of expense, trouble, and anxiety for having published a paper which the judge who tried him did not regard as criminal, instead of having the benefit of a declaration of the judge's opinion, which would have been equivalent to a direction to the jury to acquit.

The effect of the Libel Act, and of the discussions which

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led to it, was thus to embody in the definition of the crime of seditious libel the existence of some kind of bad intention on the part of the offender. I do not think that the mere words of the act abstractedly considered have that effect. They are to the effect that the whole matter in issue upon a plea of not guilty to an indictment for libel is to be left to the jury as in other criminal cases, but they do not say what is in issue on such a plea. The general principle is that a plea of not guilty in a criminal case puts in issue all the material averments in the indictment, but the Libel Act does not say whether the averments as to the specific intentions of the defendant in such cases are or are not material. It no doubt, however, assumes them to be so, and the law has ever since been administered upon the supposition that they are.

The Libel Act must thus be regarded as having enlarged the old definition of a seditious libel by the addition of a reference to the specific intentions of the libeller—to the purpose for which he wrote. And a seditious libel might since the passing of that act be defined (in general terms) as blame of public men, laws, or institutions, published with an illegal intention on the part of the publisher. This was in practice an improvement upon the old law, which indeed was, as I have already pointed out, altogether inconsistent with serious political discussion. The alteration was skilfully made, and the legal reasons assigned for it were plausible, though I think they were nothing more. It is highly improbable that an attempt to give an express statutory definition of the crime would have produced anything better than the practical result of the Libel Act. At the same time it may be said that the definition thus obtained is open to a weighty objection which may be presented in various forms.

To make the criminality of an act dependent upon the intention with which it is done is advisable in those cases only in which the intent essential to the crime is capable of being clearly defined and readily inferred from the facts. Wounding with intent to do grievous bodily harm, breaking into a house with intent to commit a felony, abduction with intent to

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marry or defile, are instances of such offences. Even in these cases, however, the introduction of the term "intent" occasionally leads either to a failure of justice or to the employment of something approaching to a legal fiction in order to avoid it.

The maxim that a man intends the natural consequences of his acts is usually true, but it may be used as a way of saying that because reckless indifference to probable consequences is morally as bad as an intention to produce those consequences the two things ought to be called by the same name, and this is at least an approach to a legal fiction. It is one thing to write with a distinct intention to produce disturbances, and another to write violently and recklessly matter likely to produce disturbances.

A further objection to referring to the defendant's intention in any case, and especially in defining the crime of libel with reference to it, is that a confusion is sure to occur between intentions and motives. Indeed in the many trials for seditious libel which followed the passing of the Libel Act, I have not found an instance in which the distinction was pointed out. The words are constantly used as if good motives and good intentions were convertible terms. It is, however, obvious as soon as the matter is mentioned that the two are distinct. A man may be led by what are commonly regarded as pure motives to form seditious or even treasonable intentions, and to express them in writing, just as he might be led to commit theft or murder by motives of benevolence. If a man who steals in order to give away the stolen money in charity, or a man who kills a child in order to save it from the temptations of life, is not excused on account of the nature of his motives, why should a man who writes a libel calculated and intended to produce a riot be acquitted because his motive was generous indignation against a real grievance? By making the intention of the writer the test of his criminality a great risk of this result is incurred. A jury can hardly be expected to convict a man whose motives they approve and sympathize with, merely because they regard his intention with disapproval. An intention to produce disaffection is illegal, but the motive for such

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an intention may be one with which the jury would strongly sympathize, and in such a case it would be hard even to make them understand that an acquittal would be against their oath.

Another objection to the definition is that it is inconsistent with a rule of law which is still in force and which was for many years after the Libel Act acted upon without the smallest question or difficulty. This is the rule that not only the authors of seditious libels but every one who publishes them, and especially every bookseller who sells them, is liable to the same punishment as the author. This rule, indeed, has been carried so far that the publisher has been held to be criminally responsible for the acts of his servant, when they were done only under a general authority and when the master is altogether ignorant of them. In the case, for instance, of [1] R. *v.* Cuthill, evidence was given to show that the pamphlet in question was published by a classical bookseller, who had never read it, and who published it under the impression that it was not a political work at all, supposing it to relate to the subjects on which the author (Gilbert Wakefield) usually wrote. Erskine, who defended Cuthill, admitted that the fact of publication was *primâ facie* evidence of what he called "the motives charged in the indictment," but he contended that if he could satisfy the jury that the bookseller was in fact only negligent and inadvertent in the publication, he was entitled to be acquitted. This view of the matter was hardly adverted to by the judge (Lord Kenyon). Cuthill was convicted, and many such convictions have taken place since, without any question as to their propriety. This rule, indeed, was expressly recognised in Lord Campbell's Libel Act of 1843 (6 & 7 Vic. c. 96, s. 7), which provides that when on a trial for libel evidence has been given which establishes a *primâ facie* case of publication against the defendant by the act of any other person by his authority, it shall be competent to the defendant to prove that the publication was made without his authority, consent, or knowledge, and that the publication did not arise from any want of due care or caution on his part. This provision clearly shows that a negligent publication of a libel by a bookseller who is ignorant of

[1] 27 *State Trials*, 641. See especially pp. 655, 663, 666, 673-675.

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its contents is criminal, but such negligence is inconsistent with the presence of any such specific criminal intention as according to Erskine's view of the Libel Act is essential to the offence.[1]

If nothing had to be regarded in legal definitions except clearness and symmetry, a seditious libel ought to be defined with reference to the tendency of the matter published and without reference to the intention of the author; but as, on the one hand, the subject is one of great delicacy, and on the other of little practical importance in the present state of public feeling and practice on such subjects, the Criminal Code Commissioners recommended no modification in that which they believed to be the definition of the offence according to the existing law.

I now proceed with the history of the law. The Libel Act was passed in the session which ended on the 31st January, 1792, many months before the war between France and England broke out, and before the French Revolution had passed into its most violent stage, though war was then imminent between the French and the continental powers. The next four years were, perhaps, the most anxious and stormy in the history of every nation in Europe, and of this nation amongst the rest. The violence of the state of feeling which then prevailed shows itself at least as distinctly in the judicial as in the political history of the country. I have already referred to the trials for high treason in 1794. In 1792 and 1793 the trials for political libels and seditious words were frequent. No less than twelve are reported in the *State Trials*, and they are only specimens.

[1] Whilst these pages were passing through the press I had to try a man named Mertens for printing and publishing a libel in a paper called the *Freiheit*. The libel consisted of an eulogy of the horrible murder committed on the 6th May, 1882, on Lord Frederick Cavendish and Mr. Burke in Dublin. The evidence was that the defendant was a compositor, who had set up the type of the paper, though there was also evidence of his having taken part in other ways in the publication of the paper. I thought myself justified in telling the jury that if they thought that the defendant set up the type mechanically, and without any intelligent perception of the meaning of what he was printing, he ought to be acquitted, but that if he knowingly printed matter which they considered libellous he ought to be convicted, and he was convicted and punished on this direction. I am not sure that in former times this would not have been considered too favourable to the prisoner.

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The number so chosen is only one less than the total number of trials for seditious libel reported from 1704 to 1789, both inclusive. I do not propose to go through all of them; it is enough to observe that they supply another illustration of a conclusion which is suggested by many other circumstances, that trial by jury is capable of being quite as severe a method of procedure as any other form of trial. The convictions after the Libel Act were as common as they were before, if not commoner. I will mention a few cases by way of illustration. [1] Duffin and Lloyd, two prisoners in the King's Bench prison, were convicted of "seditiously devising, contriving, and in-"tending to excite and stir up divers prisoners to escape, by "publishing an infamous, wicked, and seditious libel," in the shape of a placard, "This house," meaning the said prison, "to "let. Peaceable possession will be given by the present tenants "on or before the 1st day of January, 1793, being the com-"mencement of the first year of liberty in Great Britain." They were convicted at once. This trial is important only as showing the feeling of the time. At most the paper was an excusable squib.

On the following day (December 18, 1792) a more important trial occurred. This was the [2] prosecution of Paine for publishing the *Rights of Man*. The information extracted various passages from that work said to be written with intent to vilify the Revolution of 1688, to represent that the King, Lords, and Commons tyrannized over the people, and to bring them into hatred and contempt. Paine was convicted, as soon as his defence was over, the jury saying that they did not wish to hear either reply or summing-up. It is indeed impossible to doubt that he did write with the intentions specified. The case is remarkable principally on account of Erskine's speech for the defence, which was his first important speech on the subject after the Libel Act. Erskine in this case seems to me to have shown true courage, for he was on what for a considerable time was the unpopular side, and he spoke with great energy and resolution, although Paine had written from Paris, where he was sitting as a member of the Convention, a letter to the Attorney-General full of brutality and threats,

[1] 22 *State Trials*, 318. [2] *Ib.* 357-471.

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[1] and in particular referring disrespectfully to George IV. As Erskine was then Attorney-General to the Prince of Wales this made his position painful. His defence is a remarkable performance in every way, especially when we remember that at the time Louis XVI. was awaiting his trial, the history of the September massacres was but four months old, and the first efforts of the coalition had ignominiously failed. The speech is an elaborate defence and exposition of the extent and nature of the liberty of the press as Erskine understood it, and as he had a right to understand it after the passing of the Libel Act. The substance of his argument (though he does not put it quite in that form) might be expressed somewhat as follows.

The Libel Act practically defines the crime of libel as publishing certain kinds of written blame with a bad intention, that is to say, from a bad motive.

A man who publishes what he really believes to be true from a desire to benefit mankind, does not act from a bad motive, however erroneous his opinions may be, and however harshly they may be expressed.

Therefore, no publication of any opinions really entertained is criminal unless the publisher wishes to injure mankind.

Practically the inference would be that there ought to be no prosecutions for seditious libel at all unless the matter published obviously tended to provoke people to commit some definite crime, or unless it contained definite attacks upon individual character. This is not unlike the conclusion at which we have in practice arrived in these days. Notwithstanding the Libel Act, juries did not accept it for many years after 1792.

Early in 1793 an [2] attorney named Frost was imprisoned

[1] See the letter, 22 *St. Tr.* p. 397. It refers, amongst other things, to "Mr. "Guelph, or any of his profligate sons." This allusion to the habits of George IV. was too much for the Attorney-General (Macdonald). "Is Mr. Paine," he asked, "to teach us the morality and religion of implacability? Is he to teach "human creatures, whose moments of existence depend upon the permission "of a Being, merciful, long-suffering, and of great goodness, that those youth- "ful errors, from which even royalty is not exempted, are to be treasured up in "a vindictive memory, and are to receive sentence of irremissible sin at his "hands? Are they all to be confounded in those slanderous terms, shocking "for British ears to hear, and I am sure distressing to their hearts? He is a "barbarian who could use such profligate expressions," &c., and all because George IV. was called "profligate."

[2] 22 *State Trials*, 471-522.

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for six months, pilloried, made to find sureties for good behaviour for five years, and struck off the rolls (to which, though pardoned in 1813, he could not, in 1815, procure readmission) for saying in a coffee-house that he was for equality, and no king, and that the Constitution of the country was a bad one. He seems to have been more or less drunk at the time.

In the same year a dissenting minister named [1] Winterbotham was convicted at Exeter of speaking seditious words in a sermon, in which he was said to have spoken favourably of the French Revolution, to have called the taxes in England oppressive, and to have referred in somewhat strong language to the conditions on which English sovereigns held their authority, as illustrated by the Restoration of 1688. The balance of evidence to show that he had not said what was imputed to him was so much in his favour that the judge (Baron Perryn) summed up strongly for an acquittal on each of the indictments on which he was tried. The jury, however, convicted him in each case, and he was sentenced to be fined £100 for each offence, and to be imprisoned for two successive periods of two years, besides finding sureties for his good behaviour. Several other cases of the same kind are reported in the *State Trials*, and no doubt many occurred which are not reported.

In some cases, however, the defendants were acquitted. The most striking and characteristic is the case of Lambert, [2] Perry, and Gray, the proprietors and printer of the *Morning Chronicle*. They had published in that paper, on Christmas Day, 1792, as an advertisement, a [3] paper headed "An "Address to the Friends of Free Inquiry and the Public "Good," issued at Derby on the preceding 16th July. The substance of it is that "deep and alarming abuses exist in "the British Government," that the taxes are too heavy, the frequency of war a matter to be viewed with concern, "cruel "and impolitic wars" being one great cause of "our present "heavy burdens;" that in order to remedy this there ought to

[1] 22 *State Trials*, 875.

[2] The father of the late Sir Erskine Perry, whose Christian name commemorated his father's sense of his obligation to Erskine on this occasion.

[3] Attributed to Mr. Erasmus Darwin, 22 *State Trials*, 1008.

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CH. XXIV. be a reform of the representation, that "we see with the "most lively concern an army of plunderers, pensioners, &c., "fighting in the cause of corruption and prejudice;" that there exists "a criminal code of laws sanguine and ineffi-"cacious, a civil code so voluminous and mysterious as to "puzzle the best understandings," "the voice of free inquiry "drowned in prosecutions," and other matter of the same kind. Erskine repeated the same arguments as he had used on other occasions. The argument on the other side was that, considering the character of the times when the publication took place, the object of the defendants must have been a bad one. Lord Kenyon in summing up, went so far as to say that in December, 1792, [1] "the country was torn to its "centre by emissaries from France. It was a notorious fact, "every man knows it. I could neither open my eyes nor my "ears without seeing and hearing them." Being published at such a time, argued Lord Kenyon, "believing that the minds "of the people of this country were much agitated by these "political topics, on which the mass of the population can "never form a true judgment, I think this paper was "published with a wicked, malicious intent to vilify the "government and to make the people discontented with the "constitution under which they live . . . that it was done "with a view to vilify the constitution, the laws, and the "government of this country, and to infuse into the minds "of his Majesty's subjects a belief that they were oppressed, "and on this ground I consider it is a gross and seditious "libel." The jury, after considering the matter from 2 P.M. till 5 A.M., acquitted the prisoners, after an ineffectual attempt to return a verdict of "guilty of publishing, but with "no malicious intent," which Lord Kenyon, I think properly, refused to receive.

The immediate effect of the Libel Act was, as appears from these cases, to make the juries *ex post facto* censors of the press. They exercised the function in a very singular way. In 1796 [2] John Reeve, the author of a history of English law which has not even yet been superseded, was tried on a criminal information (filed by order of the House

[1] 22 *State Trials*, 1017. [2] 26 *Ib.* 529.

of Commons) for a speculation as to the origin of Parliament, in which he said: "The government of England is a "monarchy; the monarchy is the ancient stock from which "have sprung those goodly branches of the legislature, the "Lords and Commons, that at the same time give ornament "to the tree and afford shelter to those who seek protection "under it." In this and much other matter of the same sort it was said that Reeve unlawfully devised and intended "to "destroy and subvert the true principles of the free consti-"tution of this realm, and most artfully and maliciously to "traduce, vilify, and bring into contempt the power and "dignity of the two Houses of Parliament." Lord Eldon (then Attorney-General) prosecuted him, and must have felt oddly situated in trying to expound to the jury that some expressions contained in the alleged libel, and in particular the author's aversion to the word "Revolution," as applied to the events of 1688, were in a way unorthodox and hard to reconcile to the true view of the Bill of Rights, in short, that Reeve had carried his high Toryism just a little too far, and had become in relation to the golden mean what Tritheists on the one hand, and Sabellians on the other, are in reference to the Athanasian Creed. Lord Kenyon must have been equally puzzled in his summing up. He observed at some length upon the merits of free discussion, observing, [1] "I "believe it is not laying in too much claim on the behalf of "free discussion to say that we owe to it the Reformation, "and that we owed to it afterwards the Revolution." He remarked that "although licentiousness ought beyond all "controversy to be restrained, fair discussion ought not to be "too hardly pressed upon." He also gave this remarkable direction to the jury: "If I were bound to decide it . . . I "certainly should retire: I should take the charge with me, and "I should examine the charge; I should take the pamphlet "with me, I should examine the pamphlet, and I should see, "with every fair leaning to the side of lenity and compassion, "whether I thought the party was guilty or not. I say "with every *fair* leaning, but still not with that leaning "which is to do away with the effect of the criminal law of

[1] 26 *State Trials*, p. 591.

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"the country.' He does not seem on this occasion to have felt bound by his oath to express his opinion, as he did in the case of Lambert and Perry. It is to be hoped that this helped the jury, who returned this odd verdict: "The jury "are of opinion that the pamphlet which has been proved to "have been written by John Reeve, Esq., is a very improper "publication, but being of opinion that his motives were not "such as laid in the information, find him not guilty."

Passing over many cases to which reference might be made, I will mention two or three which may be regarded as important in the history of the administration of the law on this subject. [1] In 1810, Lambert and Perry, the proprietors of the *Morning Chronicle*, were for a second time prosecuted for a seditious libel. The libel imputed to them was in these words: "What a crowd of blessings rush upon one's mind "that might be bestowed upon the country in the event of a "total change of system! Of all monarchs, indeed, since the "Restoration, the successor of George III. will have the finest "opportunity of becoming nobly popular." Mr. Perry defended himself with the highest ability and was acquitted. Lord Ellenborough summed up in a very different style from Lord Kenyon. The effect of what he said is that moral blame must not be imputed to the king (the case of his deserving it is not suggested or considered), but that it is not libellous to suggest that his measures are mistaken. This is stated at considerable length, but with vigour and clearness, and the principle is applied with conspicuous fairness to the case under consideration. I am not prepared to mention any case before this in which a judge of such high authority as Lord Ellenborough had distinctly said that it was no libel to say that a king was mistaken in the whole course of his policy. It is somewhat remarkable that Lord Ellenborough illustrates his view by remarking that *even* Oliver Cromwell was mistaken, namely, in "throwing the scale of power into the hands of "France when he turned the balance against the house of "Spain." This implies that Oliver Cromwell was less likely to be mistaken than other rulers of England.

In the troubled times which followed the peace of 1815

[1] 31 *State Trials*, 335-368.

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there were many prosecutions for political libels, and the offence of seditious libel received for the first time a kind of statutory definition. It was enacted in 1819, by 60 Geo. 3, and 1 Geo. 4, c. 8, that upon a conviction for blasphemous or seditious libel the court should have power to order all copies of the libel in the possession of the person convicted to be seized, and for the purpose of deciding what libels might be seized under its powers the act gives the following description of seditious libels: "Any seditious libel tending to bring "into hatred or contempt the person of his Majesty, his heirs "or successors, or the regent, or the government and constitu-"tion of the United Kingdom as by law established, or either "House of Parliament, or to excite his Majesty's subjects to "attempt the alteration of any matter in Church or State "as by law established otherwise than by lawful means." Practically this is equivalent to saying a seditious libel is a libel which has any of the tendencies specified. No special change in the law relating to seditious libel has taken place since this time, though there have been several trials for that offence of considerable importance. Two of them deserve special mention—the trial of Sir Francis Burdett in 1820, and that of Cobbett in 1831. Sir F. Burdett was fined £2,000 and imprisoned three months for a somewhat violent and excited letter on the subject of the dispersion of the meeting at St. Peter's Field, Manchester, by the troops and yeomanry. This letter was written in Leicestershire, sent by some means to London, and there delivered to an agent of Sir F. Burdett, who at his request published it in a London newspaper. The trial was not, in a legal point of view, so interesting as the [1] subsequent proceedings on a motion for a new trial. They constitute the most important judicial comment ever made on the Libel Act of 1792, and contain the fullest inquiry into the nature of the offence of libel to be found in any case with which I am acquainted.

One of the grounds on which a new trial was moved for was that the judge (Best, afterwards Lord Wynford,) had exceeded his duty as defined by the Libel Act. The court were unanimously of opinion that he had not. [2] His own

[1] 4 *B. and A.* 95.

[2] P. 131.



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CH. XXIV. account of the part of his direction which had reference to this matter is as follows: [1] "With respect to whether this was "a libel I told the jury that the question whether it was pub-"lished with the intention alleged in the information was "peculiarly for their consideration; but I added that this "intention was to be collected from the paper itself, unless "the import of the paper were explained by the mode "of publication or any other circumstances. I added "that if it appeared that the contents of the paper were "likely to excite sedition and disaffection, the defendant must "be presumed to intend that which his act was likely to pro-"duce." Further on he says: "I told the jury that they "were to consider whether the paper was published with the "intent charged in the information, and that if they thought "it was published with that intent I was of opinion that it "was a libel. I however added that they were to decide "whether they would adopt my opinion. In forming their "opinion on the question of libel I told the jury that they were "to consider whether the paper contained a sober address to "the reason of mankind, or whether it was an appeal to their "passions calculated" (he does not say intended) "to incite "them to acts of violence and outrage. If it was of the former "description it was not a libel; if of the latter description it "was. It must not be supposed that the statute of George "the Third made the question of libel a question of fact. If "it had, instead of removing an anomaly it would have created "one. Libel is a question of law, and the judge is the judge "of the law in libel as in all other cases, the jury having the "power of acting agreeably to his statement of the law or not. "All that the statute does is to prevent the question from being "left to the jury in the narrow way in which it was left before "that time. The jury were then only to find the fact of the "publication and the truth of the innuendoes, for the judges "used to tell them that the intent was an inference of law to "be drawn from the paper, with which the jury had nothing "to do. The legislature have said that is not so, but that the "whole case is for the jury." This view of the effect of the

[1] *B. and A.* 120

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Libel Act[1] was adopted by the whole court. The account which I have already given of the subject shows, I think, that it is in a legal point of view perfectly correct, and that the view taken by the judges in the eighteenth century was also correct, subject to the limitation which I have already stated.

Several other points were debated in Sir Francis Burdett's case, one of which illustrates in a remarkable way the manner in which questions[2] which one would suppose must have been decided may, in fact, remain undecided for centuries. The evidence in the case proved that Sir Francis Burdett wrote the letter in question in Leicestershire, and that by some means or other it was conveyed to London and there published in several newspapers by his orders, but the evidence to show that he published it in Leicestershire was, to say the least, by no means clear. It was alleged, however, that the offence was complete as soon as the letter was written with intent to publish it. [3] Three of the judges held that where a man writes a letter in one county and publishes it in another he may be indicted in either, and this made it unnecessary to determine whether the writing with intent to publish was in itself a misdemeanour. [4] Holroyd, J., expressed a decided opinion in the affirmative, and [5] Abbott, C. J., seemed to incline towards the same view. The question will probably never be decided, inasmuch as it was enacted by 7 Geo. 4, c. 64, s. 12, that an offence begun in one county and finished in another might be tried in either.

Prosecutions for political libels must have occurred between 1820 and 1830, for it appears from a report in the [6] *Annual Register* for 1822 that in that year a body was in existence called the Constitutional Association, which habitually prosecuted persons for that offence, and made them give up books and pay expenses, and engage to discontinue such publications. I have not, however, found any report of any case of libel

[1] Bayley, J., p. 147; Abbott, C. J., 183-184. Holroyd, J., gave no express opinion on this point, but he did not dissent, and no doubt agreed in what was said.

[2] *E.g.* it has never been decided whether signing is essential to the validity of a deed, or whether sealing is sufficient.

[3] Abbott, C. J., Holroyd, J., and Best, J.

[4] P. 135.
[5] Pp. 158-159.
[6] P. 397.



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tried during that period of much interest either in the *Annual Register* or in an elaborate list of celebrated trials given in Haydn's *Book of Dates*.

Nearly the last trial of what may be called the old type was that of [1] Cobbett on the 7th July, 1831. He was tried for publishing an article in the *Political Register* in December, 1830, which was said to be meant to excite the agricultural labourers to burn ricks, destroy machinery, and commit other outrages. Lord Tenterden tried the case. Lord Denman, then Attorney-General, was counsel for the Crown, and Cobbett defended himself. He reviled the Whigs, he reviled the Attorney-General, he reviled all the newspapers, he reviled the ministry. He declared that he was singled out for persecution when worse offenders were left untouched, and to prove it made all sorts of attacks upon alleged libellers, and upon the course taken in regard to all sorts of offenders, some of whom, he said, had been hung when they should have been pardoned, and one pardoned, because he imputed his offence to [2] "Mr. Cobbett's Lactures," when he ought to have been hung. Lord Tenterden appears to have interfered once only. The defendant was entering upon the question whether Blackstone had "garbled a quotation from the Bible," when the judge observed, "Really, Mr. Cobbett, this is quite "irrelevant to the purpose." Cobbett quietly replied, "I do "not think so, my lord," and proceeded with his criticism without interruption. What excuse there could be for permitting the defendant to turn a trial for libel into a violent attack upon the motives and political conduct of his prosecutors it is impossible to say.

[3] Richard Carlile was tried before the Recorder of London (Mr. Knowlys) about the same time (January 10, 1831) for a similar offence. The charge was publishing a seditious libel inciting agricultural labourers to riot, insurrection, and arson. The libel complained of purported to be an address "to the "insurgent agricultural labourers." It began, "You are much

[1] Cobbett published a shorthand-writer's report of the trial, which I have. It is scarce, and the *State Trials* do not come below 1822. I am by no means confident of the completeness or fairness of the report.

[2] Cobbett keeps insisting on the poor man's mispronunciation, just as he represents the Scotch as bragging of their "antallact," as he rejoices to spell it.

[3] See a rather full report in 4 *C. and P.* 415.

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"to be admired for everything you are known to have done "during the last month. . . . Much as every thoughtful man "must lament the waste of property, much as the country "must suffer by the burnings of farm produce now going on, "were you proved to be the incendiaries, we should defend "you by saying you have more just and moral cause for it "than any king or faction that ever made war had for making "war. In war all destructions of property are counted lawful, "upon the ground of that which is called the law of nations; "yours is a state of warfare, and your ground of quarrel is "the want of the necessaries of life in the midst of an abun-"dance. . . . The more you have been oppressed and despised "the more you have been trampled on; and it is only now "that you begin to display your physical as well as your "moral strength that your cruel tyrants treat with you and "offer terms of pacification." The passage contained more to the same effect. The Recorder's charge is remarkable, principally for the earnestness with which he expressed his opinion on the passage from which I have given extracts: "Although you are at liberty, by 32 Geo. 3, to give a "general verdict, yet by the same act I am bound to give you "my opinion upon the law of the case as if it were a case of "murder or of other species of offence," and he added in reference to the passage extracted from: "I am bound in "law and in conscience to tell you, and I do tell you as "solemnly as I would pronounce the last supplication on "my death-bed, that the matter set out in that count is a "most atrocious, a most seditious, a most scandalous, and a "most dangerous libel, calculated to encourage his Majesty's "subjects, who were then, as the libel states, in actual insur-"rection, to continue in that state. This must be the tendency "of it." Carlile was convicted, fined £200, and imprisoned for two years, and till he found sureties for his good behaviour for ten years.

Since the Reform Bill of 1832, prosecutions for seditious libel have been in England so rare that they may be said practically to have ceased. In one or two instances there have been prosecutions and convictions for writings amounting to a direct incitement to commit crimes, one of which I may

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mention by way of illustration. In July, 1839, [1] riots took place in the Bull-ring at Birmingham, in the course of which some of the Metropolitan police were taken down to Birmingham, sworn in as special constables, and employed in the suppression of the riots. This excited the anger of a body called the General Convention, of which one Collins was a member. They published a placard containing three resolutions, describing the police as "a bloodthirsty and unconstitutional force from London," and strongly reflecting on the conduct of those by whom the police were sent there. For publishing this placard the [2] defendant was indicted for a seditious libel. The summing-up of the judge (Littledale, J.) states the modern view of the law on this subject plainly and fully: "You will first have to consider whether the statement "at the commencement of the indictment that there was an "unlawful assembly which was dispersed by the police be true "or not, and if it be true you will then have to consider "whether this publication was or was not a calm and temperate "discussion of the events which had occurred; for if the object "of it were merely to show that the conduct of the police "was improper, that would not be illegal, because every man "has a right to give every public matter a candid, full, and "free discussion. If the language of this paper was intended "to find great fault with the police force, even that might not "go beyond the bounds of fair discussion, and you have to "say, looking at the whole of this paper, whether or not it "does so. With respect to the first resolution, if it contains "no more than a calm and quiet discussion, allowing something for a little feeling in men's minds (for you cannot "suppose that persons in an excited state will discuss subjects "in as calm a manner as if they were discussing matters on "which they felt no interest), that would be no libel; but "you will consider whether the kind of terms made use "of in this paper have not exceeded the reasonable bounds "of comment on the conduct of the London police. With "respect to the second resolution . . . . you are to consider " . . . . whether they meant to excite the people to take the

[1] See cases of R. *v.* Neale, 9 *C. and P.* 431; R. *v.* Howell and others, *ib.* 37.
[2] R. *v.* Collins, 9 *C. and P.* 450.

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"power into their own hands, and meant to excite them to "tumult and disorder. . . . . The people have a right to discuss any grievances that they have to complain of, but they "must not do it in a way to excite tumult. It is imputed "that the defendant published this paper with that intent, "and if he did so, it is in my opinion a seditious libel." In one word, nothing short of direct incitement to disorder and violence is a seditious libel. A few cases have occurred very lately. On the 25th May, 1881, [1] Most, a German, was tried for writing an article in a newspaper which was found by the jury to be intended to incite those who might read it to assassinate sovereigns as the Emperor Alexander II. of Russia was assassinated, and also to contain libels upon foreign princes. He was convicted, and two other persons, Schwelm and Mertens, were convicted for somewhat similar articles in the same paper in June and July, 1882.

Such are the leading points in the history of the law of seditious libel in England. I may refer in connection with it to a class of libels which, if not seditious, have nevertheless a political character. [1] These are libels upon foreigners of eminence, attacks upon whom, in their public capacity, are likely to produce ill will or even war between this country and the foreign nations to which the persons libelled belong. Five cases of this sort have occurred. By far the most remarkable of them is the case of Peltier, who was tried on the 21st February, 1803, for a libel upon Napoleon (then First Consul), which was said to contain [2] a suggestion that he should be assassinated. Mackintosh's speech in his behalf appears to me to be far superior as a composition to be read to any of Erskine's speeches. It is remarkable, however,

[1] See my *Digest*, art. 99. It refers to all the cases on the subject, viz. R. *v.* D'Eon, 1 H. Blackstone, 510; R. *v.* Gordon, 22 *State Trials*, 213; R. *v.* Vint; R. *v.* Peltier, 28 *State Trials*, 529. To these must now be added R. *v.* Most, tried before Lord Coleridge at the Old Bailey, 25 May, 1881.

[2] "Il est proclamé chef et consul pour la vie,
"Pour moi loin qu'à son sort je porte quelqu'envie,
"Qu'il nomme j'y consens son digne successeur
"Sur le pavois porté qu'on l'élise empereur;
"Enfin, et Romulus nous rappelle la chose,
"Je fais vœu dès demain qu'il ait l'apothéose."
—28 *State Trials*, 533.

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that Peltier was convicted, though never called up for judgment, owing to the outbreak of war with France, which happened on the 29th April, 1803.

The law as to political libels has not been developed or altered in any way since the case of R. v. Burdett. I may, however, observe that if it should ever be revived, which does not at present appear probable, it would be found to have been insensibly modified to a great extent by the law as to defamatory libels upon private persons, which in modern times has been the subject of a great number of highly important judicial decisions. The result of them will be found in my [1] *Digest.* The effect of these decisions is, amongst other things, to give a right to every one to criticise fairly, that is honestly, even if mistakenly, the public conduct of public men, and to comment honestly, even if mistakenly, upon the proceedings of parliament and the courts of justice. Practically this by another road establishes pretty much the same theory as to the liberty of the press as was established by the long series of cases just referred to.

It is usual to describe the establishment of practically unlimited freedom of political discussion as a triumph of common sense, and as a conclusive proof of the idleness and absurdity of the restraints which have been removed. This view may no doubt be correct. It may also be true that the change marks a period in human affairs which is no more final than any of its predecessors, and that if in the course of time governments should come to be composed of and to represent a small body of persons who by reason of superior intellect or force of character or other circumstances have been able to take command of the majority of inferiors they will not be likely to tolerate attacks upon their superiority, and this may be a better state of things than the state of moral and intellectual anarchy in which we live at present. Which of these views is true it would be out of place to discuss here. It is enough to say that in this country and in this generation the time for prosecuting political libels has passed, and does not seem likely to return within any definable period.

[1] Chap. xxxii. articles 267-277, pp. 184-193.

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Some other political offences remain to be noticed. I have pointed out that prosecutions for seditious words were not uncommon about the year 1794. No such prosecution, I believe, has taken place for very many years. Seditious language, however, has on several occasions been made the subject of prosecutions, the charge being that of unlawful assembly or seditious conspiracy, of which violent speeches have been regarded as overt acts.

Several memorable trials of this sort have taken place both in England and Ireland in the course of the present century. I have already given an account of the law of conspiracy in general, regarded as a branch of the law relating to attempts, incitement, and other inchoate, imperfect crimes. Its application to political and especially to seditious offences is comparatively modern, the first instance of such a prosecution with which I am acquainted being that of [1] Redhead Yorke, in 1795. His trial is remarkable as an illustration of the way in which the law has been adapted to the various changes in the state of society which have taken place.

It would be difficult to say precisely at what period the use of completely organised voluntary associations for the purpose of obtaining political objects first became a marked feature of English political life, but it is certain that it received a great accession of importance, to say the least, when associations began to be formed for the purpose of procuring changes in the constitution of parliament and the other institutions of the country by constitutional means.

In earlier times the great questions which agitated the country hardly admitted of such associations. A voluntary association of the religious kind under the Tudors or Stuarts would have rendered its members liable to severe penalties under the Acts of Uniformity. An association for the purpose of dethroning James II. or for reinstating James III. would have been high treason.

It was not till the public at large, or considerable sections of them, began to agitate for changes in the constitution to be effected by Act of Parliament, that the formation of societies

[1] 25 *State Trials*, 1003.

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openly and avowedly intended for that purpose became possible. These societies, as is well known, were common and influential after the close of the American War, and many of the first men in the kingdom—Mr. Pitt, for instance, and the Duke of Richmond—were members of them. When the French Revolution broke out, the course pursued by some of these societies was so violent as to give occasion in 1794 to the prosecutions for high treason to which I have already referred. It was said at the time that if the prosecution had been for a seditious conspiracy it must have succeeded, and after the failure of the prosecutions for treason Yorke was accordingly prosecuted for a seditious conspiracy on facts closely resembling, and closely connected with, those which had been made the subject of the prosecutions for treason. The indictment charged in substance a conspiracy to traduce and vilify the House of Commons and the Government and to excite disaffection and sedition, as overt acts of which conspiracy it was alleged that meetings were held at different places for the purposes of hearing seditious and inflammatory speeches. Yorke was convicted and sentenced to a fine of £200, two years' imprisonment, and to find security for his good behaviour for seven years.

Many prosecutions for seditious conspiracy have occurred since that time. I may mention those of [1] Hunt and others, who were tried in 1820 for a seditious conspiracy of which the holding of the meeting dispersed at Manchester in 1819 was the principal overt act; [2] the trial of Vincent and others at Monmouth for a seditious conspiracy in connection with the Chartist disturbances in 1839; the trial of O'Connell and others in 1844 for a seditious conspiracy, of which the meetings held and speeches made in the course of the agitation for the repeal of the Union were overt acts, is another and a memorable instance; and I may also refer to the trial of Mr. Parnell and others on somewhat similar charges which took place at the end of 1880 and the beginning of 1881.

[1] The passages in *The Life of a Radical*, by Samuel Bamford, are principally occupied by this trial and the events which led to it.

[2] 9 *C. and P.* 91.

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These prosecutions and others which might be referred to all proceed on principles very similar to those on which seditious libels are tried. The charge commonly is that the defendants conspired together to effect some purpose inconsistent with the peace and good government of the country, and that they manifested that intention by speeches made, meetings held, and other steps taken in concert. The proof commonly is that some sort of organisation was formed in which the defendants took part, and that things were written and said in consequence which were calculated to effect the objects in question.

No case sets this in so clear a light as the memorable one of [1] O'Connell. The indictment consisted of eleven counts, upon which there was as to three of the defendants a general verdict of guilty and a single sentence. Of the counts nine were declared by all the judges, when consulted by the House of Lords, to be good; two were declared to be bad. [2] The nine good counts charged, with different modifications, a conspiracy with intent to raise discontent and disaffection amongst the liege subjects of the Queen; to stir up jealousies, hatred, and ill-will between different classes of her Majesty's subjects; and especially to promote amongst her Majesty's subjects in Ireland feelings of ill-will and hostility towards her Majesty's subjects in the other parts of the United Kingdom, and especially in England; to diminish the confidence of her Majesty's subjects in Ireland in the general administration of the law therein; and to bring into hatred and disrepute the tribunals established by law in Ireland for the administration of justice; to bring about changes in the law by meetings held to hear seditious speeches and by seditious writings. [3] The other counts, which were held bad, charged in substance a conspiracy to cause meetings to be held for the purpose of obtaining changes in the government and constitution of the realm "by means of the exhibition and demonstration of the "great physical force at such meetings." This language was

[1] 11 *Cl. and F.* 155.
[2] The indictment is given at pp. 157-165. The summary in the text is taken from the opinion of Tindal, C. J., pp. 234 and 236. It gives the substance of the indictment.
[3] Pp. 234-235.

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held to be too vague and uncertain to enable the court to say positively that the combination which it described must necessarily be illegal. These counts, however, would it seems have been good if they had been properly drawn.

The remarkable part of this decision is that it shows how wide the legal notion of a seditious conspiracy is. It includes every sort of attempt, by violent language either spoken or written, or by a show of force calculated to produce fear, to effect any public object of an evil character, and no precise or complete definition has ever been given of objects which are to be regarded as evil. All those which are mentioned in O'Connell's case are included in the list, but there may be others.

In the present day the law as to seditious conspiracy is of greater practical importance than the law of seditious libel. Political combinations are so common, and may become so powerful, that it seems necessary that a serious counterpoise should be provided to the exorbitant influence which in particular circumstances they are capable of exercising.

Two points still remain to be noticed which have been passed over in the preceding history of the development of the law of libel. The first is the nature, extent, and history of the rule that it is no defence to a criminal prosecution for libel to plead the truth of the matter complained of. The second is the relation between the law of seditious libel and that which is known better perhaps on the continent than in England by the name of the right of public meeting.

With regard to the rule as to the irrelevancy of the truth of the matter complained of to a libel considered as a criminal offence, it is necessary, in the first place, to recall the authorities already discussed and the history of the offence related at so much length.

Referring for the details to what has already been said, I may observe that, according to the original theory of the law of libel such offences obviously fell into two main classes. The first class consisted of written blame cast upon the institutions and general conduct of the government. The second, of attacks upon individuals, whether they happened

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to be public men or not. The principle more or less distinctly avowed, and frequently avowed with perfect distinctness, which regulated and indeed still regulates in theory the law as to offences of the first class, is that no man is to be permitted to attempt to bring into discredit the institutions of his country. If they have any defects the matter may be represented by petition to parliament, which has power to provide a remedy, but no one is to be permitted to appeal to the public at large on subjects of which most of them are incompetent to judge.

I have given the history of the gradual and informal steps by which this principle came to be qualified by an exception so nearly co-extensive with it that it has for common purposes, and in quiet times, practically superseded the rule. The exception is that criticism of existing institutions, intended in good faith for their improvement and for the removal of defects in them, is lawful, even if it is mistaken. With respect accordingly to such criticisms, it may still be said that the truth of the matter stated in a writing prosecuted as a seditious libel is immaterial. For instance, if a person were charged with seditious libel for asserting that the taxes were unjust and oppressive, and that the revenue was squandered on improper objects, the question for the jury would not and could not be whether the assertion was true, nor would evidence to prove its truth be admissible. The question would be whether the writer's object was to procure a remedy by peaceable means, or to promote disaffection and bring about riots.

With regard to attacks upon individuals, holding public positions or not, the principle was somewhat different, and the course taken by the law has also been different. Two grounds were assigned for this rule, as it affected men holding public positions. In the first place, it used to be said that the reason for punishing libels was their tendency to produce breaches of the peace, and that the truth of the libel would rather [1] increase than diminish this tendency. As regards men holding public situations, this was open to

[1] "As the woman said, She would never grieve to have been told of her red "nose if she had not one indeed."—Hudson's *Star Chamber*, p. 103.

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the obvious reply that it could hardly be supposed that a man in such a position would assault a person who libelled him for his public conduct, and no doubt the theoretical possibility that he might do so was alleged mainly as a decent technical reason for a rule which prevented the public discussion in pamphlets and newspapers of the conduct of public men. At a later period a reason commonly assigned for the rule was that if it were not enforced it would be possible for any one to put any one else upon his trial for any offence whatever, without legal evidence and without the other protections provided by law for persons accused of crimes. For instance, Horne Tooke charged the troops employed in America with murder, and the same and similar charges were made by Sir Francis Burdett against the yeomanry and soldiers who dispersed the Manchester meeting. It was said to be a hardship to these persons that the question whether they had committed murder should be tried in a prosecution to which they were not parties and behind their backs, and that if such a charge was brought at all it should be brought by a person prepared to undertake the responsibility of proving it in a court of justice by legal evidence. Great part of several of the judgments in R. *v.* Burdett, and more particularly on the question whether affidavits as to the truth of the allegations treated as libellous should be received in mitigation of punishment, turn upon this point.

It must be admitted that this argument has, at least in reference to a considerable number of libels, something unreal and technical about it which diminishes its weight. In a large number of cases the charges made against a public man's character by a newspaper or pamphlet do not charge him with anything for which he could be made responsible as a criminal, but only with misconduct, for which public discussion is practically the only available remedy. If the truth of such accusations were not allowed to be proved by way of a justification for making them much official misconduct and incapacity would be practically altogether unchecked. For cases of this kind, however, full provision has been made in two separate ways, namely, first, by the establishment of the rule that fair

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comment upon matters of public interest is lawful—a rule established in a number of civil actions for libel, but equally applicable to criminal prosecutions; and secondly, by 6 & 7 Vic. c. 96, commonly called Lord Campbell's Act, which provides, though in terms [1] not by any means free from difficulty, that it shall be competent for a defendant on an indictment or information for a defamatory libel to plead the truth of the matters charged, and that "it was for the public "benefit that the said matters charged should be published."

[1] The following difficulties occur upon the act—perhaps they are rather verbal than substantial:—

(1.) The expression "defamatory libel" has, or rather had, no ascertained legal meaning before this act was passed. It has been held not to include seditious or blasphemous libels (R. v. Duffy, 2 Cox, *C.C.* 49); but a seditious libel may also be defamatory. Personal misconduct might be imputed to eminent personages with a seditious intention, *e.g.*, an article imputing to George IV., whilst Prince of Wales, that he had secretly married a Roman Catholic, and that his subsequent marriage was bigamous, would have been both defamatory and seditious in the highest degree. The act leaves it doubtful whether such a libel could be justified or not.

(2.) The act says, s. 2, "The defendant, having pleaded such a plea as before "mentioned, the truth of the matters charged may be inquired into, but shall "not amount to a defence unless it was for the public benefit that the said "matters charged should be published." It then says how the pleading is to proceed, but omits to say directly that the defendant is to be acquitted if he proves all that he is required to prove. This, probably, is only clumsy drafting. The act then goes on to say, "Provided always, that the truth of the matter "charged shall in no case be inquired into without such plea or justification." This raises a difficulty. In s. 4 it is provided that if any one maliciously publishes a defamatory libel, "knowing it to be false," he is to be liable to two years' imprisonment; and s. 5 says, that if any one "maliciously publishes a defamatory libel," he shall be liable to be punished for one year. If a man indicted under s. 4 may prove the truth of the matter charged by way of showing that he could not know the matter charged to be false, the proviso in s. 2 is too narrow; and if he cannot it is difficult to see how any one can ever be convicted of such an offence as publishing a libel knowing it to be false, for it would be monstrous to suggest that the prosecutor might show that the defendant knew the libel to be false by giving evidence of its falsehood and of his knowledge of it, and that the defendant might not contradict him.

The difficulty may be thus illustrated:—A is indicted for publishing, knowing it to be false, that B led a grossly immoral life in his youth, the fact, if true, being one in which the public have no interest. B gives evidence to show that the assertion is false to A's knowledge. If A may contradict this by proving the assertion to be true, there is a case in which the truth of an alleged libel may be inquired into without any such plea of justification as the act permits, which contradicts in terms the proviso quoted. If A may not contradict the evidence given by B, the maxim "Hear both sides" is violated.

(3.) S. 7 allows a defendant to answer a presumptive "case of publication "by the act of some other person by his authority," by proving that in fact the publication was made without his consent or knowledge, and did not arise from want of due care on his part, but it omits to say whether such proof is to entitle him to an acquittal, or to go in mitigation of punishment. Probably, however, it means the former.

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I think that it would have been well to except from this provision libels which charge any one with committing an indictable offence, for it certainly is a grievous hardship on a man that he should be liable to be practically put upon his trial for any crime whatever by any person who chooses to run the risk of being himself prosecuted for libel for so doing, and that when so treated he should, speaking practically, be compelled to swear to the falsehood of the accusation, and to be obliged to answer upon oath to a cross-examination as to the whole of his life. The expression, Liberty of the Press, means in reality (like all other phrases into which the word liberty enters) the power of the press, and upon this point I think the press has far more power over the reputation of people in general than it ought to have.

The Newspaper Libel and Registration Act, 1881 (44 & 45 Vic. c. 60), seems to me to carry this power to a height extremely dangerous to private reputation. Libellers in newspapers are by its provisions made a privileged class, for they may not be prosecuted for their crimes without the leave of the Director of Public Prosecutions,—a privilege accorded to no other criminal whatever. I do not complain of the extension to newspaper libels of the Malicious Indictments Act, for I think it ought to be applied to all criminal proceedings; but the provision that matters of justification may be given in evidence before the committing magistrate seems to me to be opposed to every principle hitherto recognised in English criminal procedure. Cases ought to be tried before courts, not before committing magistrates; and if the magistrate goes into matter of justification and excuse —madness, for instance—the preliminary procedure becomes a superfluous trial. It is also an abortive trial, for, though the magistrate may dismiss the case, he must bind over the prosecutor to indict if he desires it. The section which privileges fair reports of public meetings appears to me most objectionable, though not likely to be repealed. It is in keeping with that indifference to personal dignity and paltry curiosity about private affairs which is one of the contemptible points of the habits of life of our day.

Far from relaxing the law as to newspaper libel, I should

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wish to see its stringency increased. It seems to me that the definition of libel should be so enlarged as to include the publication of any matter, true or false, constituting an intrusion upon private life, not capable of being shown to be in some definite way required for the public good. Why should a man be allowed (if indeed he is by law allowed) to make another's life a burden to him by publishing accounts of every sort of minute detail about his private life and personal affairs for no other reason than to make money by pandering to the prurient love for petty gossip which writing of this sort at once promotes and gratifies? The domestic spy, who picks up personal gossip for the purpose of publishing it in the papers, appears to me to be of the same family as the wretch who extorts hush-money by threats to publish.

The second matter to be noticed is the relation of the law of seditious libel, seditious words, and seditious conspiracy, to the right of holding public meetings for political purposes.

To hold an unlawful assembly or meeting is an offence known to the common law. It was defined by the Criminal Code Commission after much consideration in the following words, reference being made to a passage in the report given in the footnote.

"An [1] unlawful assembly is an assembly of three or more

[1] "The definition of an unlawful assembly in Part VI. depends entirely "on the common law.

"The earliest definition of an unlawful assembly is in the *Year-Book*, 21 "Hen. 7, 39. It would seem from it that the law was first adopted at a "time when it was the practice for the gentry, who were on bad terms with "each other, to go to market at the head of bands of armed retainers. It "is obvious that no civilised government could permit this practice, the con-"sequence of which was at the time that the assembled bands would probably "fight, and certainly make peaceable people fear that they would fight. It "was whilst the state of society was such as to render this a prevailing mis-"chief that the earlier cases were decided; and consequently the duty of not "provoking a breach of the peace has sometimes been so strongly laid down "as almost to make it seem as if it were unlawful to take means to resist those "who came to commit crimes. We have endeavoured in section 84 to enun-"ciate the principles of the common law, although in declaring that an "assembly may be unlawful if it causes persons in the neighbourhood to fear "that it will needlessly and without reasonable occasion provoke others to "disturb the peace tumultuously, we are declaring that which has not as yet "been specifically decided in any particular case. The clause as to the "defence of a man's house has been inserted because of a doubt expressed on "the subject. Forcible entry and detainer are offences at common law; and "section 95 we believe correctly states the existing law."



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"persons who, with intent to carry out any common purpose, "assemble in such a manner or so conduct themselves when "assembled as to cause persons in the neighbourhood of such "assembly to fear on reasonable grounds that the persons so "assembled will disturb the peace tumultuously, or will by "such assembly needlessly and without any reasonable "occasion provoke other persons to disturb the peace "tumultuously."

"Persons lawfully assembled may become an unlawful as-"sembly if they conduct themselves with a common purpose "in such a manner as would have made their assembling "unlawful if they had assembled in that manner for that "purpose.

"An assembly of three or more persons for the purpose "of protecting the house of any one of their number against "persons threatening to break and enter such house in "order to commit any indictable offence therein is not "unlawful."

If a meeting is held for the purpose of speaking seditious words to those who may attend it, those who take part in that design are guilty of a seditious conspiracy, of which the seditious words spoken are an overt act, and their meeting is an unlawful assembly. If at a meeting lawfully convened seditious words are spoken of such a nature as to be likely to produce a breach of the peace, the meeting may become unlawful in all those who speak the words or do anything to help those who speak to produce upon the hearers their natural effect. The speaking of the seditious words is in itself an offence in the speaker, but a mere meeting for the purpose of political discussion is not in itself illegal unless the circumstances under which it is convened or its behaviour when it is convened is such as to produce reasonable fear of a breach of the peace, nor do I think that bare presence at such a meeting as a hearer or spectator makes a man guilty of any offence, though it may expose him to serious consequences if the meeting becomes disorderly and has to be dispersed, for in such a case force may be used against all persons who are present, whether they take part in the unlawful object of the meeting or not. The law upon the

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subject was [1] stated fully in the famous case of Redford *v.* Birley, which was an action brought by a person who was injured on the occasion, against the captain in command of the yeomanry who dispersed the meeting at Manchester in 1819.

In conclusion I will notice shortly some of the provisions of the French and German codes on offences, analogous to those which have been the subject of the present chapter.

It is remarkable that the French *Code Pénal* contains no provisions at all corresponding to the seditious offences known to the law of England, but the absence of such provisions is supplied by [2] an elaborate and somewhat intricate series of enactments relating to the press. Many of the laws in force apply to conditions imposed on the publication of books, newspapers, &c., which it would be foreign to my purpose to describe or discuss. The earliest law now in force which creates press offences of the nature of libels is the law of May 17, 1819. [3] It enacts in the first place that every one who "par des discours, des cris ou menaces proférés dans des "lieux ou réunions publiques soit par des écrits, des imprimés, "des dessins, des gravures, des peintures ou emblèmes vendus "ou distribués mis en vente ou exposés dans les lieux ou "réunions publiques, soit par des placards et affiches exposés "au regard du public, aura provoqué l'auteur ou les auteurs "de toute action qualifiée crime ou délit à le commettre sera "reputé complice et puni comme tel." The description of the manner in which press offences may be committed given in this article runs through the subsequent legislation, which usually provides that every one who does something by any of the means referred to in the law of May 17, 1819, Article 1, shall incur certain consequences.

If we turn to the *Code Pénal* it will be seen that the article first quoted is capable of being so interpreted as to be extremely severe. For instance, by Article 87, "l'attentat "dont le but est, soit de détruire ou de changer le gouvernement," is a crime punishable with transportation. If such

[1] 3 Starkie, *N. P.* pp. 102-107; motion for new trial, pp. 110-128.
[2] Collected in Roger et Sorel, *Lois Usuelles*, under the head "Presse," pp. 989-1018.
[3] P. 991.



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an offence is committed, every person whose words or writings may be regarded as having incited any one to take part in it would be an accomplice, and so liable under Article 59 to the same punishment. The importance of this, however, depends upon the manner in which the word "provoquer" may be interpreted in practice.

By [1] Articles 2 and 3 of the same law a provocation to a crime or *délit* by the same means not followed by the actual commission of the offence suggested is punishable in the case of a provocation to a crime by imprisonment for from three months to five years, and in the case of a *délit* for from three days to two years.

In order to appreciate the effect of these provisions it must be recollected that the *Code Pénal* contains many provisions as to public functionaries resembling nothing known to our law. The following are a few instances.

By Article 201 ministers of religion who in the exercise of their functions deliver any discourse "contenant la critique "ou censure du gouvernement, d'une loi, d'un décret du "Président de la République ou de tout autre acte de l'autorité "publique," may be imprisoned for two years.

By Article 222, "Lorsqu'un ou plusieurs magistrats de "l'ordre administratif ou judiciaire, lorsqu'un ou plusieurs "jurés auront reçu dans l'exercise de leurs fonctions ou à "l'occasion de cet exercise quelqu' outrage par paroles par "écrit ou dessin non rendu public, tendant dans divers cas "à inculper leur honneur ou leur délicatesse celui qui leur "aura adressé cet outrage sera puni d'un emprisonnement de "quinze jours à deux ans." By the following articles insults to any person holding any sort of official position are punishable with more or less severity. By the press law almost any criticism upon public men for their public conduct might be punished as a "provocation" to some one of these offences.

An offence still more likely to be regarded as being provoked by writings in the papers is *Rébellion*, as defined by the *Code Pénal* (Articles 209-220). Under this name the French law includes all resistance to isolated acts of the Government:—"Toute attaque, toute résistance avec violence,

[1] P. 992.

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"et voies de fait envers les officiers ministériels, les gardes "champêtres, ou forestiers, la force publique, les préposés à la "perception des taxes et des contributions, les porteurs de "contraintes, les préposés des douanes, les séquestres, les "officiers ou agents de la police administrative ou judiciaire, "agissant pour l'exécution des lois, des ordres, ou ordonnances "de l'autorité publique, des mandats de justice, ou jugements, "est qualifiée, selon les circonstances, crime ou délit de ré- "bellion." The circumstances which determine the quality of the offence are the number of the offenders and their being armed or not. [1] Variations are rung on these points with the minute and rather fanciful precision characteristic of the French Code.

Besides the provisions by which writers may become the accomplices of other persons, the legislation to which I am referring creates a number of substantive offences which may be committed by writers on public affairs. Thus [2] Article 8 of the law of May 17, 1819, subjects to a year's imprisonment, "tout outrage à la morale publique et religieuse ou aux "bonnes mœurs par l'un des moyens énoncés en l'article 1."

[1] The articles run thus:—

| | Persons. | Armed or not. | Punishment. |
|---|---|---|---|
| Rebellion by | 20 | armed | travaux forcés à temps. |
| ,, | 20 | not armed | reclusion. |
| ,, | 3 to 20 | armed | reclusion. |
| ,, | 3 to 20 | not armed | 6 months' to 2 years' imprisonment. |
| ,, | 1 or 2 | armed | 6 months' to 2 years' imprisonment. |
| ,, | 1 or 2 | not armed | 6 days' to 6 months' imprisonment. |

Nothing would be easier than to put cases showing the extreme hardship which this apparently neat but really trivial and superficial arrangement might produce.

[2] P. 992.

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CH. XXIV.

[1] Article 13 defines "diffamation" as "toute allegation ou "imputation d'un fait qui porte atteinte à l'honneur ou à la "considération de la personne ou du corps auquel le fait est "imputé."

It defines "injure" as "toute expression outrageante "terme de mépris ou d'invective."

Subsequent articles punish with fine and imprisonment, "la diffamation envers tout dépositaire ou agent de l'autorité "publique pour des faits relatifs à ces fonctions," also "la "diffamation envers les ambassadeurs, ministres plenipo-"tentiaires, envoyés, chargés d'affaires, ou autres agents "diplomatiques."

In the [2] law of May 26, 1819, which regulates the procedure in these cases the following provision occurs: "nul ne sera "admis à prouver la vérité des faits diffamatoires si ce n'est "dans le cas d'imputations contre des dépositaires ou agents "de l'autorité, ou contre toutes personnes ayant agi dans un "caractère public de faits relatifs à leurs fonctions." The exception to this rule is in singular contrast to the law of England as it stood in 1819, and it differs from the spirit of French legislation in general, which is specially favourable to persons in authority.

On [3] 25th March, 1822, a further law on the press was enacted, which is still in force though the punishments have been to some extent modified, and though its provisions have been applied to the new order of things. The principal offences created by it are [4] as follows: Art. 1.—"Quiconque ". . . aura outragé ou tourné en dérision la religion de l'État." Art. 3.—"L'attaque . . . des droits garantis par les articles "5 et 9 de la charte constitutionelle." Art. 4.—"Quiconque ". . . aura excité à la haine ou au mépris du gouvernement "du roi." Art. 5.—"La diffamation ou l'injure . . . envers "les cours, tribunaux, corps constitués, autorités ou adminis-"trations publiques." Art. 6.—"L'outrage fait publiquement "d'une manière quelconque à raison de leurs fonctions ou de "leur qualité soit à un ou plusieurs membres de l'une des 'deux chambres, soit à un fonctionnaire public, soit enfin

[1] P. 993.
[2] P. 994.
[3] Roger et Sorel, 996.
[4] Art. 1, p. 9.

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"à un ministre de la religion de l'État, ou de l'une des "religions dont l'établissement est légalement reconnu en "France." Finally, omitting some matters of less importance, Art. 10 provides that "Quiconque par l'un des moyens énoncé "en l'article 1 de la loi du 17 Mai, 1819, aura cherché à "troubler la paix publique en excitant le mépris ou la haine "des citoyens contre une ou plusieurs classes de personnes" shall be liable to a maximum imprisonment of two years.

Upon the establishment of the Republic of 1848 these laws were not only maintained but extended. By the law of [1] Aug. of 11 that year it is enacted (Art. 1) that "tout attaque par l'un "des moyens, &c., contre les droits et l'autorité de l'assemblée "nationale, contre les droits et l'autorité que les membres du "pouvoir exécutif tiennent des décrets de l'assemblée, contre "les institutions républicaines, et la constitution, [2] *contre le "principe de la souveraineté du peuple et du suffrage universel*," shall be punishable by fine and imprisonment, which may extend to five years.

By Art. 3 an attack "contre la liberté des cultes, le principe "de la propriété, et les droits de la famille" exposes its author to fine and imprisonment from a month to three years.

Article 5 punishes "l'outrage fait publiquement d'une "manière quelconque à raison de leurs qualité soit à un "ou plusieurs membres de l'assemblée nationale, soit à un "ministre d'un des cultes qui reçoivent un salarie de l'État." On the 27th July, 1849, a law was passed which extended the 7th article of the law last mentioned to attacks "contre les "droits de l'autorité que le President de la Republique tient "de la Constitution et aux offenses envers sa personne." The following new provision was also made (Art. 3): [3]"Toute attaque "par l'un des mêmes moyens, contre le respect dû aux lois et "l'inviolabilité des droits qu'elles ont consacrés, toute apologie "de faits qualifiés crimes ou délits par la loi pénale sera punie "d'un emprisonnement d'un mois à deux ans et d'une amende "de seize francs à mille francs." [4] Laws have also been made

[1] Roger et Sorel, 1001.

[2] These words are strange to a reader of M. Taine's *Origines de la France Contemporaine*.

[3] Roger et Sorel, 1002.

[4] See, in particular, law 11 May, 1868, p. 1012; 15 April, 1871, p. 1014; 6 July, 1871, p. 1015.

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as to the licensing and suppression of newspapers, but the only additional offence which need be noticed as having been created by later legislation is contained in [1] Art. 1 of the law of Dec. 29, 1875, which extends Art. 1 of the law of Aug. 11, 1848, to "toute attaque par l'un des moyens énoncés en "l'article 1 de la loi du 17 Mai, 1819, soit contre les lois "constitutionelles, soit contre les droits et les pouvoirs du "gouvernement de la République qu'elles ont etabli."

The German law upon the subject presents some points of resemblance and some of marked contrast to the French law. It is much simpler and less stringent. [2] It is contained so far as I can ascertain, in the law on the Press passed 7 May, 1874, and in certain provisions of the *Strafgesetzbuch*. The first article of the law of 1874 says: [3] "The freedom of "the Press is subject to those restrictions only which are "prescribed or admitted by the present law." It proceeds to lay down various regulations as to the publication of newspapers and other periodicals. It defines (Articles 20 and 21) the degree of responsibility which attaches to various persons connected with a periodical [4] if its contents are criminal, but it is silent as to what amounts to a crime.

There are, however, provisions in the *Strafgesetzbuch* which supply the silence of the Press law on this subject. Thus Article 110, which closely resembles some of the articles of the French law of 1819, punishes with fine and imprisonment up to two years every one who "publicly before an assembly "or by [5] publication or public promulgation or public exhibition "of writings or other representations incites to disobedience "to the laws or ordinances having the force of law, or orders "made by the government within its competency." Article 111 puts every one who by any of the above-mentioned means

[1] Roger et Sorel, 1016-1017.

[2] The quotations below are from Rudorff's *Strafgesetzbuch nebst den gebrauchlichsten Reichs-Strafgesetzen*, 1881.

[3] "Die Freiheit der Presse unterliegt nur denjenigen Beschränkungen "welche durch dies gegenwartige Gesetz vorgeschrieben oder zugelassen sind." —P. 178.

[4] "Begründet der Inhalt einer Druckschrift den That-bestand einer Straf-"barenhandlung, so wird der verantworliche Redakteur der Verleger, der "Drucker," &c.—P. 184.

[5] "Verbreitung." A "Verbreiter" is defined in the press law thus: "Derjenige welcher die Druckschrift gewerbsmassig vertrieben oder sonst "offentlich verbreitet hat."—P. 185.

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[1] incites any one to an act punishable by law on the same footing as an accessory before the fact (*Anstifter*). If the incitement is not followed by any effect the punishment is reduced to fine up to 600 marks and imprisonment up to a year.

The offences punished by the *Strafgesetzbuch* to which it is likely that these provisions should apply are not so numerous, nor are they defined in such sweeping terms as in the *Code Pénal*. It is obvious, however, that so general a provision must be capable of being so construed as to impose great restrictions on public discussion.

There are some provisions which apply more directly to what we should call seditious libels. [2] Article 130 punishes every one who "in any way dangerous to the public "peace publicly incites" (*anreizt*) "different classes of the "population to acts of violence against each other." By [3] Article 131 every one is liable to punishment who "publicly "affirms or publishes false or distorted facts, knowing that "they are false or distorted, in order thereby to bring into "contempt the measures or orders of the government."

Besides these general provisions the *Strafgesetzbuch* contains many enactments as to the offence of "Beleidigung," which may be translated insult, and resembles the "injuria" of the Roman lawyers. It includes, however, insult by writings, &c. Two chapters of the *Strafgesetzbuch* are concerned with it, namely, chapters ii. and xiv. of the Second Part. Chapter ii. is headed "Beleidigung des Landesherrn" and punishes insults to the Emperor and the rulers of the different states of the confederation. Thus [4] "wer den Kaiser" or certain other sovereigns "beleidigt" is liable to imprisonment up to five years. The same offence against other princes of the confederate states is punishable less severely (see Articles 95–101).

The fourteenth chapter of the Second Part relates to the offence of "Beleidigung" simply. It is treated of in [5] articles 185–200, which seem from their terms to apply chiefly to private insults and libels, though insults to and libels on public men for their public conduct are evidently intended to be included. By Article 185, "die beleidigung" is declared to

[1] "Auffordert." [2] P. 58. [3] P. 59. [4] Art. 95. [5] Pp. 80-86.

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be punishable by fine up to 100 marks or imprisonment up to a year, or [1] if it is committed by an act the fine may be 1,500 marks, and the imprisonment two years. No definition of the offence is given in this Article. By Article 186 it is provided that "whoever asserts or publishes a fact relating "to another which has a tendency to bring him into contempt "or to dishonour him in public opinion, is, unless the fact "is notoriously" (*erweislich*) "true, punishable as for insult," —the punishment is fine and imprisonment up to a year in general, and a higher fine and imprisonment up to two years when the insult is public or is effected by the publication of writings, pictures, or representations. A subsequent Article (192) provides that proof of the truth of a fact alleged or published is not to exclude punishment for an insult under Article 185, if the existence of insult is established either by the form of the affirmation or publication, or by the circumstances under which they occur. I suppose that the result of the two enactments would be that if A were to say of B, truly, "You committed theft at such a time and place," he would, under Article 186, be justified by showing the truth of his assertion; but that if A called out "Thief" after B in the street simply for purposes of insult he would be liable to be punished under Article 185. Provision is made by Article 187 for an increased severity of punishment if the matter published is false to the knowledge of the offender. Article 193 protects unfavourable judgments upon scientific, artistic, and professional performances; communications made in the exercise or for the protection of rights, or the protection of legitimate interests; reproofs and censure by superiors to inferiors; official reports or judgments by a public officer; and similar cases, unless the form of the communication or the circumstances under which it is made show the existence of insult (*Beleidigung*).

It is remarkable that by Article 189 the publication of facts known to be false to the prejudice of the reputation of a deceased person is punishable on the demand of a parent, child, widower, or widow of the deceased.

[1] "Mittels einer Thätlichkeit begangen wird." "Thätlichkeit," I suppose, corresponds to the French "voie de fait," which, though not exactly confined to an assault, commonly means an assault.

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Besides these provisions a very stringent law was passed on the 21st October, 1878, "against [1] the generally dangerous efforts of Social Democracy." This law prohibits (Art. 1) societies "which by social, democratic, socialist, or communistic "efforts aim at the overthrow of the existing order of govern- "ment or society," or in which the same effects come [2] to light "in a manner which endangers the public peace "particularly the harmony of different classes of society."

By Article 11 publications of the same character (the words of the definition just given are repeated) are forbidden, and periodicals of which a single number is forbidden may be suppressed. Various administrative provisions, which I pass over, are contained in the law as to the extent and effect of the prohibitions to be imposed. By subsequent Articles (17–20) the infringement of these prohibitions is punished by various terms of fine and imprisonment.

From this comparison of the laws relating to what may in one word be called sedition in three great nations it seems to follow that the law of France is by far the most severe, and the law of Germany more severe than that of England; but the great and striking peculiarity of the law of England lies in its historical character. It was worked into its present form by a process which lasted for at least 150 years, and of which the history is traceable for a much longer time. That process was hardly aided by the legislature at all, and such assistance as the legislature did give was afforded in such a way as to be wholly unintelligible to a person unacquainted with the history of the common law and the decisions upon it. It is still more worthy of remark that though the law of England, if used in a stringent manner, might be at least as severe as the law of Germany as embodied in the *Strafgesetzbuch*, it has in practice become almost entirely obsolete, so far as press offences are concerned, for a period of about fifty years.

[1] "Gesetz gegen die gemeingefährlichen Bestrebungen der Sözial-democratie."—P. 197.

[2] "Zu Tage treten."

## CHAPTER XXV.

### OFFENCES AGAINST RELIGION.

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OFFENCES against religion can hardly be treated as an actually existing head of our criminal law. Prosecutions for such offences are still theoretically possible in a few cases, but they have in practice become all but entirely obsolete. The history of the subject is, however, of the highest interest, connecting itself, as it does, with several of the most important passages in our general history, besides which it throws light upon several matters to which their due importance has hardly been attracted by those who have written the history of political and social events.

The history of the Ecclesiastical Criminal Law has some points of resemblance, but many more of contrast, to the history of the ordinary criminal law. The ordinary criminal law always has been and still is recognised as an indispensable part of the institutions of the country, and the history both of its procedure and of its substantive provisions is a history of the improvement of definitions, and the adjustment of institutions to social changes. The improvements have (as the earlier part of this work clearly shows) been slow and imperfect, but in the aggregate they have been considerable, and if slow their progress has been uniformly in the same direction. The history of the Ecclesiastical Criminal Law, on the other hand, has for several centuries at all events been a history of decay. By a variety of provisions more or less distinctly and openly intended to diminish its importance, it has been rendered practically obsolete and ineffectual. I will try to give the history first of its development and then of its fall.

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Probably the clergy were never more powerful in any time or country than they were in England before the Norman conquest. [1] Civil and ecclesiastical legislation went hand in hand. Nearly every set of secular laws enacted by any of the early English kings was coupled with an ecclesiastical code, or contained ecclesiastical provisions: the bishop and the earl sat side by side in every county court. Heresy and schism were alike unknown, and the ecclesiastical censures which the clergy had it in their power to inflict furnished a sanction to their discipline which the whole population, from the highest to the lowest, regarded with awe.

At the Norman conquest a great change was introduced into this state of things, as appears from what has been described as the "[2] one authentic monument of William's juris-"prudence." This was the law by which he separated the spiritual from the temporal courts. This enactment recited that the ecclesiastical law had previously been ill administered, that for the future no bishop or archdeacon "de legibus epis-"copalibus amplius in hundret placita teneat, nec causam "quæ ad regimen animarum pertinet ad judicium secularium "hominum adducant, sed quicunque secundum episcopales "leges de quâcunque causâ vel culpâ interpellatus fuerit, ad "locum quem ad hoc episcopus elegerit vel nominaverit "veniat, ibique de causâ vel culpâ suâ respondeat, et non se-"cundum hundret, sed secundum canones et episcopales leges "rectum Deo et episcopo suo faciat. Si vero aliquis per "superbiam elatus ad justitiam episcopalem venire contemp-"serit vel noluerit, vocetur semel, secundo et tertio; quod si "nec sic ad emendationem venerit excommunicetur et si "opus fuerit ad hoc vindicandum, fortitudo et justitia regis "vel vicecomitis adhibeatur." Such was the origin of the Bishops' Courts which still exist, and which have played so prominent a part in some stages of our history.

[1] See, *e.g.*, laws of Cnut, Thorpe, i. 358-376, especially IV. De reverentia sacerdotibus præbendâ; VII. De conjugiis prohibitis; XIV. De Dei juribus festis et jejuniis conservandis; XV. De Die Dominico; XVIII. Pia exportatio ad confessionem et pœnitentiam; XXI. Ad Deum ex intimo colendum et fidem; XXIII. Ut exitalia fugiant; XXIV. Et inter hæc stuprum. See, too, the laws of Alfred, Thorpe, i. 36-43. Many others might be mentioned. Nearly all the laws, in fact, contain more or less of a religious element.

[2] Stubbs, *Constitutional History*, i. 276. The "Carta Willelmi" is given in Thorpe's *Ancient Laws*, i. 494-496; also in Stubbs's *Charters*, p. 85.

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This memorable measure must have had two sets of effects. On the one hand, it is impossible to imagine a stronger assertion by the King of his unqualified sovereignty. The title of the document is "Carta Willelmi," and its style is as follows:— "W. gracia Dei Rex Anglorum R. Bainardo et G. de Magna "Villa, et P. de Valoines ceterisque meis fidelibus de Essex "et de Hertfordscire et de Middlesex salutem." After reciting former abuses, it adds: "Communi concilio et consilio "archiepiscoporum et episcoporum et abbatum, et omnium "principum regni mei [episcopales leges] emendandas judi- "cavi. Propterea mando et regia auctoritate præcipio quod," &c. There is not a word in it which suggests that any other authority was needed for the enactment than his own will, though he recites the advice of the ecclesiastical authorities.

On the other hand, although the King in this unquestionable way asserts his supreme authority over the clergy, he gives to them complete independence in their own sphere. Every one is to answer when the bishop requires him to do so, and if he refuses, the bishop's authority is to be supported by the sheriff. It is, however, most important to observe that no power to fine or imprison or otherwise to inflict temporal loss is conferred upon the bishop; the sheriff is to help him in case of need, but the bishop can inflict only spiritual censures. As necessarily incidental to this, the bishops must have obtained by this Charta full control over the procedure of their own courts, and a separation from the secular influences which the habit of sitting in the ordinary hundred courts would undoubtedly have exercised upon them. In early times the court is the substantive, the law the adjective, and the establishment of a separation between the ecclesiastical and temporal courts, involved, of necessity, the introduction of that peculiar version of the canon law which still, in a certain sense, and in certain cases, survives in this country. I do not propose to try to relate at length the history of the ecclesiastical courts, or that of the struggles between the clergy and the crown, in which Becket is the most conspicuous figure. I may, however, refer to two or three leading instances in which the legislature recognised the ecclesiastical courts, and so gave the character of coercive law to the canon law as

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understood and administered by them. The first article of [1] Magna Charta provides, "quod Anglicana ecclesia libera sit "et habeat jura sua integra, et libertates suas illæsas." Another monument of the nature of the spiritual jurisdiction is the statute of Circumspecte agatis, passed in 1285, in the same year as the Statutes of Westminster Second, and of Winchester. The material part of it is in these words: "Circumspecte "agatis de [negotio tangente] Dominum Episcopum Norwi- "censem et clerum, non puniendo eos si placita teneant de "hiis quæ mere sunt spiritualia, videlicet de correctionibus "quas Prælati faciunt pro mortali peccato, videlicet, fornica- "tione, adulterio et hujusmodi pro quibus aliquando infli- "gitur pœna corporalis aliquando pecuniaria, maxime si con- "victus sit de hujusmodi liber homo." The following suits are also expressly mentioned, namely, suits referring to churches and churchyards, tithes and offerings, mortuaries, penances, laying violent hands on a clerk, defamation when the proceeding is for the correction of sin and not for damages, and likewise breach of faith (pro *fidei læsione* in some MSS., translated in the printed Statute Book, "and likewise for breaking "an oath.") This statute was to a certain extent re-enacted and confirmed by the Articuli Cleri, 9 Edw. 2, stat. 1, A.D. 1315. It is said in [2] Caudrey's case that, notwithstanding the Statute of Circumspecte Agatis, "the clergy did not think "themselves assured nor quiet from prohibition" till this act was passed, and 15 Edw. 3, c. 6, and 31 Edw. 3, c. 11, are also referred to as confirming the jurisdiction of the Ecclesiastical Courts. The importance of this description of the ordinary ecclesiastical jurisdiction will be illustrated hereafter.

As to the Ecclesiastical Courts themselves it is enough to say that [3] they may be divided into two classes, the provincial and the diocesan courts, the provincial courts of the dioceses of Canterbury and York being also diocesan courts. The diocesan courts are Consistory Courts and Archdeacon's Courts. An appeal lies from the Archdeacon's Court to the Consistory Court, from the Bishops' Court to the Provincial Court, and from thence to the Judicial Committee. Sir

[1] Stubbs's *Charters*, 296. [2] 3 Coke's *Reports*, xxxvi.
[3] Phillimore's *Ecclesiastical Law*, chap. iv. 1189-1215.

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CH. XXV. Robert Phillimore says that till lately there were also 300 peculiars, which however from the early part of the present reign have been practically abolished. They represented, in some cases, the local ecclesiastical jurisdictions of abbeys and other religious houses which were made over at the Reformation, or at other times, either to bishops or other ecclesiastical bodies, or in some cases to laymen. The owner of Rothley Temple, in Leicestershire, was, as such, the ecclesiastical head of a certain number of parishes which were exempt from all other spiritual authority.

Apart from these, which were and are the ordinary ecclesiastical courts, it was a question whether what we now know as Convocation, and what was before the Reformation known as a National or Provincial Council, was not also a court of justice having criminal jurisdiction. The question has long ceased to have the least practical importance. [1] It was debated in Whiston's case, when Convocation was desirous to call Whiston before them and try him for having "advanced "several damnable and blasphemous assertions against the "doctrine and worship of the ever blessed Trinity." The judges were consulted upon the subject, and eight were of opinion that the jurisdiction existed, and four that it did not. Their opinions, however, were extra judicial. The point was nearly though not absolutely decided in the case of [2] Gorham *v.* Bishop of Exeter, in which it was decided in substance that the Upper House of Convocation was not a Court of Appeal, though the question whether it possessed an original criminal jurisdiction was not touched upon. [3] Sir Robert Phillimore observes that "the power of Convocation to condemn an "heretical work appears to be as well established as its incom-"petence to try a clerk for heresy." In 1864 Convocation condemned a work entitled *Essays and Reviews.* What difference there is between the condemnation of a book and an expression of dislike of it, say in an unfavourable review, is not and probably could not be explained.

The grounds of the supposition that Convocation was ever

[1] 15 *State Trials*, 703.
[2] 15 Q. B. 52; 10 C. B. 102; 5 Ex. 630.
[3] *Ecclesiastical Law*, 1961.

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a court of justice will appear further on in this chapter. I should say that there is some evidence that on a few occasions it may possibly have acted as a court, but that the evidence falls far short of what would be necessary to prove that it ever has been recognised and established in that capacity.

However this may have been, we can still give a clear account of the procedure of the ordinary ecclesiastical courts in criminal cases, as well as of the crimes to which it was applied. There is no reason to suppose that the procedure differed according to the nature of the case. The following is the account given of it in the learned preface to [1]Archdeacon Hale's *Precedents in Criminal Causes.*

"[2]There are three distinct methods of indictment" (he means accusation): "(1) Inquisition, (2) Accusation, (3) "Denunciation. In the first form of proceeding, that by in-"quisition, the judge is in fact the accuser. He may proceed "against the party from his own personal knowledge, or from "common fame of crime committed, and no other step is "required to bring the party before the court except citation. "I am inclined to believe that before the Reformation the "most usual mode of proceeding was that by inquisition, and "that the apparitors of the different courts, who not only "attended the ecclesiastical judges at the time of their visita-"tions and during the sitting of the courts, but who also at "other times employed themselves in discovering cases of "delinquency, were the chief means of bringing crimes to the "notice of the judge, who, without further information, cited "the parties to appear." . . . "The second form of indict-"ment, as it may be called, is that in which an accuser comes "forward who voluntarily undertakes the cause, and in the "legal phrase is said to promote the office of the judge. In "this form criminal suits are now generally brought forward, "the bishop or ordinary having ceased to proceed by inquisi-"tion, and substituting as a matter of form his secretary or "other person, who in his own name promotes the office of "the judge and becomes the accuser of the party."

[1] A series of precedents and proceedings in criminal causes, extending from the year 1475 to 1640, extracted from act books of ecclesiastical courts in the diocese of London, by William Hale Hale, Archdeacon of London, 1847.

[2] Hale's *Ecclesiastical Precedents*, preface, lvii.-lxi.



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"The third form of proceeding by which the ecclesiastical "court took cognisance of offences was that of denunciation. "It differed from accusation essentially in this point, that the "person who gave the information to the judge was not bound "to constitute himself the accuser, and become subject to "the conditions and penalties to which the accuser was liable "in order to carry forward the suit. Denunciation is now "known to us under the name of presentment: the process "of time and the enactment of the canons of 1603 has "limited the power of making presentments to the minister "and churchwardens; and thus the churchwardens have "become not only the guardians of the goods of the church, "but also in theory the supervisors of the clergy and people." . . . "These presentments, in the present state of the practice "of the ecclesiastical courts, are but the shadow of a form."

It is no easy matter in our days to realise the fact that for many centuries, from the reign of William the Conqueror to that of Charles I., this system was in full activity amongst us. It was in name as well as in fact an Inquisition, differing from the Spanish Inquisition in the circumstances that it did not at any time as far as we are aware employ torture, and that the bulk of the business of the courts was of a comparatively unimportant kind, though from the days of Henry IV. to those of Queen Mary—a period of nearly 160 years—they conducted, by the aid of express statutory powers, persecutions, less severe indeed than those which took place on the continent, but still severe enough to have left deep traces on our national history and opinions.

To begin, however, with the ordinary business of the Ecclesiastical Courts. It was various, and it could hardly be better described than in the [1] words which Chaucer puts into the

[1] "Whilom there was dwelling in my countré
"An erchedeken, a man of gret degré,
"That boldly did executioun
"In punysching of fornicacioun,
"Of wicchecraft, and eek of bauderye,
"Of diffamacioun and avowterye,
"Of chirche reves and of testamentes,
"Of contracts, and of lak of sacraments;
"And eek of many another meaner crime,
"Which needeth not to reherse at this tyme;
"Of usur, and of symony also,
"But certes lecchours did he grettest woo,

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mouth of the Friar whose indignation is raised by the sompnour's presence in the party of pilgrims.

Abundant and indisputable evidence as to its nature is afforded by the *Criminal Precedents* already referred to, published in 1847 by the late Archdeacon Hale.

This work consists of a collection of extracts from the Act-books of six different ecclesiastical courts, four being archidiaconal courts in the diocese of London. The entries are dated from 1475 to 1640. The book contains 829 precedents, and may thus be taken as fully exemplifying the manner in which the ordinary ecclesiastical courts acted during the last two centuries of their full activity. There is no reason to doubt that in the four preceding centuries and even in earlier times they filled a similar position. As to the importance and frequency of the proceedings in these courts, Archdeacon [1] Hale observes, that from Christmas, 1496, to Christmas, 1500, 1,854 persons were cited before "the Court of the Commis-"sary (whose jurisdiction was limited to the City of "London and some small part of Essex and Hertfordshire)." This is more than a case a day during the whole period. He adds, "There is no reason to believe that the activity of the "ecclesiastical courts, as instruments of moral correction, was "at all abated as the year 1640 approached. In the Court of "the Archdeacon of London, between the 27th November, "1638, and 28th November, 1640, the judge held thirty "sittings, the number of entries of causes being more than "2,500. The number of persons prosecuted must have been "considerably less, allowing that each person attended on two "or three court days; the index, however, to the volume

"They shoulde synge, if that they were bent;
"And small tythers, they were foullie schent,
"If any person would upon him pleyne,
"Ther might astert him no pecunial peyne.
"For small tythes, and for small offerynge
"He made the people pitously to synge.
"For er the bisschop caught them in his hook,
"They weren in the erchedeknes book:
"And hadde through his jurisdiccioun
"Power to have of them correccioun.
"He had a sompnour redy to his hand,
"A slyer boy was noon in Englond,
"Ful privily he had his espiaile,
"That taught him wher he might avail."—*The Friar's Tale.*

[1] Hale, *Ecc. Prec.* p. liii.



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"would show that about 1,800 persons were before the "court in that year, three-fourths of whom, it may be calcu-"lated, were prosecuted for tippling during divine service, "breaking the Sabbath, and nonobservance of saints' days." The ecclesiastical courts must thus have resembled, in some respects, the courts of modern police magistrates, the difference being that the courts dealt with all sorts of irregularities as being sinful, which magistrates would punish, if at all, only on the ground of their being statutory offences.

The offences which appear from these precedents to have been made the subject of prosecution may be divided into two principal classes, namely, offences immediately connected with religion, and ordinary offences, and these last may be divided into offences which either did not, or did arise, out of the relation between the sexes. I will give a few illustrations of the procedure adopted in relation to each of these heads. I may observe, however, of all, that I know of nothing which in any degree resembled an ecclesiastical penal code. The courts seem to have had authority to punish anything which they regarded as openly immoral or sinful, without reference to any rule or definition whatever. A striking instance of this is afforded by the following curious [1] entry in 1543, "Symon Patryke notatur quod nunquam ibat ad lectum in "charitate per spatium xx annorum."

Of offences connected with religion the most important, as appears from the precedents, were heresy and blasphemy, neglect of church services and ecclesiastical ceremonies, contempt of the clergy, and neglect by the clergy of clerical duty. With regard to heresy [2] Archdeacon Hale observes that he was "unable to trace in these Act-books the pro-"ceedings against any persons of eminence who were "Lollards or heretics." He accounts for this by supposing that the articles of accusation and depositions of the witnesses were preserved together, as being too long for entry in the Act-book, though a few important cases were afterwards transcribed into the Bishop's register. He gives, however, a considerable number of cases which illustrate what may be called the summary jurisdiction exercised over

[1] Hale, cccixxi. p. 120. [2] Hale, preface, lxi.

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language regarded as heretical or profane in the latter part of the fifteenth century. The first entry in the book illustrates this. In 1480, [1] Ambrosius de Borageos, "Contempsit Deum "dicendo quod non est (? est) custus parcialis, et quod unum "diligit melius quam alium; et contempnit beatam Mariam "Katerinam et Margaretam vocando eas meretrices." For this the offender had to offer a wax candle weighing two pounds "apud Salvatorem," and to promise to pay ten pounds of wax to his parish church if he was convicted again. In the same year [2] Thomas Wassyngbourn, apparently a priest, was charged with heresy in saying, "quod sacramentum "altaris est panis materialis." Also Mariona Sylwyng deposed that Thomas Wassyngbourn said, "Qúod Christus erat falsus "patri suo, dum vixit in terra; et beata Maria erat falsa "qwene, Bartholomæus et Paulus erant falsi occisores "hominum." Wassyngbourn "abjuravit et dimittitur."

[3] In 1493 John Steward was "detectus officio de crimine "heresim sonante sive tangente" for saying "I set nothing "by cursse" (excommunication) "yff I be ones on horssebake "and my fete within the stiroppis," "et sic vilipendit claves "ecclesiæ." He committed a further offence by refusing to answer without counsel. He was excommunicated and put to penance, but to what penance does not appear.

One [4] Bowkyn, a cobbler, "fovet opiniones hereticas tenendo "candelam in manu suâ et dicendo coram testibus"—"as this "candill doth vaad and gooeth out, lykwyse my soolle shall goo "and assend to heaven." Probably Bowkyn meant to express doubts similar to those of one [5] Draper, of whom it is recorded, in 1587, "that the common report is that he doth "not acknowledge the immortality of the sowle, and by his "owne speeches he hath affirmed the same. Dominus ei "injunxit, that he shall have conference with Mr. Bernnan, "Mr. Negus, and Mr. Dent, sonderie times in metinge in "Lee church, whereby he may be fullie perswaded of the "immortality of the sowle, and to certifie under their "hands of his full perswasion of the immortalitie of the "sowle."

[1] Hale, p. 1, i. [2] P. 8, xxxiv., xxxv. [3] P. 41, cli. [4] P. 36, cxxxv. [5] P. 193, dxcvi.

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There are a variety of convictions for profane swearing, especially for such oaths as, "God's blood,"[1] "God's heart."

Not going to church, and neglecting other ecclesiastical ordinances, is a common head of offence. Thus, in 1476, [2] Nicholaus Haukyns "non audit divina, set jacet in lecto in "tempore matutinarum et missæ die dominica in domi-"nicam." In this case, however, there occurs the note, "non "fiat processus." So in 1499 [3] "Thomas Berno, in Chyklane, "auceps notatur quod violat Sabbatum et non audit divina, "sed vadit aucupando tempore divinorum, et est suspectus "de heresi." Here again, in 1630, is a scene like a Dutch picture.

"[4] John Strutt and one Joseph Bridge, Joan Goodman and "Amye Thorpe, single men and single women, departed out "of the church in the tyme of the sermon in the forenoone "of that Sunday; they went to the alehouse or taverne which "one William Chaundler keepeth, and there stayed eatinge, "drinkinge, and tiplinge, both wyne and beare, until evening "prayer. John Strutt came not at all to eveninge prayer, but "lay asleepe in the fields. The rest came to church. Joane "Goodman went out of churche about the beginning of the "sermon, and was observed by the parishe to goe out reelinge: "she lay down at the end at the chauncell, and there laye "asleepe till the latter end of the sermon, her hatt lyinge at "her feet, &c. The sideman, Robert Barnard by name, .... "led her out of the churchyard, she being not able to go "of herself.... And so it is commonly noysed and reported, "both at home and abroade, in many places that she was "drunke." Upon this follows the note, "citentur."

Disrespectful language about the clergy was a common offence. Thus, "[5] Michel Moumford, notatur officio quod "vilipendit curatum ecclesie parochialis Sancti Botolphi "prædicti, necnon vilipendit verba Dei, dicendo præfato "curato in hiis verbis Anglicis sequentibus, viz. 'Leve thy "'preaching it is nott worth a ——.'"

[1] *E.g.* Hale, dccxv. p. 231. Margaret Jones, "being used much swearing, so "she layde violent hands and smote the vicar of the said parish reproving "[her] for her swearinge, and followed him, swearing most develishly, from "the one ende of the toune to the other."

[2] lxiv. p. 15. [3] ccxxxvi. p. 69. [4] dccxcii. p. 253.

[5] cclxxviii. p. 82. The —— is in the original.

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[1] William Sevill "vilipendit et adnichilavit ac diffamavit "dominum Thoman Warde sic maliciose dicendo, 'Go forth, "'fool, and set a cockes combe on thi crowne,' sacerdotalem "ordinem nequiter contempnendo."

Neglects of clerical duty were very common, such, for instance, as [2] committing assaults or using bad language in church, or behaving there indecently.

[3] The following is a strange instance of the odd twists in conduct which occur in times of great religious excitement. "Johannes Coyte" (curate of St. Martin's, Ironmonger Lane,) "confessus est quod die Veneris septimo, viz. die hujus "mensis Martii (apparently, 1543) fuit absens a generali "processione factâ ex mandato consilii domini nostri regis "in civitate London contra monitionem alias ibi factum, &c., "et quod tempore processionis hujusmodi presens fuit in "publico spectaculo apud Tyburne dum quidam trans- "gressores legis, &c., mortem inde subierunt, &c. Et ulterius "fatebatur ut sequitur. That he did here noo confessions "in his paryshe syns Lente sayeing that it greveth hym to "here confessions, specially when any person uttereth and "confessyth unto hym any partycular matter sounding "to . . . fylthyness" (p. 136, ccccx.).

The above instances show that even as regards what might with propriety be called ecclesiastical offences, the old ecclesiastical courts had a jurisdiction wide enough to make them sufficiently formidable to the laity, but this is set in a much stronger and clearer light by refering to the manner in which they dealt with common offences which could be regarded as spiritual only because they are sins.

These offences may be divided under two principal heads, namely, those which do not and those which do arise out of the relation between the sexes. The following are amongst the most important of the former: Perjury, defamation, witchcraft, breach of faith, drunkenness.

[1] Hale, cclix. p. 76.

[2] "Simon Greene, capellanus injecit violentas manus in dominum, Johannem "Whyte, curatum ibidem, et eum ad summum altare predicte ecclesie violenter "percussit."—cxciii. p. 54. As to bad language, see l. 12, and indecent conduct, lii. 13, lxi. 15, cliii. p. 42.

[3] cccix. p. 136.

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Perjury was frequently punished, and this fact is one of some importance in reference to the history of that offence. The cases of perjury which are noticed in the precedents are, [1] perjury to arbitrators, [2] perjury as a compurgator, [3] perjury in the ecclesiastical court in denying incontinence upon the *ex officio* oath, [4] perjury in not keeping an oath "quod evitaret consortium ac colloquium "Margaretæ Bird nisi fuerit in presentia plurium," [5] perjury in relation to a will, [6] perjury in not making a payment according to oath. There is no instance in which perjury as a witness in a lay court is treated as an offence, and it is probable that a prohibition would have been granted to restrain proceedings for such an offence. Indeed, [7] two cases occur in the Year-books in which a prohibition went to the spiritual court to restrain them from inquiring into breaches of promissory oaths relating to temporal matters, upon the ground that such an inquiry was an indirect way of determining temporal questions. In the record of the cases referred to the report says, "It happened in the King's "Bench that a man had sworn to make a feoffment of land, "and for not doing so he was prosecuted in the Court "Christian as for perjury, and because by this means he "might be forced to perform a thing touching land and "inheritance, the same course was taken as if he had been "sued for the land itself in the Court Christian," *i.e.* no doubt a prohibition went.

Breach of faith not involving perjury was, however, treated as an ecclesiastical offence, and might have turned the ecclesiastical courts into something like county courts or the old courts of requests, if the civil courts had not invented the action of assumpsit in addition to the old action of debt and covenant. The following are instances. [8] "Willielmus "Weldon fregit fidem Magistro Ricardo Boseworthe pro non "solucione xxs." . . . "fatetur quod promisit solvere in festo

[1] Hale, lxx. 5, 18.
[2] lxxvii. 18, "perjurator et perjuravit se duodecim hominibus quod non "vexaret Willielmum Petit."
[3] xciii. p. 23; cxxxi. 35. [4] cxlvi. p. 39. [5] cxlvii. p. 40.
[6] cc. pp. 57, 58. [7] 2 Hen. 4, p. 10, No. 45; 11 Hen. 4, p. 88, No. 40.
[8] xxxi. p. 8.

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"Michaelis proximo sub pœnâ excommunicationis." [1] Palmer claimed from Atkinson, 14*s.* 6*d.*, "nomine mutui" "ad quod "debitum probandum introduxerunt testes .... qui deposuerunt .... eos audivisse predictum Atkinson predictum "debitum et summam ante ejus accessum ad mare sponte "recognovisse pro servicia pane (sic) et aliis." [2] "Robertus "Church notatur officio fama referente quod est communis "perjurus, et presertim violavit fidem cuidam Johanni Tatam "in non solvendo eidem vs. quos promisit sibi fide media ad "terminum effluxum pro togâ de dicto Johanne emptâ."

There are other cases in which the breach of faith complained of was not abiding by arbitration, not completing a contract of service, keeping a promise, or restoring a pledge.

Defamation was also a common subject for spiritual censures, and the fact that it was so explains the rule of the common law that no action lies for words spoken unless they impute a crime or relate to a man's profession or trade, or cause special damage. The remedy for common bad language was in the ecclesiastical courts. Thus in 1588 one [3] Pettigrew was "detected for railing against Mr. Evans of High Onger, and "reviling him, and called him raskill, jacke, and skurfe." In 1619 one [4] Harwood was prosecuted for "railing and abusing "the constable and the whole parish in executing the king's "warrant upon him according to law, in calling them "murtherers and villains, with other base and slanderous "names." The most remarkable language I have observed, however, is that which was used by one [5] Eleanor Dalok, who is described as "communis skandilizatrix." She said many dreadful things, but amongst others these:—

"Item ipsa dicit quod si habeat celum in hoc seculo non "curat de celo in seculo futuro."

"Item ipsa utinizavit" (the perfect, I suppose, of utinam), "se fuisse in inferno quam diu Deus erit in cælo, ut potuisset "uncis infernalibus vindicare se de quodam Johanne Gybbys "mortuo."

Another item about her is "quia diabolice semper agit et

[1] Hale, xcv. p. 23.
[2] cclxxii. A note is added to this case, "Deus Rex celestis miserere anime "sui quia mortuus est ideo dimittitur."
[3] dci. p. 195.
[4] dcclxv. p. 245.
[5] cxxxvii. pp. 36, 37.

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CH. XXV. "nunquam Deifice," which seems not improbable if she was as angry with other people as with John Gibbs.

Drunkenness or disorderly life was also punished in these courts. Thus, in 1493, "[1] Dominus Thomas Stokes est pessimi "regiminis sedendo in tabernis et potando horis inconsuetis, et "violenter percussit dominum Robertum Goddard presbyterum "in domo cujusdam Johannis Cooke, et projecit quandam ollam "ad caput dicti domini Roberti et fregit ollam." So [2] Cole, a shoemaker, is prosecuted "for a most notorious and common "drunkard, infamous and offensive to the whole parish and "congregation, who in his drunken fits walketh about the "streets with his naked sword breaking the windows," &c. So [3] Thomas Peryn is detected for a common drunkard and a "reylour and chyder to the griefe of the godlie and great danger "of his soul." [4] Also William Watkins (and others), in 1633, "for disorderly carrying of himself on the Sabboth dayes, and "sittinge up the greater part of the night disquietinge of his "neighbours with their showtinge and outcryes." There are other instances of the same kind.

Witchcraft is also a frequent subject of punishment, though in almost every instance, particularly in the more modern ones, the offence charged is that of consulting cunning men and women for some harmless or praiseworthy purpose. No doubt the reason is that certain kinds of witchcraft were made felony in 1542 by 33 Hen. 8, c. 8, which would oust the jurisdiction of the ecclesiastical courts. The following are instances:—

In 1480, "[5] Stokys utitur incantationibus sortilegiæ "pro febribus." [6] In 1482 Joan Beverley entreated witches "to "secure for her the affection of her two lovers." In 1476 [7] Barley showed to Jarbrey a beryl stone in which Jarbrey saw a thief or thieves. [8] In 1490 Joan Benet a witch "vult "accipere longitudinem hominis et facere in candelam ceri et "offerri coram imagine et sicut candelam consumit sic debet "homo consumere." This would have been felony within the express words of 33 Hen. 8, c. 1. In the same year [9] Laukiston

[1] Hale, clvi. p. 43. [2] dcclxxxii. p. 250. [3] dclxxxviii. p. 223.
[4] dccxciii. p. 252. [5] x. p. 3. [6] xxvii. p. 7.
[7] xliii. p. 10. [8] lxxxii. p. 20. [9] cxviii. p. 32.

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and Margaret Jeffrey, a widow, were convened "super certis "articulis crimen heresie tangentibus et sorcerie." The man offered to find the woman "a man worth a thousand pounds" as a husband. The woman thereupon delivered to him two [1] "masers" worth five marcs ten shillings (£3 16*s.* 8*d.*) in hopes of getting such a husband. Each was sentenced to penance—the man to return the property, the woman to walk barefoot before the procession of the cross. [2] The other cases relate to curing animals or human beings by medicines and charms, or to the discovery of stolen goods by keys or sieve and shears.

The law relating to witchcraft has a curious history, to which I shall return, but this is enough to show the part taken in relation to it by the old ecclesiastical courts.

The second great class of offences over which the ecclesiastical courts had jurisdiction were offences arising out of the relation of the sexes. Every form of incontinence, whether committed by the clergy or the laity, and whether or not it involved adultery, was habitually censured, the parties being cited, put upon their oath to answer the questions proposed to them, and adjudged to penances of various kinds. I need not give instances of these cases, but I may observe that Archdeacon Hale [3] says that out of 1,854 cited before the Court of the Commissary for London and a small part of Essex and Hertfordshire "one half were charged with the "crimes of adultery and others of like nature."

The jurisdiction which the ecclesiastical courts exercised over marriage and incontinence seems to have been extended in practice to nearly all crimes which arise out of or are connected with the relation of the sexes, and which were not punishable as crimes by the common law. It will be sufficient to mention those which are dealt with in the cases reported by Archdeacon Hale. [4] They are as follows: incest, bigamy, acting as a procuress, procuring abortion, overlaying children, and in [5] one case an assault with intent to ravish.

[1] Translated "murras," which, I believe, means some sort of vessel.
[2] cccxxxvii., cccxxxviii., ccccxviii., ccccxlii., ccccxciv., dlxviii.
[3] Preface, liii.
[4] The cases are numerous.
[5] cxxiv. p. 33. The offender was the parish priest. He purged himself, "v manu," *i.e.* by his own oath and that of four compurgators, all priests. It is impossible that the four priests could know anything of such a matter. The charge says, "Pro eo quod noluit in eum consentire voluit eam suffocasse "cum suo flammiolo, prout liquet per vestigia in collo suo, &c."

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The jurisdiction of the courts upon subjects of this kind was so extensive that they sometimes interfered in quarrels between married people. Thus [1] "Nicholaus Elyott notatur "officio quod non tractat Margaretam uxorem suam maritali "affecione." Many neighbours on both sides were called, and at last the husband was required to show cause why he should not be excommunicated. Indeed, the court extended its protection even to a mistress. [2] John Bell not only lived in adultery with Margaret Sanfeld, but said to her at last, "If "I see the speke eny more with him, I shall kutt of thi nose," "pretextu quorum verborum predicta Margareta est extra se "jam posita et totaliter demens effecta."

The sanction by which the ecclesiastical courts enforced their decrees was excommunication. Of this there were two kinds, the less and the greater. The less excommunication deprived a man of all the offices of the Church. The greater cut him off from the society of all Christians, and both involved a variety of civil incapacities. An excommunicated person could not sue, nor give evidence, nor receive a legacy. Moreover, if he refused to submit to penance, the ecclesiastical court signified his contumacy to the king in his chancery, whereupon a writ was issued *de excommunicato capiendo*, and upon this the party might be imprisoned till he submitted. Penance consisted in carrying a fagot or a taper, or standing in a street, or undergoing some other public humiliation. One of the most elaborate penances I have observed was enjoined upon a man and woman who had entered into a contract of marriage whereby a subsequent marriage of the woman was said to be invalidated, [3] "Dominus injunxit dicto Johanni "Grey, quod tempore matutinarum in ecclesia sua parochiali "dicat psalterum beate Marie et quod procedat processione "nudis tibiis et pedibus indutus lynthiamine cum cera in "manu sua dextera posita, et ita ad manus celebrantis missam "illum offerat penitenter; et istis factis et missa celebrata, "quod accipiat disciplinam a dicto celebrante missam, &c.; ac "eciam injunxit mulieri consimiliter."

Such were the old ecclesiastical courts. I have tried to illustrate, as clearly as I could, the character of their juris-

[1] Hale, clxi. p. 44. [2] cvii. p. 26. [3] ccxcv. p. 89.

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diction, because I think it has a more important place in legal and general history than has usually been assigned to it. The only difficulty which is suggested in the present day by the account given of it is to understand how people submitted to it so long as they did. It is difficult even to imagine a state of society in which on the bare suggestion of some miserable domestic spy any man or woman whatever might be convened before an archdeacon or his surrogate and put upon his or her oath as to all the most private affairs of life, as to relations between husband and wife, as to relations between either and any woman or man with whom the name of either might be associated by scandal, as to contracts to marry, as to idle words, as to personal habits, and in fact as to anything whatever which happened to strike the ecclesiastical lawyer as immoral or irreligious.

The hatred with which the *ex officio* oath was regarded, and which was excited by the policy of such a man as Laud, who wished to make the discipline of the Church seen and felt as well as talked of, becomes intelligible when we read such a book as Archdeacon Hale's.

In order, however, to understand the matter fully, it is necessary to refer to the history of the Court of High Commission which extends over the interval between the Reformation and the year 1640. It was the great instrument by which the royal supremacy was put in force under Elizabeth, James, and Charles. Henry VIII. had exercised his ecclesiastical supremacy first through Cromwell, and afterwards to some extent at least personally. The short reign of Edward VI. was a time of almost revolutionary confusion. Mary had done her best to replace the bishops and the Pope in their ancient position. Elizabeth's whole reign was occupied by efforts which upon the whole were for the time successful, to force upon extreme parties a compromise, which practically satisfied the majority of the nation, and which rested on her authority. Hence, the very first important step taken by her and her advisers was to procure the act under which the Court of High Commission was established. This was 1 Eliz. c. 1, A.D. 1558, entitled, "An Act to restore to the Crown the "ancient jurisdiction over the estate ecclesiastical and spiritual,

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"and abolishing all foreign powers repugnant to the same." Section 17 established and enacted that all ecclesiastical jurisdiction, and in particular all [1] ecclesiastical criminal jurisdiction, shall for ever be united and annexed to the Crown. Section 18 empowered the queen and her successors to authorise such persons, being natural born subjects, as she thought fit to exercise under her all ecclesiastical jurisdiction, and especially all ecclesiastical criminal jurisdiction, according to letters patent to be issued by her.

It was under the authority given by this act that Elizabeth and her two successors exercised their ecclesiastical supremacy. The first commissions issued under the act appear to have been local and temporary. One was issued June 24, 1559, for "the cities and dioceses of York, Chester, Durham, and "Carlisle," the text of which is printed in [2] Burnet. It authorises the commissioners amongst other things to proceed against "contumaces et rebelles cujusque conditionis sive "status fuerint, si quos inveneritis tam per censuras ecclesias-"ticas quam personarum apprehensionem et incarcerationem "ac recognitionem, acceptionem ac quæcunque alia juris regni "nostri compescendum."

The commissioners so constituted stood to the ordinary ecclesiastical courts in a relation not unlike that in which the king's courts soon after the Conquest came to stand to the local jurisdictions of earlier times. The two jurisdictions were concurrent, but the Court of High Commission had, or at all events used, powers which the inferior courts had never claimed, and they proceeded against offenders who would probably have been able in a variety of ways to evade and perhaps in some cases to defy the ordinary ecclesiastical courts.

[3] Five High Commissions were issued in the first twenty-five years of Elizabeth's reign, but in December, 1583, a Commission was issued which created a permanent court having authority in every part of the kingdom. The text of the commission is published by [4] Neal. It empowers the

[1] "And for reformation, order, and correction of the same, and of all manner "of errors, heresies, schisms, abuses, offences, contempts, and enormities."
[2] *History of the Reformation*, vol. ii. part ii. p. 481.
[3] Neal's *Puritans*, i. 330.
[4] *Ib.* 330-332, *note;* Gardiner's *History of England*, i. 152-154.

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commissioners, of whom there were forty-four, twelve being bishops, and three a quorum, "to inquire from time to time "during our pleasure as well by the oaths of twelve good "and lawful men, as also by witnesses and all other ways "and means you can devise, of all offences, contempts, mis-"demeanours, &c., done and committed contrary to the tenor" of the principal acts passed in the queen's reign, "and also "to inquire of all heretical opinions, seditious books, con-"tempts, conspiracies, false rumours or talks, slanderous words "and sayings, &c." The commissioners were also authorised to punish offenders "by fine, imprisonment, censures of the "Church, or by all or any of the said ways" as they might think proper. They were also empowered to call any persons suspected before them, to examine them "on their corporal "oath for the better trial and opening of the truth; and if "any persons are obstinate and disobedient, either in not ap-"pearing at your command or not obeying your orders and "decrees, then to punish them by excommunication or fine, or "to commit the said offenders to ward." Several parts of this commission were clearly unauthorised both by the statutes on which it was professedly founded and by the common law.

The prerogative was probably never carried higher than by the creation of this formidable court, and the proceedings which took place under the authority conferred upon it by its commission. The commissioners not only stretched to the utmost the illegal powers which the commission gave them, but they imposed tests of their own devising, and enforced as law instructions called advertisements and informations which the bishops issued at the instigation of the queen, though she characteristically refused to give them the sanction of her authority when they were issued.

[1] The interrogatories which they administered were so close and searching that Burleigh [2] remonstrated upon the subject with Whitgift, describing them as "too much savouring of the "Romish inquisition." Whitgift replied that "they ought "not to be compared with the inquisition, because the "inquisition punished with death," and he observed that if

[1] See an instance given in Neal, i. pp. 337, 338, *note*.
[2] See his letter, Neal, i. p. 339; Gardiner, i. p. 154.

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CH. XXV. they proceeded by witnesses and presentment it would be hard to get evidence to convict them, and they could not make quick despatch enough with the sectaries. Neither Burleigh, however, nor the Privy Council, who agreed with him, could succeed in bridling the bishops. [1] Neal publishes a curious letter in which eleven of the Council formally wrote to Aylmer, Bishop of London, calling on him to make compensation to one Benson, a minister, whom he "had suspended and kept in prison several years on pretence "of some irregularity in his marriage." The Council based their advice on the consideration that if Benson "should "bring his action of false imprisonment he should recover "damages which would touch your lordship's credit." The bishop prayed the council to "consider my poor estate and "great charges otherwise, together with the great vaunt the "man will make of his conquest over a bishop. I hope, "therefore, your lordships will be favourable to me, and refer "it to myself either to bestow upon him some small benefice "or otherwise to help him as opportunity offers. Or, if this "shall not satisfy the man or content your lordships, leave "him to the trial of the law, which I hope will not be so "plain for him as he taketh it."

The proceedings of the High Commission were so violent that even in that age they were called in question. Cawdrey, minister of Luffingham in Suffolk, was suspended by the Bishop of London for refusing the oath *ex officio*, and as he did not submit to the bishop he was cited before the High Commission, which deprived him. [2] He sued the person put into possession of his living for trespass, and the jury found a special verdict to the effect that the defendant was not guilty if the High Commission had power to deprive Cawdrey of his benefice. The report and the decision in Cawdrey's case form a kind of treatise, headed in Coke's *Reports*, "De jure regis "ecclesiastico." It is the leading authority on the subject of the true nature of the ecclesiastical law. It deals with many matters, but amongst other things it carried the power of the High Commission to the highest possible pitch, for [3] "it was

[1] P. 350.
[2] Cawdrey's case, 5 *Rep.* 1, vol. iii. p. xv. of edition of 1826.
[3] *Ib.* 5 *Rep.* 7, vol. iii. p. xxvi. of edition of 1826.

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" resolved that the said act" (1 Eliz. c. 1) "was not a statute " introductory of a new law, but declaratory of the old . . . . " so if that act . . . . had never been made it was resolved " by all the judges, that the king or queen of England for the " time being may make such an ecclesiastical commission as " is before mentioned by the ancient prerogative and law of " England." This doctrine would practically make the king's power in ecclesiastical matters absolute, for where the statute failed the king's ecclesiastical law would come in, and where there was in fact no ecclesiastical law the king and his commissioners could make it under the fiction of declaring it.

This was set in a striking light by the [1] answers given by the judges to questions put to them in 1605, soon after the publication of King James I.'s canons in 1603. The first of these questions was whether the deprivation of Puritan ministers by the High Commissioners for refusing to conform to the ceremonies appointed by the last canons was lawful? The judges replied that it was lawful, because the king had the supreme ecclesiastical power which he has delegated to the commissioners, whereby they have the power of deprivation by the canon law of the realm, and the statute 1 Eliz. which appoints commissioners to be made by the queen does not confer any new power, but explains and declares the ancient power; and therefore they held it clear that the king without parliament might make orders and constitutions for the government of the clergy, and might deprive them if they obeyed not; and so the commissioners might deprive them.

Although the courts of common law were disposed to carry the king's power in ecclesiastical matters to very great lengths, they were by no means disposed to acquiesce in the powers which the commissioners assumed of inflicting fine and imprisonment and forcing accused persons to criminate themselves by the *ex officio* oath. This appears from many cases in Coke's Reports. For instance, in the Michaelmas term, the 4th of January (1606 or 1607), [2] " there was moved " a question amongst the judges and serjeants at Serjeant's " Inn if the High Commissioners in ecclesiastical causes may

[1] Neal, ii. 36.
[2] 12 *Rep.* 19; edition of 1826, iii. 217.



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CH. XXV. "by force of their commission imprison any man or no," and the opinion seems to have been that as the power was not given by the act of Elizabeth they could not. The act was regarded no doubt as declaring the common law, but the common law did not authorise imprisonment by the ecclesiastical courts, and the act did not give the power.

[1] In Easter term of the same year "the Lords of the Council "demanded of Popham, C.J., and myself, upon motion made "by the Commons in Parliament, in what cases the ordinary "may examine any person *ex officio* upon oath." They replied in substance that the Ordinary cannot constrain any man to swear generally to answer such interrogatories as shall be administered to him, but must deliver to him the articles upon which he is to be examined that he may judge whether he is bound to answer them. Moreover, such interrogatories ought to be administered only in testamentary and matrimonial causes, and not in accusation of "adultery, incontinency, usury, "simony, hearing of mass, heresy, &c." They admitted "that "for a very long time divers had been examined upon oath in "ecclesiastical courts," but it was answered that if this was by their consent it would not be illegal—a very lame answer. The rest of the opinion seems to state that whatever the practice may have been the *ex officio* oath was contrary to the principles of English law.

Besides these expressions of opinion the courts in [2] several cases set at liberty by *habeas corpus* persons whom the High

[1] 12 *Rep.* 26, vol. vi. p. 227, ed. of 1826.

[2] Sir Anthony Roper's case, 12 *Rep.* 47, vi. 258. Sir W. Chanley's case, 12 *Rep.* 82, vi. p. 309. See also the case of Nicholas Fuller, *ib.* p. 750. Fuller was a barrister who, as counsel, moved for the discharge of various Puritan divines imprisoned by the High Commission on the ground that they had no right to imprison. Neal says that he himself "was shut up in close prison, "from whence neither the intercession of his friends nor his own humble peti- "tions could obtain his release till the day of his death."—*Puritans*, ii. 39-40. The report in Coke consists entirely of a statement of the resolutions come to by the court. It gives no date, states no fact, and does not even say what the judgment of the court was, or even before what court the question (whatever it was) came. It says simply, "In the great case of Nicholas "Fuller, of Gray's Inn, these points were resolved upon conference had with "all the justices and barons of the Exchequer." It ends by saying "that the "commissioners convicted Fuller of schism and erroneous opinions, and im- "prisoned him, and fined him £200, and afterwards Fuller moved the King's "Bench for a *habeas corpus et ei conceditur*, upon which writ the gaoler did "return the cause of his detention," but what became of the matter finally is not said. See as to Fuller's case, Gardiner's *History of England*, i. 444-446. Mr. Gardiner says Fuller paid his fine and was released.

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Commissioners had imprisoned, and issued prohibitions to them on various occasions. This led in 9 Jas. 1 (1611 or 1612) to a debate upon the subject. [1]"All the justices of "England were by the command of the king assembled in the "Council Chamber, where was also Abbot, Archbishop of "Canterbury, and with him two bishops, and divers civilians, "where the archbishop did complain of prohibitions to the "High Commissioners out of the Common Pleas, and the "delivery of persons committed by them by *habeas corpus*, and "principally of Sir William Chanley, where I" (Coke) "defended our proceedings." There was "great disputation "between the Archbishop and me" (Coke). Coke strenuously maintaining the rights of the courts of common law to interpret the statutes and keep the High Commission within limits, and the archbishop asserting their independence. The matter was afterwards greatly debated with the other judges, the judges of the Common Pleas being excluded, and the judges of the other two courts being examined as to their opinions *seriatim* and without previous warning or preparation. Coke says that "they were not unanimously agreed," and that the king said after hearing them he would "reform the com-"mission in divers points, and reduce it to certain spiritual "causes, the which after he will have to be obeyed in all "points, and the Lord Treasurer said that the principal feather "was plucked from the High Commission, and nothing but "stumps remaining, and that they should not intermeddle with "matter of importance, but of *petit* crimes." Upon this Coke told the king that it was "grievous to us his justices of the "Bench to be so severed from our brethren the justices and "barons, but more grievous that they differed from us in "opinion without hearing one another;" especially because they had proceeded judicially in the case of Cawdrey and other cases concerning the power of fine and imprisonment claimed by the High Commission. Their judicial determination that these powers were not possessed by the commission ought not, in Coke's opinion, to be set aside otherwise than judicially.

The conduct of Coke and his court in the whole of this

[1] 12 *Rep.* 34, vol. vi. p. 311, ed. of 1826.



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CH. XXV. matter appears to have been extremely spirited, and in principle as wise as it was bold, though certainly his theory as to the king's ecclesiastical authority over the clergy and the formularies of the Church was carried to as great a length in one direction as his theory as to the liberty of the subject was carried in the other.

No alteration appears to have been made in the constitution of the Court of High Commission in consequence of these proceedings. Parliament [1] petitioned against it in 1610, but without effect. It reached the height of its power during the twelve years which intervened between the dissolution of Charles I.'s third parliament in 1628, and the meeting of the Long Parliament in 1640.

The best evidence as to the nature of its proceedings during the last seven years of its existence still remains, as a large part, though not quite the whole, of its Act Books for this period are printed [2] in calendars of the Domestic State Papers lately published under the authority of the Master of the Rolls. These documents enable us to see distinctly what sort of body the Court of High Commission was. It seems to have had three principal functions: the punishment of clerical improprieties; the punishment of lay immorality, and the enforcement of ecclesiastical conformity upon all persons whatever, whether lay or clerical.

I will illustrate each of these classes of cases.

As to clerical improprieties, a considerable number of cases of drunkenness and immorality occur, such as would now be dealt with under the Church Discipline Act. Of these I need say nothing, but apart from them the court appears to have been continually occupied with the cases of clergymen who either preached in what was regarded as an objectionable manner, or neglected ceremonies to which Laud and his partisans attached special importance. A singular instance of this kind is afforded by the case of [3] Dr. Stephen Dennison, the curate of Katharine Cree Church, in London, whose per-

[1] See the petition in Neal, ii. pp. 72-73; and see Gardiner, i. 472-473.

[2] *Calendar of State Papers*, Domestic Series, 1633-1640. There are nine volumes of them. There are several ways of quoting these volumes. I quote them by the year and the page.

[3] 1635-1636, p. 105.

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formances seem to have attracted great attention. A painted window, representing Abraham sacrificing Isaac, having been put up in the church, Dr. Dennison said it was "a whirligig, "a crow's nest, and more like the swaggering hangman "cutting off St. John Baptist's head. He also in divers ser- "mons reviled some of his parishioners, comparing them to "frogs, hogs, dogs, and devils, and called them by the name "of knaves, villians, rascals, queans, she devils, and pillory "whores." He preached a sermon depreciating baptism in comparison with preaching, and was accused of immorality. "For his personal taxations and his invective manner of "preaching the court held it so odious" that they removed him from his curateship. This cannot be considered very severe, as he had [1] previously been ordered not to preach on account of his personalities, and had afterwards continued his "personal taxations" "under pretence of catechizing." [2] Ward of Ipswich was convicted upon somewhat similar charges. He spoke ill of set forms of prayer, especially against the service for the visitation of the sick, he "uses not to kneel or show "any sign of devotion when he comes into his seat or pew in "the church, and has preached disgracefully against bowing "and other reverend gestures in the church. He preached "doubtfully concerning Christ's descent into hell. He uttered "speeches derogatory to the discipline and government of the "Church of England. He preached by way of opposition to "his Majesty's declaration concerning recreations to be per- "mitted on Sundays." He was suspended, condemned in costs, and required to recant, but was not punished with any special severity.

One [3] Dr. Holmes was "charged with almost all variety of "clerical misdoings then alleged against inconformable "clergymen. Amongst other things, with speaking irrever- "ently in the pulpit; using these words 'the drunken knave "'priest'; with never reading the book of Liberty; with speak- "ing very unreverently and rudely against the reverend "bishops; with preaching for divers Sundays together 'in the

[1] 1634-1635, pp. 329, 335.
[2] 1635-1636, p. 129.
[3] 1637-1638, p. 63. The words are copied from the abridgment of the editor.

CH. XXV. "'pew and in the pulpit, four sermons in a day;' with bap-"tizing his own child without the sign of the cross; with "being passionate and speaking angerly in the church, and "in the church calling the writer of the present paper "[1]'Mutch-a-vile'; with allowing strangers, after evening ser-"mon on Sunday, to resort to his house so as we can see he "does but 'hover with all the ceremonies,' and with many "other similar offences."

The frequent occurrence of such prosecutions as these must have been a great grievance to the Puritanical party, but I do not think they would explain the detestation excited by the court. It is hardly possible to believe that violent zealots who used unseemly language, and attached a passionate degree of importance to ceremonies not calculated to excite any strong feeling in the minds of the great majority of lay people would have raised any special storm. In this part of its work the Court of High Commission did little more than other ecclesiastical courts always did and still do.

The second class of cases to which I have referred were of a very different kind. They consist of instances in which the court punished immorality as a crime, either in the laity or in the clergy. The smaller ecclesiastical courts, as I have already shown, continued till the year 1640 to exercise a jurisdiction resembling that of modern police magistrates, over all sorts of immoral practices. The Court of High Commission proceeded apparently [2] in a more formal way against persons of superior rank to those who were cited in the smaller courts, and inflicted upon them infinitely more serious punishments. Numerous prosecutions are mentioned for adultery and incest amongst the laity. Some idea of their frequency is given by the following entry as to the case of [3] a man charged with adultery committed nineteen years before. "It not "being the law of this court to examine misdemeanours of "that kind committed above ten years past referred to "Sir John Lambe and Dr. Eden to consider the articles."

[1] Can this mean Machiavel?

[2] One, Santley, being charged with simple incontinence, "being a bachelor, "with a single woman, it was ordered that that article should be put out as "being more fit for an ordinary court."—1635-1636, p. 501.

[3] 1634-1635, page 124, case of George Curtis.

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Adultery was punished with extreme severity. A fine of £500 seems to have been a common punishment, but in some cases it was heavier. One [1] Thomas Hesketh, for instance, was fined £1,000, ordered to do penance in York and Chester cathedrals, and a parish church, and to be imprisoned till he gave securities in 2,000 marks (£1,332) for the performance of the order and the payment of costs. In [2] another case, not on the face of it nearly so bad, a woman was fined "for notorious adultery," £2,000. Such a fine would obviously have been idle if the person on whom it was imposed had not been rich. The extreme severity of proceedings of this nature is perhaps best illustrated by the case of Thomas Cotton and Dorothy Thornton of Lichfield. [3] In April, 1634, they were both sentenced to do penance, and Cotton was fined £500. It seems from other entries that Cotton did not pay his fine, [4] and in November, 1639, the following entry occurs: "Thomas " Cotton and Dorothy Thornton—their petition read, praying " that they might be released from confinement in Stafford " gaol, where they had remained these four years in great " misery, upon entering their own bonds to perform the " sentence of this court." There are many other entries of this nature. There are also a few for immorality of another kind. Thus [5] "Augustine Moreland, of Stroud, was much " given to excessive drinking, and at the same time swore " most desperate oaths, and blasphemed the name of God; " but the highest point of blasphemy objected against him " having, according to the depositions, been spoken beyond " the time mentioned in the articles, the court forbore to " proceed against him for that, but for his notorious drunken- " ness and habitual swearing ordered him to make acknow- " ledgment at his parish church in certain words to be set " down by the commissioners, fined him £500 to the king, " and condemned him in costs."

In several of these cases, and especially in cases of incontinence charged against clergymen, the defendants were permitted to make purgation. Thus in the case of [6] Stephen

[1] 1635-1636, p. 475.
[2] 1633-1634, p. 481.
[3] 1633-1634, p. 580.
[4] 1639-1640, p. 282.
[5] 1634-1635, p. 330.
[6] 1635-1636, p. 115.

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CH. XXV. Dennison already mentioned, part of the charge was that he attempted the chastity of certain women. He swore that he never did so, and five compurgators, each being the parson of a parish in London, took their oaths that they believed him to have taken a true oath, "whereupon the court pro-"nounced him to have purged himself."

A jurisdiction of this sort must have been invidious to the last degree, and would excite almost any amount of sullen hatred.

The third class of the decisions to which I have referred are those by which the court tried to enforce ecclesiastical conformity upon all persons whether lay or clerical. Its proceedings in this matter were similar to, and indeed can hardly be distinguished from, those of the Court of Star Chamber; for all the great political questions of the day were ecclesiastical, and it was hardly possible for any one to write or speak in what could be regarded as an objectionable manner in relation to either politics or religion without being regarded both as a seditious person and as an offender against the doctrines and discipline of the Church. The publication of seditious and fanatical pamphlets, the preaching of seditious and fanatical sermons, and speaking of seditious and fanatical words, form the gist of a large proportion of the offences dealt with by the court. I will give a few of the most characteristic instances. [1] The following instances all occur on the 18th February, 1633, being the day of the mitigation of fines:—John Vicars, holding heretical opinions; George Preston, speaking scandalous words against the king and queen; Nathanial Barnard, seditious preaching at St. Mary's, Cambridge, fined £1,000; Barker and Lucas, the king's printers, fined for errors in printing the Bible—Barker, £200, Lucas, £100; Frederick Waggoner, profane speeches of the Lord's Supper and contumely towards the clergy, fined £100; [2] Lady Eleanor Davis,

[1] 1633-1634, p. 480.

[2] It is said in the preface to the volume, p. xviii., that she was "unquestion-"ably mad," and that she was the sister of Lord Castlehaven, whose disgusting case is mentioned in the *State Trials*. She is the subject of a story told, I think, in Disraeli's *Curiosities of Literature*. She attached great importance to anagrams, from which she proved various unwelcome doctrines. Some officer of the court replied that "Dame Eleanor Davies" made "never so mad a ladie."

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publishing fanatical pamphlets, fined £3,000; Pamplin, for dispersing Popish books, fined 100 marks; George Burdett, for schism, blasphemy, and raising new doctrines in his sermons.

The particulars of some of the cases are very strange, Thus [1] Richard Parry, of Llanvalty, was fined £2,000 for the following offences:—He made a disturbance in church by causing the sexton to apprehend a person during divine service. "Rising after receipt of the bread in the Sacrament, " he said, 'Some devil is in my knee.' He said to his rector, " 'I am a better preacher than thou, and I care not a straw " 'for thee.' He said of the Archdeacon of Carmarthen, or " his official, that he hoped he would be hanged, also that if " he were king there should be no bishops."

[2] John Bastwick was convicted of a great variety of offences. He said that a double-beneficed man could not be an honest man. He "termed the bishops of the Church of " England 'grolls,' and that this word 'groll' he commonly " used to slight men withal." He objected to kneeling at the Communion and bowing at the name of Jesus. He " affirmed that the reverend bishops lived like beasts and " drones," and wrote various books against episcopacy. He was sentenced to acknowledge his errors, his books were to be burnt, he was excommunicated, suspended from the practice of physic, fined £1,000, and condemned in costs. [3] Lastly, in respect that, neglecting his calling, he used to employ much of his time in speaking and writing scandalous matter against Church and State, he was committed close prisoner to the Gatehouse until he gave bond for the due performance of his sentence.

Bastwick was no doubt a prominent person, but the court took notice of small as well as great. This appears from [4] the case of Richard Waddington, aged eighteen, and William Ellyott, aged about twenty, "Two poor foolish boys, taken " amongst others at Francis Donwell's house, the 'Ale

[1] 1634-1635, p. 52.
[2] The same person who was punished by the Star Chamber with Burton and Prynne, 1634-1635, p. 547. "*Groll*," I believe, is Dutch for "silly."
[3] This entry, it is said, has been scored out.
[4] 1635-1636, p. 98.

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CH. XXV. " 'howlder,' at Stepney. They came newly in, and were found "sitting at the table with Bibles before them. They were "discharged." One [1] Blundell, a bailiff, who executed a warrant on Belts, in Bletchingly churchyard, and "upon some "struggling rent a skirt in the said Belts' doublet," and in "a saucy and scornful manner" desired the rector to make him (Blundell) churchwarden, was fined, his fine being assessed at £30 by three commissioners and £50 by three others, because it was considered that by the facts stated "he had violated the liberties of Holy Church and con-"secrated ground, and had scoffed at the office of church-"warden."

Pages might be filled with further illustrations, but these are enough. I may observe in general that all opinions except those which were regarded as strictly correct, were pretty impartially punished. It was as dangerous to believe too much as not to believe enough—to be a Roman Catholic priest as to be a publisher of fanatical pamphlets.

The lengths to which the court went, not merely in hearing and determining cases otherwise brought before them, but in seeking out offenders, appear from several entries. [2] On the 1st April, 1634, the commissioners addressed a circular "to "all justices of the peace, mayors, and all other officers of "the peace, as follows: 'There remain in divers parts of the "'kingdom sundry sorts of separatists, novalists, and sectaries "'as follows: Brownists, Anabaptists, Arians, Traskites, "'Familists, and some other sorts, who upon Sundays and "'other festival days, under pretence of repetition of sermons, "'ordinarily are to meet together in great numbers, in "'private houses and other obscure places, and there keep "'private conventicles and exercise of religion by law pro-"'hibited.'" The circular then directs the persons addressed "to enter any house where they shall have intelligence that "such conventicles are held, and every room thereof search "for persons assembled and all unlicensed books," and bring them before the Ecclesiastical Commissioners.

[3] On the 20th February, 1635-6, a general warrant was

[1] 1638-1639, pp. 152-153.
[2] 1633-1634, p. 538.
[3] 1635-1636, pp. 242-243.

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issued to John Wragg, the messenger of the chamber. It recited that the commissioners had credible information that conventicles were held in London and elsewhere of "Brownists, "Anabaptists, Arians, Thraskists, Familists, Sensualists, Anti-"nomians, and others." The warrant directs Wragg, with a constable and such other assistance as he thinks meet, to enter all houses and search for such sectaries and for unlicensed books, and to bring them before the commission, or to commit them to the next prison and acquaint the commissioners therewith, unless they [the sectaries] give bonds for their appearance before the commission.

These warrants were, so far as I can judge, wholly illegal. Their effect was to enable the persons to whom they were addressed to arrest and imprison, merely on suspicion, persons who by law were not liable to be imprisoned at all, even upon conviction, except upon a significavit to the Court of King's Bench and a writ *de excommunicato capiendo*. Some light is thrown on the nature of the oppressions which they must have caused by a [1] petition from Robert Belim, keeper of the White Lion prison at Southwark. The petition showed "That "the White Lion, the common gaol for heresy, is the next "prison to Lambeth, the place where the High Commission "Court is kept, and therefore he prayeth (and the rather for "that he hath lately done some good service to the Church "and State in discovering a number of Separatists and "Schismatics, whereof divers were now in prison, and hoped to "do better service in that kind hereafter) that he might be "admitted to attend the Commission Court." The abstract goes on "which the court well liked of, and that as occasion "should serve he might have now and then prisoners com-"mitted thither, to which he was assigned to attend the court "accordingly."

No doubt the gaoler regarded the prisoners as a source of profit, used all possible means to get them arrested, and was rewarded by having them "now and then" committed to his custody.

These illustrations, which might be indefinitely increased, are enough to enable us to understand the recitals of the act

[1] 1635-1636, p. 92.

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CH. XXV. by which the Court of High Commission was dissolved, 16 Chas. 1, c. 11, A.D. 1640. The act recites the provisions of the act 1 Eliz. c. 1, and then proceeds as follows: "And whereas "by colour of some words in the aforesaid branch of the said "act, whereby commissioners are authorised to execute their "commission according to the terms of the king's letters "patent, and by letters patent founded thereupon, the said "commissioners have to the great and insufferable wrong and "oppression of the king's subjects used to fine and [1] imprison "them, and to exercise other authority not belonging to "ecclesiastical jurisdiction." The act goes on to take away all coercive jurisdiction whatever from all the ecclesiastical courts. It repeals the provision in the statute of Elizabeth, and forbids the erection of any new court like the Court of High Commission for the future in England and Wales.

The minor ecclesiastical courts fell by the same blow, for s. 4 enacts that no ecclesiastical judge should "award, impose, "or inflict any pain, penalty, fine, amerciament, imprisonment, "or other corporal punishment upon any of the king's subjects," for anything belonging to spiritual cognizance. The act also took away the *ex officio* oath. During the interval between 1640 and 1661 there were accordingly no ecclesiastical courts, but in 1661, by 13 Chas. 2, c. 12, s. 1, it was "declared and "enacted" that neither this act nor anything contained in it doth or shall take away any ordinary power or authority from any of the said ecclesiastical judges, and the statute was repealed except as to the Court of High Commission. Its provision as to the *ex officio* oath, was, however, re-enacted by s. 4. It is probable that the declaratory form was given to this statute by way of suggesting that the parliament had no power to deprive the ecclesiastical courts of their jurisdiction, but however this may have been, the result of the abolition of the *ex officio* oath was to put an end practically to the powers of the ecclesiastical courts, although they still retain them in theory. To this day there is no legal reason

[1] The imprisonments which I have noticed in the Act Books seem to be principally, if not always, by way of arrest, to compel the giving of security for the payment of fines, performance of penance, &c. I have not noticed a case of a sentence of imprisonment for a fixed time by way of punishment.

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why any ecclesiastical court in England should not try any person for adultery or fornication and enjoin penance upon them, to which [1] they must submit under pain of six months' imprisonment. No doubt, however, the first proceeding of the kind would be the last—the public would not endure it.

The whole of the ecclesiastical ordinary jurisdiction did not fall at once, nor did all of it remain untouched till the year 1640. It was always a recognised principle of law that the ecclesiastical courts should not try men for temporal offences, and that if they did so they might be restrained by a writ of prohibition. As some of the crimes with which they concerned themselves came to be regarded as temporal offences of importance they were made felonies by statute, and thus the ecclesiastical courts lost jurisdiction over them. This was the case with several offences.

The earliest enactment of this kind I believe to have been [2] 25 Hen. 8, c. 6 (1533), which makes unnatural offences felony, reciting in the preamble that "there is not yet suffi-"cient and condign punishment appointed by the due course "of the laws of this land" for such offences. It is true that [3] Fleta, Britton, and the Mirror mention the offence, the first mentioning burying alive, the other two burning, as the punishment. This is one of many reasons which points to the conclusion that the early writers frequently stated as actual law either what they thought ought to be the law, or what they found laid down as law by canonists or civilians. A well-known [4] passage in the *Germania* of Tacitus presents a parallel which may be merely accidental to Fleta's notion about burying alive. [5] Burning was the punishment inflicted by the Theodosian Code. The statute of Henry VIII. is wholly inconsistent with the opinion that the authors cited stated the law correctly, whereas it is not only consistent with

[1] 53 Geo. 3, c. 127, ss. 1-3.

[2] Repealed by 1 Edw. 6, c. 12, which repealed (s. 4) all statutes making new felonies in Henry VIII.'s reign, but revived by 5 Eliz. c. 17, A.D. 1562.

[3] Quoted in Coke, *Third Institute*, 58.

[4] "Ignaros et imbelles et corpore infames coeno ac palude injecta insuper "crate mergunt."—*Germania*, c. xii.

[5] "Hujusmodi scelus expectante populo flammis vindicibus expiabunt."—Gotofred's *Codex Theodosianus*, iii. 68.

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but suggests the notion that the offence was till then [1] merely ecclesiastical.

In connection with this matter I may observe that the only reason which I can assign why incest in its very worst forms is not a crime by the laws of England is that it is an ecclesiastical offence, and is even now occasionally punished as such. It is, I believe, the only form of immorality which in the case of the laity is still punished by ecclesiastical courts on the general ground of its sinfulness.

Bigamy continued to be an ecclesiastical offence exclusively till the year 1603, when it was made felony with benefit of clergy by 1 Jas. 1, c. 11. This act remained in force till modern times, when it was repealed and re-enacted by 9 Geo. 4, c. 31, s. 22, which enactment was treated in the same way by 24 & 25 Vic. c. 100, s. 57. In the proposed alteration of law under the Commonwealth it was proposed that bigamy should be punished with death.

Speaking defamatory words continued to be an offence cognizable in the ecclesiastical courts till our own days. The courts [2] lost their jurisdiction over it by an act passed in 1855, 18 & 19 Vic. c. 41.

The last of the ecclesiastical offences which I need notice, which became an offence by statute, was one which had a strange and terrible history, namely, witchcraft. The few cases of this offence which are noticed in Archdeacon Hale's work are, as I have already shown, rather instances of trifling superstitions than what was afterwards hated and dreaded as witchcraft, namely, the infliction of bodily harm by supernatural

[1] The Penitentiaries published in Thorpe abound in provisions as to penance for this offence. In Foxe's *Acts and Monuments*, vol. ii. p. 169, it is said that Anselm made an "act synodal" on this subject, that he was persuaded not to publish it, or to recall its publication, on the ground that it would attract attention to the subject, and do more harm than good; that he acted upon this advice, and that the enforced celibacy of the clergy aggravated the evil. In 2 *Rot. Par.* 332*a*, No. 58 (A.D. 1376), a complaint occurs that the Lombards had introduced the practice into England, "Par quoi le Roialme ne "poet failler d'estre en brief destruyte si redde corrigement ne soit sur icell "hastivement ordeignez."

[2] I remember one of the last cases under the old law. It occurred when I was at Cambridge, about the year 1850. Some one had talked scandal of a clergyman near Cambridge, who was unwise enough to prosecute the offender in the ecclesiastical court, which enjoined upon him penance in the church in a white sheet. The offender blacked his face, got drunk with a number of friends, and made a disgraceful scene in the church, which ended in a riot. Whether this was the immediate occasion of the act I do not know.

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means. This offence came in process of time to be regarded with special horror, and to be believed in with an ardour and eagerness which it is now hard to understand. It is regarded by Mr. Lecky as a natural result of religious excitement, by which the minds of men were directed to the unseen world. However this may be, the first act passed upon the subject was 33 Hen. 8, c. 8 (A.D. 1541). This act makes it felony to practise or cause to be practised conjuration, witchcraft, enchantment or sorcery, to get money; or to consume any person in his body, members, or goods; or to provoke any person to unlawful love; or for any other unlawful purpose; or for the despite of Christ or lucre of money dig up or pull down any cross, or to declare where goods stolen be. In his [1] *Essay on Witchcraft* Hutchinson suggests that this act, which was passed two years after the act of the Six Articles, was intended as "a hank upon the reformers," that the part of it to which importance was attached was the pulling down of crosses, which, it seems, was supposed to be practised in connection with magic. Hutchinson adds that the act was never put into execution either against witches or reformers. The act was certainly passed during that period of Henry's reign when he was inclining in the Roman Catholic direction. Upon Edward VI.'s accession this act, together with all the others of Henry VIII.'s reign which created new felonies, was repealed, and no further legislation on the subject took place till 1562, when was passed 5 Eliz. c. 16. This was one of [2] several acts which revived acts of Henry VIII., repealed either by Edward or by Mary. [3] It recites the act of Henry VIII., its repeal, and the subsequent increase of witchcraft, and it makes it felony without benefit of clergy (1) to use, practise, or exercise any invocations or conjurations of evil or wicked spirits to any intent whatever. (2) To use, practise, or exercise any witchcraft, enchantment, charm, or sorcery whereby any person happens to be killed or destroyed. It also provides that every one shall be liable to a year's imprisonment and six hours' pillory, and on a second offence

[1] Hutchinson's *Essay on Witchcraft*, 216.

[2] c. 10 revives 21 Hen. 8, c. 7, which first made embezzlement by a servant felony. c. 10 revives 25 Hen. 8, c. 6, against unnatural crimes.

[3] Hutchinson misstates the effect of this act.

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to be a felon without clergy, who uses any witchcraft, enchantment, &c., whereby any person happens to be wasted, consumed, or lamed in his body or member, or whereby any goods or chattels of any person are destroyed, wasted, or impaired. This act increases the severity of Henry VIII.'s act as to invocations of spirits, but diminishes it as to witchcraft by other means. Thus to invoke an evil spirit merely in order to satisfy curiosity would not have been a crime under the act of Henry VIII., but would have been felony without benefit of clergy under the law of Elizabeth. On the other hand, to use witchcraft to provoke unlawful love would be felony without benefit of clergy under the act of Henry, and on the first offence a misdemeanour under the act of Elizabeth. These variations are curious, and in the present day unintelligible. In his list of trials for witchcraft, Hutchinson mentions five cases of convictions under this statute. [1] One case occurred at Cambridge in 1560, [2] another at Abingdon in 1575, [3] another in 1576 in Essex, [4] another in 1593 also in Essex, and another in [5] Lancaster in 1597. These are the only cases which Hutchinson, writing early in the eighteenth century, seems to have been able to discover as having occurred in the last part of the sixteenth.

The law relating to witchcraft was most severe, and trials for the offence most common in the seventeenth century. In Scotland the prosecution of witches was undertaken at an earlier period than in England, and their punishment was more severe. [6] The articles of Justice-Aire for Jedworth in 1510 include the inquiry "gif thair be ony wichecraift or "sossary wsyt in the realme," and instances occur in which witches were burnt in [7] 1572 and 1576. James I. before his accession to the throne of England greatly busied himself with witchcraft. [8] Hutchinson says, "In the twenty-third year

[1] P. 39.

[2] P. 35. Some person connected with this case seems to have said that "with his sword and buckler he killed the devil, or at least wounded him so "sore that he made him stink of brimstone."

[3] P. 38. "Seventeen or eighteen were condemned on this occasion. An account "of this was written by Brian Darcy, with the name and colours of their spirits."

[4] P. 42. This was the case of the witches of Warbois. See Hutchinson, pp. 130-139, a horrible story.

[5] P. 44.

[6] Pitcairn's *Criminal Trials*, i. 66*x*.

[7] Pitcairn, i. 38 (Borgman's case), 49 (Bessie Dunlop's case).

[8] P. 228.

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"of his age he had the examination of Agnes Simpson, "commonly called the wise wife of Keith, and of several "others who confessed themselves guilty of witchcraft."

Some years afterwards he published his *Dæmonologia*, and Hutchinson conjectures, not improbably, that the act passed immediately after his accession (1 Jas. 1, c. 12, A.D. 1603), was more or less by way of a compliment to his special tastes and acquirements. The offences which it punishes are as follows:—

(1) To use, practise, or exercise any invocation or conjuration of any wicked or evil spirit.

(2) To consult, covenant with, entertain, employ, feed, or reward any evil or wicked spirit to or for any intent or purpose.

(3) To take up any dead man, woman, or child out of the grave or other place where the "body rests, or the skin, bone, "or [1] any part of a dead person to be employed or used in any "manner of witchcraft, sorcery, charm, or enchantment."

(4) To use, practise, or exercise any witchcraft, enchantment, charm, or sorcery, [2] whereby any person shall be killed, destroyed, wasted, consumed, pained, or lamed in his body.

All these offences were under the act of James felonies without benefit of clergy. A considerable number of prosecutions took place at intervals under this act, to some

[1] These words, says Hutchinson, were probably suggested by part of the confession of Agnes Simpson, "Then they opened their graves, and took the "fingers and toes and noses of the dead people," &c.

[2] This provision fell far short in point of severity of the Scotch law, according to which any kind of witchcraft was a capital crime. In Pitcairn (vol. iii. part ii. pp. 555-558) there is an account of a certain Thomas Greave, who was "dilatit for cureing of the persons following by sorcery and witch-"craft,"—to wit, fifteen specified persons. One or two instances may be given. "Item, for cureing of ane woman, duelland besyde Margaret Douglas, of ane "grit and panefull seiknes by drawing her nine times backward and ford-"ward by the leg." Another offence was "that whereas one Elspeth Thom-"son was visseit with one grievous seiknes," Greave promised to cure her if two of her brothers would walk with him twelve miles at night, and not speak, and whatever they saw "nawayes to be effrayed." Greave took the woman's shift and her two brothers to a place twelve miles off, "and at the "ffurde" (ford) "be-ist Burley in ane south-rynning watter he thaur wusche "the sack; during the time of the quhilk wasching of the sack there was one "grit noise maid be foullis on the lytte beistis" (water-fowl, or little beasts—snipe, *e.g.*) "that arraise and flichtered in the water." The woman, on putting on the shift was cured. For this Greave was sentenced to be "taen "to the Castell-hill of Edinburgh and thair to be wirreit" (worried—strangled) "at ane stake quhill he be deid, and his body thaireafter to be burnt to ashes." This was in 1623.



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CH. XXV. of which I have already referred for other purposes. The most notable instances are [1] the case of the Lancashire witches in 1634, and the case of the witch trials in Norfolk and the other eastern counties in 1644 and 1645, in which about fifty persons in all were executed.

The case of the Lancashire witches was a good instance of the horrible cruelty involved in the very nature of laws against witchcraft. Seventeen persons were condemned to death on the evidence of a single witness, who afterwards admitted his imposture and perjury. Their lives were saved only by the good sense of the judge. The prosecutions in the eastern counties involved the death of a large number of innocent persons. Probably the ease with which a belief in their criminality was produced was due to a great extent to the passionate religious excitement of the period, and to the support which a belief in witchcraft was supposed to, and no doubt did really, give to many of the religious theories of the time.

The evidence on which they were convicted seems to have consisted principally of confessions obtained by torture. A wretch of the name of Hopkins made himself specially conspicuous in the work of extorting such confessions. That they were ever received in evidence is infinitely disgraceful to all who were responsible for it. Torture had been solemnly declared to be illegal in Felton's case, and even if it ever had any colour of law at all it was only when it was inflicted by a special warrant from the king in council. The brutalities of Hopkins and others like him were devoid of the faintest shadow of legal authority, and constituted crimes for which those who were guilty of them might and ought to have been punished.

The readiness with which religious people in the seventeenth century gave way to cruel superstitions and the fierce fanaticism with which they insisted on the reality of witchcraft are a stain upon them and on their religion. Those who laughed at the ridiculous nonsense which the witchfinders believed in were wiser, and, as far as that matter went, better than those who prayed and groaned over it.

[1] Hutchinson, 264. See also Ewald's *Stories from the State Papers*.

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A considerable number of isolated cases of convictions for witchcraft took place in the seventeenth century. The following are the cases mentioned by Hutchinson. [1] Two at Salisbury in 1653, and one about the same time at Ipswich; two at Bury in 1655, and one in Somersetshire, another in Norfolk, and others in Cornwall in 1658; [2] two at Lancaster in 1659, [3] one at Taunton in 1663, two at Bury (this was the case tried by Sir Matthew Hale) in 1664, [4] one condemned at Ely but reprieved in 1679, three hanged at Exeter in 1682 (this was the last execution known to Hutchinson in England. It was not, however, by any means the last trial.) [5] Three women were tried before Holt, L.C.J., in Somersetshire in 1691, and [6] another at Bury, and another at Ipswich, both before the same judge, in 1694. [7] He also tried a case at Launceston in 1695, and at Exeter in 1696. [8] He also tried a woman at Guildford in 1701. In all these cases there were acquittals. The last case in which a conviction for witchcraft took place in England seems to have been that of [9] Jane Wenham, who was sentenced to death for witchcraft at Hertford in 1712.

[1] P. 51. [2] P. 52. [3] P. 54. [4] P. 56.
[5] P. 58. [6] P. 59. [7] Pp. 60-62. [8] P. 63.
[9] P. 163. Hutchinson thus mentions in all fifteen cases, in which twenty-three persons at least were accused between 1653 and 1712. Probably the list is incomplete. Hutchinson says that Chief Justice Holt lent him the notes of four of the trials (p. 62). There may have been other cases of which he had not heard, as it seems improbable that one judge should try all the cases of a particular kind which happened in a series of years. Hutchinson sums up the result of his inquiries thus:—"In this collection that I have made it "is observable that in 103 years from the statute against witchcraft in the "33 Hen. 8, till 1644, when we were in the midst of our civil wars, I find "but about fifteen executed. But in the sixteen years following" (1644-1660) "when the government was in other hands, there were 109, if not more, "condemned and hanged. In the five years following" (1660-1665) "before "the late notions were well considered, I find five witches condemned, and "three of them, if not all five, executed; and three after, at Easter, 1682. "Since then, that is, in thirty-six years last past" (so that this was written in 1718) "I have not met with one witch hanged in England." This, according to Dr. Parr, is an error. He says (*Works*, iv. 181), "I know not that "Judge Powel was a weak or hardhearted man, but I do know that . . . this "judge in 1712 condemned Jane Wenham at Hertford, who, in consequence "perhaps of a controversy that arose upon her case than of any interposition "of Powel, was not executed; and that four years afterwards he at Hunting-"don condemned for the same crime Mary Hickes and her daughter Elizabeth, "an infant of 11 years old, who were executed on Saturday, 17th July, 1716. ". . . Two unhappy wretches were hung at Northampton the 17th of March, "1705, and upon July 22, 1712, five other witches suffered the same fate at the "same place." Parr's authority for these statements is Gough's *British Topography*, ii. 255, but it does not warrant his assertion. If these cases had really happened, Hutchinson writing in 1718 must have known of them. By my calculation, the 17th July, 1716, was not a Saturday but a Thursday.



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The judge, however, respited her, and procured a pardon. The act of James continued in force till 1736, when it was repealed by 9 Geo. 2, c. 5, which also enacted (s. 2) that no prosecution, trial, or proceeding shall be commenced or carried on against any person for witchcraft, enchantment, or conjuration. The effect of this section was to prevent the prosecution of witchcraft even as an ecclesiastical offence. The act contains a section still in force for the punishment of persons "pretending to "exercise or use any kind of witchcraft, sorcery, enchantment, or "conjuration" or to discover stolen or lost property by "any "occult or crafty science."

The result of this long history may be thus shortly summed up. The function of the ordinary ecclesiastical courts was to punish offences against religion and morals, in a word to punish sin as such. This function they discharged with little interruption till the year 1640, and during the latter part of the period they united with it the function, half political, half theological, of enforcing ecclesiastical conformity and suppressing writings and words opposed to the system established by law. The resistance provoked by these efforts and the intense unpopularity of their method of procedure brought the whole system to the ground. It was revived to a very limited extent in 1660, and still retains a shadowy existence as against the laity, though it has fallen into complete desuetude in regard to them, except in the single case of incest.

As regards the other offences with which the ecclesiastical courts used to deal, two, namely, unnatural offences and bigamy, were withdrawn from the ecclesiastical courts, the first in the reign of Henry VIII. and the second in that of James I., by statutes the equivalents of which are still in force. Witchcraft in its more aggravated forms became a statutory offence under Henry VIII., and ceased to be even an ecclesiastical offence by virtue of the act of 1736. The speaking of defamatory words continued to be an ecclesiastical offence till 1855, when the jurisdiction of the ecclesiastical courts in that matter was abolished.

As instruments of Church discipline the ecclesiastical courts are still in full force. The law under which a beneficed clergyman is admonished, suspended, or deprived, for im-

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morality or intemperance, is precisely the same as the law under which the laity were liable to be enjoined to do penance before the year 1640, though the procedure against clergymen who are guilty of any impropriety is now regulated chiefly by the Church Discipline Act of 1840 (3 & 4 Vic. c. 106). Practically the Church courts have thus in the course of their long history changed from being courts of law, having authority over the sins of all the subjects of the realm, to special courts for enforcing propriety of conduct upon the members of a particular profession.

There is, however, one ecclesiastical offence with which I have still to deal, as it has a history of its own of the highest interest and importance, and as it is connected with all the most stirring epochs of our history.

In order to show the connection between the ancient ecclesiastical courts, the court of high commission, the ecclesiastical courts of our own days, and that branch of the criminal law which has been substituted by statute for part of the old ecclesiastical criminal law, I have passed over what in one point of view may be regarded as the most important and curious part of the subject. I refer to the laws by which, through a great part of our history, religious opinions regarded from time to time as heretical, were made the subject of legal punishment.

The general outline of the history of prosecutions for this offence is of course well known, but I am not aware that it has as yet been considered from the legal point of view. The unexpressed assumption on which all legislation and government from the conversion of the English from heathenism to our own days has proceeded, has been the truth of Christianity. What specifically Christianity is? and by whom and how questions relating to it are to be determined? has been the subject of passionate controversy. Indeed for upwards of three hundred years the controversy has been so eager that since 1688 government has been carried on as far as possible without prejudice to differences of opinion which, in earlier times, were regarded as altogether fundamental. Even in our own days it is an offence for any person brought up as a Christian to deny the truth of Christianity, however

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respectfully; and the present generation is the first in which an avowed open denial of the fundamental doctrines of the Christian religion has been made by any considerable number of serious and respectable people. For many centuries the maintenance, or even the expression of opinions, suspected or supposed to involve a denial of the truth of religion in general, was regarded in the same kind of light as high treason in the temporal order of things. A man who did not begin by admitting the king's right to obedience and loyalty, put himself out of the pale of the law. A man who did not believe in Christ or God put himself out of the pale of human society; and a man who on important subjects thought differently from the Church, was on the high road to disbelief in Christ and in God, for belief in each depended ultimately upon belief in the testimony of the Church. In our own days the physical sanctions of the law are so much more frequently appealed to, and are so much more effective than its moral sanctions, that it is only by an effort that we can understand the horror with which our ancestors regarded a man who held opinions which, in their view, were inconsistent with a real hearty assent to the principles on which they believed all human society, whether spiritual or temporal, to repose. For many centuries there was hardly any distinct law against heresy in England, because there were hardly any heretics. There was a general understanding as to what constituted Christianity, and it was unnecessary to define it, just as from the Reformation till our own time there was in the formularies of the Church of England no definite doctrine about the Bible and its authority. By degrees questions arose and definitions were attempted, with what results I shall now attempt to show.

The laws of the early English kings contained a few provisions against heathenism. Thus the laws of [1] Edward and Guthrum provide "if any one violate Christianity or reverence heathenism by word or by work, let him pay as well "wer as wite or lah-slit according as the case may be." [2] Ethelred enacted: "This, then, is first, that we all love and "worship one God, and zealously hold one Christianity, and

[1] Edward and Guthrum, Thorpe ii. 72. [2] Ethelred v. Thorpe i. p. 129.

"every heathenship totally cast out." [1] Cnut, in a law already quoted, says: "And we earnestly forbid every "heathenism; heathenism is that men worship idols; that "is, that they worship heathen gods, and the sun or the "moon, fire or rivers, water-wells or stones, or forest-trees of "any kind; or love witchcraft, or promote morth-work in "anywise, or by [2] 'blot' or by [2] 'fyrht,' or perform anything "pertaining to such illusions."

Heresy is occasionally referred to in the Penitentiaries; for instance, the *Liber Pœnitentialis* of Theodorus, Archbishop of Canterbury, said to have been written between 668 and 690, contains an article [3] "De Communione Hereticorum," in which various penances are appointed for communicating with heretics, but they are not pointed at any particular heretics, and may have been copied from some foreign authority. Heresy is also referred to in the [4] *Canons of Ælfric*, and also in his [5] *Pastoral Epistle*, but in each case in a historical way, and as a man speaks of something past. "Many synods have "been held since, but these four are the principal, because "they extinguished the heretical doctrines which the heretics "heretically invented against God."

These scattered notices of heathenism and heresy are the only traces that I know of any law upon the subject of heresy in England before the Conquest. For several centuries after that event the references to heresy are even slighter. The following are the only ones referred to either by Foxe, by Coke, or by Hale, each of whom has gone into this matter minutely.

The following passage occurs in [6] *Bracton de Corona.* After describing the privilege of the clergy in a passage already quoted, Bracton proceeds to say that when a clerk is degraded for any offence, he is not, in common cases, to be subjected to any further punishment, as degradation is punishment enough. He then adds, "Nisi forte convictus fuerit de apostasia quia "tunc primo degradetur, et postea per manum laicalem com- "buretur secundum quod accidit in concilio Oxoñ celebrato

[1] Cnut, 5; Thorpe, i. 379.
[2] Mr. Thorpe considers these words unintelligible.
[3] Thorpe, ii. 38. [4] *Ib.* ii. 343-344. [5] *Ib.* ii. 373-375.
[6] Bracton, vol. ii. p. 300.

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"a bonæ memoriæ S. Cantuareñ archiepiscopo, de quodam "diacono qui se apostatavit pro quadam Judæa, quicum esset "per episcopum degradatus statim fuit igni traditus per "manum laicalem."

[1] Nothing else whatever is known of this transaction or of the council at which it is said to have taken place. The case is important because it will be found that several centuries afterwards great weight was attached to it as a precedent. It is possible that the apostasy may have consisted only in an improper connection with the Jewess, for there is at least [2] one authority for saying that such a relation was about that time looked upon in a light which would make it likely to be stigmatised as "apostasy."

With this solitary exception there is no evidence to show that till the end of the fourteenth century any other provision was made for the punishment of heresy than such as was afforded by the ordinary ecclesiastical courts, and their power of enjoining penance in the manner already described. [3] Hale, indeed, refers to two cases mentioned in the *Close Rolls* in which persons are said to have forfeited their goods to the king's use upon a conviction for heresy, but these he regards as of questionable authority. He also refers to two passages in the chronicles of the reign of Henry II. where it is stated that heretics were banished; but these references are vague and unsatisfactory in the extreme.

Though the power of the Church Courts was thus narrowly limited, they made efforts to enlarge it. During the thirteenth and fourteenth centuries the [4] Canon law was brought

[1] Foxe, ii. 374, says, "In the town of Oxford, where the king" (Henry III.), "then kept his court, Simon" (a mistake for Stephen) "Langton held "a council, where was condemned and burned a certain deacon, as Nicholas "Trivet says, for apostasy. Also another rude countryman, who had crucified "himself, and superstitiously bare about the wounds in his feet and hands, "was condemned to be closed up perpetually within walls." Langton was Archbishop of Canterbury from 1206 to 1228.

[2] Fleta, i. c. 35. "Contrahentes cum Judæis et Judæabis, pecorantes et Sodomite in terra vivi confodiantur." The author of the *Mirror* describes unnatural crimes as a kind of "majesty . . against the King of heaven."

[3] 1 Hale, *P. C.* 394.

[4] The *Corpus Juris Canonici* includes Gratian, 1151; Gregory IX.'s decretals, 1230; Sixtus decretalium, 1298; the Clementine Constitutions, and extravagantes Joannis, 1317. The English canon law consisted partly of the ordinary canon law, so far as it was received here, and partly of constitutions enacted at national synods by Cardinals Otho and Othobon, about the years 1220 and

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into shape, and in a certain modified sense introduced into England. The Canonists, of whom Lyndwood was the highest authority, took their views of heresy from this body of law. The continental canon law assumed the existence of the continental civil law. The provisions of this system as to heresy went back to the [1] Theodosian Code, which punished with death, under certain circumstances, the Manichæans, the Donatists, and other heretics, and contained a multitude of provisions as to lighter punishments in particular cases. The Emperor Frederic Barbarossa (1154-77) was understood by [2] Lyndwood to have made a law that "indistincte illi qui "per Judicem ecclesiasticum sunt damnati de hæresi, quales "sunt pertinaces et relapsi, qui non petunt misericordiam "ante sententiam sunt damnandi ad mortem per sæculares "potestates, et per eos debent comburi et in igne cremari." In short, the view of the Canonists in England, as elsewhere, was, that it was the right of the ecclesiastical courts to try and convict heretics and the duty of the civil power to act as their executioners. This, for a considerable time, was not admitted by the law of England. [3] Hale observes, "As to the "penalties by the Canon law (*i.e.* the English Canon law), "they go no further than ecclesiastical censures, imposition "of penance, excommunication, and a deprivation of eccle-"siastical benefices, but yet they" (the Canonists) "made "bold by some of their constitutions to proceed further, and "indeed further than they had authority; such were, among "others, imprisonment by the Ordinary, and confiscation of "goods, but whether they adventured hereupon only in sub-"servience to civil constitutions, or whether by their own "pretended power, may be doubtful; but howsoever it is so "decreed by their canons and constitutions."

Such were the views of the Canonists on the one hand, and

1268, and partly of provincial constitutions, or decrees of convocation, made at different times, from Stephen Langton's days down to the days of Archbishop Chichele, in the reign of Henry V. These, however, had no force except as far as they were recognised and adopted by the king and parliament. Thus limited they were so vague that it is almost hopeless to say how far the canon law upon any given point was and is in force or not. (Blackstone, i. pp. 82-83).

[1] Book xvi. tit. v. Gothofred, v. pp. 116-122, in his paratitlon or abridgment, gives an abstract of the mass of legislation on this subject.

[2] Quoted by Hale, i. p. 388. [3] *Ib.* p. 488.

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CH. XXV. of the common lawyers on the other, between the reign of Edward III. and that of Richard II. During all this period there was an extreme jealousy on the one side against the introduction of either the Roman civil law or the Roman canon law into this country; and on the other side a corresponding desire to introduce them.

[1] The destruction of the Albigenses appears to have produced almost no effect upon the state of the laws of this country, but it was very different with the Lollards. Wickliff's great contest with the clergy of his day began about [2] 1377, when he was deprived of his benefice, and continued till his death in 1384. Various articles taken from his works were condemned as heretical by Pope Gregory XI., who by a [3] bull in 1378, denounced him as a heretic, and ordered him to be apprehended and detained in the custody of the Archbishop of Canterbury. He also addressed a letter to Richard II. calling upon him to assist the archbishop. The bishops cited Wickliff but were ordered not to proceed. Gregory XI. died, and the proceedings came to nothing. Archbishop Courtney procured the condemnation, as heretical, of [4] various opinions ascribed to Wickliff, and called upon the Bishop of London to "extirpate" these heretical opinions, and to order every one to shun all who taught them "as he "would avoid a serpent putting forth most pestiferous poison." This was to be "under pain of the greater curse which we "command to be thundered against all and every one who "shall be disobedient in this behalf." Two of Wickliff's disciples, Herford and Reppington, were excommunicated in

[1] End of Albigensian crusade, 1229.

[2] Foxe, ii. 797.

[3] Foxe. iii. pp. 5-7. "John Wiclif" . . . "vomiting out of the filthy "dungeons of his breast" . . . "most wicked and damnable heresies."

[4] Foxe, iii. pp. 21-23. One opinion was "that God ought to obey the devil." On which Foxe's editor gravely observes, "this article is either slanderously "reported, or else can hardly be defended." The "hardly" seems unnecessarily cautious. At p. 30 a sort of explanation occurs. Certain Wickliffites, "being asked whether God owed any manner of obedience to the devil or not, "they answered, 'Yea, as the obedience of love, because he loveth and pun- "'ished him as he ought.' And to prove that God ought so to obey the "devil they offered themselves to the fire." It is hard to say which is most obscure, the doctrine, the explanation of the doctrine, or the connection between the doctrine and the argument proposed in proof of it. It possibly may have been intended as the strongest imaginable illustration of the proposition that the obligations of morality are universal, extending even to the relations between God and the devil.

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1382, but no temporal consequences appear to have followed. Upon this [1] Foxe makes the following observation: "The "archbishop, not yet contented with this, doth moreover, "by all means possible, solicit the king to join withal the "power of his temporal sword, for that he well perceived that "hitherto the popish clergy had not authority sufficient by "any public law or statute of this land, to proceed unto "death against any person whatsoever in case of religion, but "only by the usurped tyranny and example of the Court of "Rome." Foxe's hatred of popery has somewhat lowered his authority in a generation which likes to sympathise with and understand everything, but I think that in this instance he was right, and that Hale, who long afterwards affirmed the existence at common law of a power to burn heretics by a writ called the writ *de hæretico comburendo*, was wrong. It is to me incredible that Wickliff and his followers should have been allowed to go unpunished after the pope and the Archbishop of Canterbury had solemnly declared their doctrines to be heretical, and after some of them had been solemnly excommunicated, if any means of punishing them had been known to the law. The utmost, therefore, that could be done was to excommunicate them, for which, in itself, they did not care. It would no doubt have been possible to enjoin upon them the performance of penance, as, for instance, by publicly renouncing their heretical opinions, and to have imprisoned them till their penance was performed under the writ *de excommunicato capiendo.* This might have been thought sufficiently severe, but I suppose that the clergy thought it was not enough, and that in any case the lay courts would be slow to afford their assistance, and might altogether refuse it.

At all events the clergy proceeded, in 1382, to a measure which can probably not be paralleled in the history of England. They forged an Act of Parliament, which appears in the Statute Book as 2 Rich. 2, c. 5. It recites that "divers evil persons" go about preaching heresy, who, when cited before the ordinaries, refuse to obey their summons, and "expressly despise" the censures of the Church. It then proceeded to enact that the king's commissions are to

[1] Foxe, iii. p. 35.

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be directed to sheriffs and others, "according to the certifica- "tions of the prelates thereof to be made in the chancery "from time to time, to arrest all such preachers, and all their "fautors, maintainers, and abettors, and to hold them in "arrest and strong prison till they will justify them according to the law and reason of holy Church." Though published as an act of parliament, this measure was not entitled to the name, for, as [1] Coke says, it was never assented to by the Commons. He adds that in the next Parliament "the Commons preferred a bill reciting the "said proposed act, and constantly affirmed that they never "assented thereunto, and therefore desired that the said "supposed statute might be aniented and declared to be "void, for they protested that it was never their intent to "be justified by, and to bind themselves and successors to, "the prelates more than their ancestors had done in times "past; and hereunto the king gave his royal assent in these "words, 'Pleist au Roi.'" This appears to have been taken by Coke from [2] Foxe, who gives what purports to be a translation of "an extract from the petition of the Commons." He adds that "such means were used by the prelates that "this act of repeal was never published, nor ever since "printed with the rest of the acts of that parliament." It is now printed in 3 *Rot. Par.* p. 141, No. 53. It recites the statute and then proceeds: "Laquiel ne fuist unques assentu "ne grante par les coes, mes ce q fuist ple de ce fuit sanz "assent de lour. Qe celui estatut soit annienti, qar il "n'estoit mie lour entent d'estre justifiez ne obliger lour ne "lour successours as prelats pluis q̄ lour auncestres n'ont este "en temps passez. Y plest au Roi."

The pretended statute gave no other power than that of arrest and imprisonment by the sheriffs on the order of the bishops, and this proves that before that time no such power existed.

It does not appear that during Richard II.'s reign anything beyond the ordinary process of the ecclesiastical courts was used for the punishment of heretics. An instance of what

[1] 12 Coke's *Rep.* pp. 56-58 (the case of heresy).
[2] iii. p. 37.

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this amounted to is afforded by the case of [1] William Swinderly. He was convicted of heresy by the Bishop of Lincoln, "the "friars" . . . . "bringing also dry wood with them to the "town to burn him." He was put to penance, and forced to read a recantation in different churches in the diocese. He was afterwards tried again by the Bishop of Hereford for [2] heresy, and was excommunicated, from which sentence he appealed to the king and his council, and addressed "a "fruitful letter" to the House of Commons. Foxe knew not what ultimately became of him, except that "this "remaineth out of doubt, that during the life of King "Richard II. no great harm was done unto him."

This confirms the opinion, that till the very end of the fourteenth century the only punishment for heresy in England was by process of the ordinary ecclesiastical courts.

Henry IV., according to one of our [3] latest historians, owed his crown to a tacit engagement with the nobles to renew the war with France, and to the clergy to persecute the Lollards. "The last pledge," says Mr. Green, "was speedily redeemed" by the passing of the act 2 Hen. 4, c. 15. This is true, but it is not the whole truth.

[4] In April, 1399, one William Chatris, or Sawtre, was convicted of heresy before the Bishop of Norwich, and put to penance by recanting his heresies in certain churches specified. On the 12th February, 1400, Arundel, then Archbishop of Canterbury, "in the presence of his council provincial," cited Sawtre before him, and questioned him as to his belief on eight Articles as to which he was said to hold heretical opinions. Sawtre had time allowed him to answer the Articles from Saturday till Thursday. On the Thursday he

[1] Foxe, iii. pp. 107-131.

[2] The proceedings are set out in Foxe, pp. 101-126. They run into a controversial form. There is also in Foxe a brief account of the proceedings before the same bishop against a layman, named Brute, who believed the pope to be Antichrist, and held many other views about the controversies of the day. He submitted (p. 187), but what ultimately became of him does not appear.

[3] Green's *History of the English People*, p. 258. Mr. Green is not technically accurate in speaking of Sawtre as "its" (the statute's) "first victim." See also Stubbs, *Const. Hist.* iii. 31, 32. The facts as to Sawtre are here stated correctly, but I do not think Mr. Stubbs appreciates the legal importance or bearing of the case.

[4] Foxe, iii. p. 225.

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CH. XXV. was examined as to his opinions, and [1] affirmed the truth of the doctrines which were alleged against him as heretical. He was then convicted of heresy, and on the production and admission by Sawtre of the record of the previous conviction before the Bishop of Norwich, he was declared to be a relapsed heretic, and was degraded. [2] The sentence of degradation ends by saying, *inter alia,* "and for thy pertinency "incorrigible we do degrade thee before the secular court of "the High Constable and Marshal of England, being person-"ally present . . . . beseeching the court aforesaid that they "will receive favourably the said William unto them so "recommitted."

What the constable and marshal had to do with the matter I am unable to say. Possibly it may have been thought that as such proceedings as they took were regulated by the civil law, they were the proper persons to be concerned in a proceeding under the canon law; but, however this may have been, the king upon this conviction issued a writ, which is entered on the [3] Parliament Roll, for burning Sawtre. It is dated Wednesday, March 2, 1400, and is headed thus:— "Item. Mesme cette Mesquerdy, un brief feut fait as Meir

[1] His principal heresy was as to transubstantiation, on which he was closely cross-examined. Some of the questions and answers are given by Foxe, p. 224.

"The [arch]bishop demanded of the same William if the same material "bread being upon the altar, after the sacramental words being by the priest "rightly pronounced, is transubstantiated into the very body of Christ or "not? And the said Sir William said he understood not what he meant.

"Then the said archbishop demanded whether that material bread, being "round and white, prepared and disposed for the sacrament of the body of "Christ upon the altar, wanting nothing that is meet and requisite thereunto, "by virtue of the sacramental words being by the priest rightly pronounced, "be altered and changed into the very body of Christ, and ceaseth any more "to be material and very bread or not? Then the said Sir William, deridingly "answering, said he could not tell.

"Then consequently the archbishop demanded whether he would stand to "the determination of the holy Church or not, which affirmeth that in the "sacrament of the altar, after the words of consecration being rightly pro-"nounced by the priest, the same bread, which before in nature was bread, "ceaseth any more to be bread? To this interrogation the said Sir William "said that he would stand to the determination of the Church, where such "determination was not contrary to the will of God.

"This done, he demanded of him again what his judgment was concerning "the sacrament of the altar, who said and affirmeth that after the words of "consecration by the priest, duly pronounced, remained very bread and the "same bread which was before the words spoken.

"And this examination about the sacrament lasted from 8 o'clock until 11 "o'clock or thereabouts of the same day."

[2] It is very long, see Foxe, pp. 227-228.

[3] 3 *Rot. Par.* p. 459*a.*

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"et Viscontz de Londres, par advis des Seigneurs Temporelx "en Parlement, de faire execution de William Sawtre, jadys "chapelein heretic, dont le tenour s'en suyte." The writ recites the conviction of the archbishop and bishops "in "concilio suo provinciali conjugat'," and commands the mayor and sheriffs "quod prefatum Willielmum in custodia vestra "existen'" (nothing is said of the constable and marshal) "in aliquo loco publico et aperto infra libertatem civitatis "prædictæ, causâ premissâ, coram populo publice igni com-"mitti ac ipsum in eodem igne realiter comburi fac'." The writ is tested February 26, being the day on which the sentence of degradation was passed. The act 2 Hen. 4, c. 15, was not passed till March 10.

These facts are of greater legal importance and of more constitutional interest than has been supposed. In the first place, they clearly prove that Sawtre was not executed under the statute, inasmuch as he was burnt a week before it passed. In the next place, in later times this was used as an argument to show that there was a writ *de hæretico comburendo* at common law, and that therefore the king had a right to burn heretics apart from the statutes of Henry IV. and Henry V. Sawtre's case, and the case of the deacon mentioned in Bracton, were the only authorities for this proposition.

I think, for the reasons already given, that no such power existed, and that no such writ was ever known or issued before Sawtre's case. I also think that the course taken in that case was taken in order to establish a precedent for the punishment of heresy as an offence known to the common law apart from any statute. My reasons are: *First*, that there is no record whatever of any such writ having been issued before, and, with the exception of the few words in Bracton already referred to, no evidence of the existence of any power to burn heretics. If such a writ had been capable of being issued it would probably have been issued, or at least demanded in express terms, in the reigns of either Edward III. or Richard II. *Secondly*. The same thing appears from the title of the writ entered on the Parliament Rolls. Why should the temporal lords have assented to it if it had been a well-known writ? In such a case their consent would

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CH. XXV. not have been asked. *Thirdly*. There is a great similarity between the granting of this writ by the advice of the temporal lords, and the passing of the statute of 1382 by the House of Lords without the consent of the Commons. The Commons were always jealous of the introduction of new bodies of law into England, and in particular of the introduction of the canon law. I think that the Lords, by sanctioning this writ, contrived by a side wind to introduce into England the most oppressive part of what was then known on the continent of Europe as the canon law, and that the practice of burning heretics was thus introduced into the law of England by forgery and usurpation countenanced and procured by the clergy.

The Canon Law is well summed up in [1] Lyndwood:—"Hodie indistincte illi qui per judicem ecclesiasticum "sunt damnati de hæresi, quales sunt pertinaces et relapsi "qui non petunt misericordiam ante sententiam, sunt "damnandi ad mortem per seculares potestates et per eos "debent comburi seu igne cremari ut patet in quâdam "constitutione Fræderici, quæ incipit, &c." Lyndwood, like many other writers of his time, seems to have been under the impression that the civil law had a force of its own apart from that which it might derive from its acceptance by the sovereign power of this country, and that if according to the civil law the secular power might and ought to burn people convicted of heresy by an ecclesiastical court, the king of England had authority to do so apart from any act of parliament or ancient usage whatever. A similar view is often taken in our own days as to the authority of speculative writers upon international law. It should be observed, however, that in the time of Lyndwood (he died in 1446) the writ *de hæretico comburendo* was regarded as a writ which in his discretion the king might or might not issue. It did not issue as of course. Under this system accordingly no one could be burnt as a heretic unless both the king and the clergy thought he ought to be burnt, and this no doubt weakens to some extent the force of the argument against the existence of the writ, drawn from the

[1] P. 293, note *d*.

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fact that no such writ was issued under Edward III. or Richard II.

On the 10th March, 1400, a few days after Sawtre's execution, was passed the statute 2 Hen. 4, c. 15. It recites at considerable length that "divers false and perverse people of "a certain new sect" preach new doctrines, make unlawful conventicles, hold and exercise schools, and write books, and stir up sedition; that the diocesans of the realm "cannot by "their jurisdiction spiritual without aid of the said royal "majesty sufficiently correct" these persons, "because" they "go from diocese to diocese and will not appear before the "said diocesans, but the said diocesans and their jurisdiction "spiritual and the keys of the Church, with the censures of "the same, do utterly contemn and despise." The statute then enacts that no one is to preach without licence, or to teach anything contrary to the Catholic faith, or favour any such person; that every one who has heretical books shall deliver them up, that any one "defamed or evidently suspected" of any offence against the statute may be arrested by the diocesan and detained in the diocesan's prison till he purges himself and abjures his heresies. The offender may be fined by the diocesan, and if any person "is before the diocesan sententially convict" "upon the said wicked preachings, doctrines, "opinions, schools, and heretical and erroneous informations, "or any of them, and the same wicked sect, &c., do refuse "duly to abjure," or if he relapses after conviction, "so that "according to the holy canons he ought to be left to the "secular court, whereupon credence is to be given to the "diocesan of the same place, or to his commissaries in his "behalf"; then the sheriff or other civil authority, who is to be personally present to hear the sentence of the ecclesiastical court, "the same persons after such sentence promulgate shall "receive, and them before the people in an high place do to "be burnt."

This statute was much increased in severity in 1414 by 2 Hen. 5, c. 7, which was supplementary to it, and in particular dealt with the question of procedure. It enacts that "the chancellor, treasurer, justices of the one bench and the "other, justices of peace, sheriffs, mayors, and bailiffs of



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"cities and towns, and all other officers having governance of "people, shall make an oath in taking of their charges and "occupations, to put their whole power and diligence to put "out and do to be put out, cease, and destroy all manner of "heresies and errors, commonly called Lollardries." They are to assist the ordinaries and their commissaries as often as they are required. All persons convict of heresy and left to the secular power are to forfeit their lands, goods, and chattels. Moreover the King's Bench, the justices of assize, and the courts of quarter sessions are to receive indictments for heretical offences, and are to deliver persons indicted to the ordinaries to be tried. A curious proviso upon this subject throws light on what has already been said as to the value attached in early times to indictments as proof of the matters alleged in them. "Provided always, that the said indictments "be not taken in evidence, but for information before the "spiritual judges against such persons so indicted, in the "same manner as if no indictment were, having no regard to "such indictment." Persons indicted were to be admitted to mainprise, and the jurors were to be qualified by a landed estate of £5 a year.

These acts gave to the bishops what Hale calls a "wild "and unbounded jurisdiction" in three different ways.

First. They contain no definition of heresy. The ordinary might describe any opinion he pleased as heretical.

Secondly. The words of the statute "whereupon credence "shall be given to the diocesan or his commissary," made the sentence conclusive upon the civil power, so that when a man was convicted of anything which was found by the ordinary to be heresy he might be at once delivered over to the sheriff to be burnt without waiting for any writ *de hæretico comburendo.*

Thirdly. The ecclesiastical authorities obtained, for the first time under these acts, power to arrest and imprison by their own authority, and to require the assistance of the civil power in doing so.

Some slight modification of the law was effected by decisions of the Court of King's Bench to the effect that if a person was imprisoned as being suspected of heresy they

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would inquire in what the alleged heresy consisted and deliver the party if they were of opinion that the matter of which he was suspected was not heretical. [1] Thomas Keyser was imprisoned as a heretic for saying that notwithstanding his having been excommunicated by the Archbishop of Canterbury "he was not excommunicated before God, for "his corn yielded as well as any of his neighbours." Warner was imprisoned as a heretic for saying "he was not bound "to pay tithes to the curate of the parish where he dwelt." Each of these persons was set at liberty on a writ of Habeas Corpus.

Besides this, it should be observed that there is no provision whatever in such cases as to procedure before the Bishop's Court, except that it is to be "according to the laws "of the Church." In fact the procedure actually adopted, as appears from many cases reported in Foxe, was that of the ordinary ecclesiastical courts. The accused persons had certain articles objected to them. They were cross-examined as to their belief by the bishop, who usually had the assistance of civilians and canonists, and if their answers satisfied the bishop or other judge of their heresy, and they refused to abjure, they were convicted as obstinate heretics or otherwise, and were handed over to the sheriff to be burnt, or were put by the ecclesiastical authority to a variety of other painful and humiliating penances.

This system continued in full force till 1533. During the interval between 1400 and 1533 many persons were punished and not a few burnt for heresy. The details are given in Foxe's *Acts and Memorials*. Amongst the most conspicuous cases were the proceedings against Lord Cobham, who was prosecuted first in 1413, and afterwards in 1417. [2] He was half hanged and half burnt at the beginning of 1418. Several persons suffered in the reign of Henry VI., large numbers being in several cases punished in various ways. [3] Between 1428 and 1431 a hundred and twenty persons were "examined "and sustained great vexation," for their religious opinions in Beccles and other small places in Norfolk and Suffolk,

[1] 1 Hale, *P. C.* p. 400.
[2] Foxe, iii. pp. 370-405, 541.
[3] *Ib.* p. 587.



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several of them were burnt. [1] In 1491 Joan Boughton was burnt at Smithfield, and several other persons in 1498 and 1499. [2] About the year 1506 two persons were burnt and many others put to penance at Amersham.

These are not quite but nearly all the cases mentioned by Foxe, in which the statute of Henry IV. was put in force from 1400 when it was passed to the end of the reign of Henry VII. Foxe obviously took great pains to collect every instance he could, and he complains that the events having in many cases been forgotten or the evidence of them lost, he had omitted many things. Still the instances to which he refers show that the statutes of Henry IV. and Henry V. were enforced, and on particular occasions with rigour, though almost everything must have depended on the character of individual bishops.

Under Henry VIII. the cases of punishment for heresy became much more common. Between 1509 and 1518, Fitzjames and afterwards Tunstall being bishops of London, there were numerous prosecutions for heresy. [3] Foxe gives the names of forty persons who were charged with various heresies. Most of them were excommunicated, imprisoned, put to penance, and compelled to recant. Some few were burnt, as for instance, [4] William Sweeting and John Brewster on the 18th October, 1511.

One [5] Richard Hun was confined in the bishop's prison called the Lollard's Tower at St. Paul's and was found hanged to a beam there. The [6] coroner's jury found that he had

[1] Foxe, iv. p. 7. [2] *Ib.* pp. 4, 123. [3] *Ib.* p. 174.
[4] *Ib.* p. 180. [5] *Ib.* p. 183.
[6] Foxe gives the whole story at great length, pp. 183-205. One highly curious document printed by him purports to be "the whole inquiry and "verdict of the inquest, exhibited by them unto the coroner of London, "and so given up and signed with his own hand." It begins by a most minute and detailed account of the position in which the body was found, carefully pointing out minute circumstances tending to show that the case was one of murder, and not suicide, *e.g.*, "We find that within the "said prison there was no means whereby a man might hang himself, but "only a stool; which stool stood upon a bolster of a bed so tickle that any "man or beast might not touch it so little but it was ready to fall," &c. The depositions of nine witnesses are given at length, and the finding of the jury upon the oath of twenty-four jurors, is that Horsley (the chancellor), Joseph, and Spalding, "of their set malice feloniously killed and murdered Hun." The case clearly proves that witnesses were at this time examined before coroner's inquests, though it is not said that they were examined upon oath. The circumstances as to the position, &c., of the body, are stated by the jury

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been murdered by the chancellor of the diocese, the almoner, and the bellringer.



[1] Man was burnt for heresy in London. He had preached in various places, and especially at Newbury, to "a glorious "and secret society of faithful favourers, who continued by "the space of fifteen years together, till at last by a certain "lewd person whom they trusted and made of their "council they were bewrayed; and then many of them, to "the number of six or seven score, were abjured, and three "or four of them burnt." Similar events took place much about the same time in [2] the diocese of Canterbury, and [3] the diocese of Lincoln. Probably conventicles of a more or less secret kind were formed in various parts of England, and when discovered the preachers and leading persons were burnt and the ordinary members of the congregation put to penance by carrying fagots and wearing badges on their dress.

Such was the condition and administration of the law relating to heresy before the Reformation. The next question to consider is the change which that event produced in it.

Legally, the Reformation may be said to have consisted of four great measures, namely: 1, The statute for the restraint of appeals, 24 Hen. 8, c. 12, passed in 1532; 2, The statute called the submission of the clergy and restraint of appeals, 25 Hen. 8, c. 19, passed in 1533; 3, The statute of supremacy, 26 Hen. 8, c. 1, passed in 1534; 4, The statutes for the demolition of the monasteries, the last of which was 31 Hen. 8, c. 13, passed in 1539.

Legally, the result of these acts was to deprive the pope of all authority whatever in England, to make the king the supreme head of the Church in the same sense in which he was supreme head of the State, that is to say, to vest or

as of their own knowledge and observation, and the evidence of the witnesses seems to have been recorded rather as justifying their verdict than as a record of evidence to be used afterwards. The case thus marks the stage at which the transition of juries from witnesses to judges was in process, and was not quite complete. Fitzjames wrote a letter to Wolsey in favour of Horsley (p. 196), begging that a *nolle prosequi* might be entered by the Attorney-General, which was done. The bishop's reason is singular. "Assured am I "if my chancellor be tried by any twelve men in London, they be so mali-"ciously set 'in favorem hæreticæ pravitatis' that they will cast and condemn "my clerk, though he were as innocent as Abel."

[1] Foxe, pp. 14, 213. [2] *Ib.* v. p. 644, *seq.* [3] *Ib.* iv. p. 219.

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CH. XXV. declare to be vested in him ultimate judicial and legislative authority in the one case as well as in the other, to destroy as corporations the bodies which had been the strongest supporters of the Roman Catholic religion, and to distribute their property amongst public institutions and private persons. The great points in this legislation were all completed in the course of seven years, and resulted in the complete remodelling of the old system of Church government.

The effect of these changes undoubtedly was to produce a change in the doctrines of the Church, at least as deep and as important as the change which they made in its discipline, and no doubt it was the wish of the bulk of the more active reformers to produce that effect. This however was far from being the intention of Henry VIII. himself and some of his principal advisers. They piqued themselves on their orthodoxy, and maintained that the changes made by them involved only the removal of corruptions and a return to primitive purity. Hence it was a necessary part of their scheme that heresy should be treated as a crime under the new no less than under the old order of things, though it was natural to reform this as well as other branches of the law. This reform was effected by two acts passed respectively in 1533 and 1539, the first in the session in which was passed the act of the submission of the clergy, the second in the session in which was passed the act for the dissolution of the greater monasteries. The first act has attracted far less attention than it deserves; the second act was the famous act of the Six Articles. The two, as it seems to me, complete, and can hardly be understood unless they are considered in connection with, each other and with the events which happened in the interval between their enactment.

[1]The statute of 1533 (25 Hen. 8, c. 14), like many of Henry VIII.'s statutes, is exceedingly wordy, but in substance it is as follows. It recites the act of 2 Hen. 4, c. 15, and says that this act is extremely defective because it does not "decline any certain cases of heresy," and because it gives the bishops an unlimited power of putting men on their trial for

[1] For these statutes reference should be made to the Statutes of the Realm. The common editions of the Statute Book either abridge them most inaccurately or omit them altogether.

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heresy on bare suspicion, whereas even in cases of high treason a subject cannot be tried unless he is accused by a grand jury or otherwise, according to the known course of law. It expresses, however, the utmost detestation of heresy, and accordingly confirms and so re-enacts the statutes of 5 Rich. 2, c. 5, and 2 Hen. 5, c. 7. Moreover it gives a kind of negative definition of heresy, for it provides that speaking against the authority of the pope, or against spiritual laws made by the authority of the See of Rome repugnant to the laws of this realm and the king's authority shall not be heresy. This last provision was extremely vague, and in an age of furious controversy must have opened the way for discussions which all parties had reason to dread. For instance, the questions whether a denial of the doctrine of the celibacy of the clergy, or the refusal of the cup to the laity were protected by the clause in question, were left unsettled. The effect of this must have been to make it far more difficult than it was before to convict a man of heresy, as the act whilst declaring that certain things were not heresy left it uncertain what was heresy.

The changes which the act introduced into procedure were still greater. By repealing the act of 2 Hen. 4, c. 15, it deprived the bishops of the power of arrest and imprisonment on suspicion, and by leaving in force the acts of Rich. II. and Henry V. it made it necessary for the proceedings in cases of heresy to begin by indictment. The superior courts and courts of quarter sessions had, by the act of Henry V., power to receive indictments for heresy. This power was extended by the act of Henry VIII. to sheriffs in their tourns and stewards in their leets. The result of the act must thus have been greatly to blunt the law against heresy. It appears from Foxe (who does not mention the act under consideration) that two persons, [1] Frith and Hewet, were burnt on the 4th July, 1533, under a sentence by the Bishop of London, and [2] he mentions some obscure cases as occurring in 1538, but there seems generally to have been a considerable pause in prosecutions for heresy between 1533 and 1539. There was, however, one great and memorable instance to the

[1] Foxe, pp. 11-18. [2] *Ib.* pp. 251-254.

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CH. XXV. contrary. This was the case of John Lambert, who was tried before Henry VIII. in person in Westminster Hall in November, 1538, and burnt the day after his trial. His heresy consisted in a denial of transubstantiation. It is difficult to understand the procedure against him. Neither [1] Foxe nor Burnet precisely explain it, especially they do not say whether he was indicted or not. He seems, however, in some way to have been tried before Cranmer and to have appealed to the king. Lambert's trial was, however, only one symptom of the state of feeling which had gradually grown up during the years immediately succeeding the establishment of the royal supremacy. They had been marked by insurrection, especially the pilgrimage of grace, and conspiracy, especially the conspiracy of the Marquis of Exeter. It is probable that the bulk of the population, the quiet people who disliked foreigners but were averse to changes of a revolutionary kind, were willing enough to support Henry in his measures against the pope and the monks, but by no means disposed to tolerate what they regarded as the wild and revolutionary views of the sacramentaries, whose special doctrine was that the sacrament was a simple metaphor—a doctrine which summed up for the moment the crude imperfect rationalism of the day. Upon this point there was not apparently much difference of opinion. Whatever might or might not be heresy, it was clearly heresy to deny the miraculous change in the elements at the celebration of the mass. Other points, such as communion in both kinds, the marriage of the clergy, and auricular confession, were subjects of furious controversy, and as the law stood, after the act of 1533, it was not easy to say whether the minority, the Lutheran party, were heretics or not.

It was in this state of things that the famous act of the Six Articles was passed, 31 Hen. 8, c. 14, A.D. 1539.

By this act it was provided that every one who denied the doctrine of transubstantiation, or depraved the sacrament,

[1] Foxe, v. pp. 227-250; Burnet, *Reformation*, i. pp. 390-391. Mr. Froude throws no light on the legal points in the case, iii. 153. Foxe says that at Gardiner's instigation Henry "sent out a general commission, commanding all "the nobles and bishops of this realm to come with all speed to London to "assist the king against heretics and heresies, which commission the king "himself would sit in judgment upon."

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should be burnt as a heretic; that every one who should preach in any sermon or teach in any school or other congregation, or obstinately affirm, uphold, or defend the communion in both kinds, the marriage of priests, the lawfulness of marriage after vows of chastity or widowhood, the unlawfulness of private masses, or that auricular confession is not expedient or necessary, should be guilty of felony without benefit of clergy. Any one who declared any such opinion by writing or printing was to forfeit his goods and the profits of his lands for life, and to be imprisoned at pleasure for the first offence, and for the second offence to be guilty of felony without benefit of clergy. Priests keeping company with women to whom they had been married were to be guilty of felony. To contemn or contemptuously refuse, deny, or abstain to be confessed or to receive the sacrament at the usual times was punishable on the first offence with imprisonment and ransom, and the second offence was a clergyable felony.

A special and very curious procedure was provided for the prosecution of these offences. Commissions were to be issued to the bishop of each diocese, his chancellor, or commissary, and other persons, who were to inquire into all the offences mentioned, four times a year, and also in the case of the bishops at their visitations. The inquiry might be either by a grand jury or "by the oaths and depositions of two able and "lawful persons at least." If the two accusers came forward they were "to be examined what other witnesses were by or "present at the time of doing and committing the offence," and such witnesses were to be bound to appear. The commissioners had power to issue process, as in cases of felony, into all shires to compel the appearance of the accused persons, and upon their appearance they were to hear and determine, *i.e.* try them by jury. An account of sittings held under one of these commissions by Bonner in the Guildhall is given by [1] Foxe.

In a legal point of view the act of the Six Articles may be regarded as supplementary to the act of 1533. As the earlier act declared what was not to be heresy, the later act

[1] v. p. 444, *seq.*

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declared what was to be heresy. The system of procedure established or recognised by the two acts taken together, as well as by the earlier acts of Henry V. and Richard II., had the effect of making heresy, as [1] Hale observes, "in great "measure a secular offence." Hale also observes that the iurisdiction which the Ordinary had by the act of Henry V. was exercised under this act by commissioners under the great seal. This, no doubt, was important, as involving an emphatic assertion of the royal supremacy, but as the statute provides that the bishops should be on the commission, its practical importance was not great. Some slight mitigations were introduced into the severity of the act of the Six Articles by permitting convicted persons to recant, &c., but no alteration in the law relating to heresy which need be noticed here took place till the death of Henry VIII., though I may observe that by 34 & 35 Hen. 8, c. 1 (1542-3), it was made heresy, punishable upon a third offence with burning, for any spiritual person to preach, teach, or maintain anything contrary to the king's instructions or determinations. It ought to be observed of these celebrated acts, that whatever might be their merits or demerits, they were infinitely less severe than the system established by the statutes of Henry IV. and Henry V. Nothing was made heresy by the act of the Six Articles, which might not have been held to be heresy by the Ordinary under the act of Henry IV., and many offences which, under the earlier act, might have been punished by burning, were punishable under the later act only by hanging, and that after a previous conviction. Moreover the procedure under the act of the Six Articles was infinitely less oppressive than under the earlier acts. If the act of the Six Articles had been passed in 1533 the fact that it really greatly mitigated the law of heresy as it then stood would have been obvious. Being delayed till 1539, after a somewhat milder system—which however was upon the face of it wholly incomplete—had been in force for six years, it looked to the thorough-going Protestants then even more severe and cruel than it looks to most people now.

Upon the accession of Edward VI. a complete change of

[1] 1 Hale, *P. C.* 403.

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policy took place. By 1 Edw. 6, c. 12 (A.D. 1547), not only the act of the Six Articles but "all acts of parliament and "statutes touching, mentioning, or in anywise concerning "religion and opinions," were repealed, the following being specifically named: 5 Rich. 2, st. 2, c. 5; 2 Hen. 5, c. 7; 25 Hen. 8, c. 14; 31 Hen. 8, c. 14, and 34 & 35 Hen. 8, c. 1. The effect of this was to restore the common law as to heresy, but the law so restored was understood to be the law as settled by Sawtre's case at the beginning of the reign of Henry IV., which authorised the burning of a heretic by the writ *de hæretico comburendo* after a conviction by a provincial council. [1] Accordingly on the 2nd May, 1550, Joan Bocher, a Kentish woman, was burnt as a heretic after a conviction before a commission issued by the Protector Somerset to the Archbishop of Canterbury, six bishops and other persons to examine and search after all anabaptists, heretics, or contemners of the Common Prayer. Joan Bocher "denied that "Christ was truly incarnate of the Virgin, whose flesh being "sinful he could take none of it, but the Word by the consent "of the inward man in the Virgin took flesh of her." In the following year George Van Paar, a Dutchman, was burnt on the same authority for denying that Christ was very God.

It seems to me that these executions were clearly illegal. There was no authority for the issue of the commission, nor was there any authority for the infliction of the punishment of burning. The only case which was in any way a precedent for Joan Bocher's was that of Sawtre, and to say nothing of the objections to the authority of that case, which were probably unknown in Edward VI.'s time, it authorises the issue of the writ *de hæretico comburendo* only after a conviction in a provincial council. Some other offences against religion were created by Edward VI.'s legislation. These were "depraving, "despising, or contemning" the sacrament, which was punishable by the justices in quarter sessions, with fine and imprisonment (1 Edw. 6, c. 1). [2] By some strange accident this act has never been repealed, and is still theoretically in force though it has long been forgotten.

[1] Burnet, *Reformation*, vol. ii. part i. p. 179, and see Froude, iv. p. 526.
[2] It is printed in the Revised Statutes.

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The same is true of the penal clauses of the Act of Uniformity of Edward VI. (2 & 3 Edw. 6, c. 1), which requires ministers to perform service in the prescribed form under the penalty of imprisonment for life upon a third conviction. The same act punishes every person who speaks "in the derogation, depraving, or despising of the Book of Common Prayer," or who interrupts the minister in reading the service, upon a third conviction with forfeiture of all his goods and chattels, and imprisonment for life. [1] These acts are still in force and have, by 14 Chas. 2, c. 4, s. 20, and the Act of Uniformity of 1661, been applied to the Book of Common Prayer now in use.

As soon as Queen Mary succeeded her brother she repealed a great part of his and of her father's legislation, and in particular she [2] revived the statutes of Richard II., Henry IV. and Henry V. against Lollards. It was under the authority of these statutes that the great persecutions took place which earned for her the title of "Bloody Mary." In a legal point of view they have little interest, as they show only how the statutes of Henry IV. and Henry V. were capable of being used when they were zealously put in force.

When Elizabeth succeeded her sister she began her reign by repealing many of her sister's laws and reviving many of the laws of her father and brother. This was effected by 1 Eliz. c. 1 (1558), which amongst other things repealed (s. 13) formally the statutes of Richard II., Henry IV., and Henry V.

This act provided however a completely new jurisdiction for the trial of ecclesiastical offences by provisions contained in ss. 17, 18, which, as already mentioned, authorised the establishment of the Court of High Commission.

This statute did not define heresy, but it enacted (s. 36) negatively that the commissioners "shall not in anywise "have authority or power to order, determine, or adjudge "any matter or cause to be heresy, but only such as hereto-"fore have been determined, ordered, or adjudged to be "heresy by the authority of the canonical scriptures, or by "the first four general councils, or any of them, or by any "other general council wherein the same was declared heresy

[1] See them in my *Digest*, pp. 99-100.
[2] 1 & 2 Phil. & Mary, c. 6.

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"by the express and plain words of the said canonical "scriptures, or such as hereafter shall be ordered, judged, or "determined to be heresy by parliament, with the assent of "the clergy in their convocation."

The effect of this in reference to heresy was to limit the High Commission narrowly as to what was to be declared to be heresy. Practically it might be said to have enacted that no one should be treated as a heretic on account of his views as to the Roman Catholic and Protestant controversy, unless he was an Anabaptist, or as we should say in these days, a Unitarian. The Anabaptists, and indeed every one who was not orthodox about the Trinity, were in those days regarded with a horror which we have ceased to feel with regard to those who reject all religion whatever. The act is silent as to the punishment of heresy. [1] No doubt the tacit assumption was that the writ *de hæretico comburendo* really was a common law writ, and might issue upon a conviction for heresy before the High Commissioners. This view seems to have been acted on in 1575. There was at that time a question of an alliance with Spain. "[2] Elizabeth was ready to do "what she could to gratify Philip, and she took the oppor-"tunity of showing him that the English for whom she de-"manded toleration were not the heretics with whom they "were confounded. Amongst the fugitives from the provinces "who had taken refuge in England was a congregation of "Anabaptists, wretches abhorred in the eyes of all orthodox "Anglicans. Twenty-seven of them were arrested in Aldgate "and brought to trial for blasphemous opinions on the "nature of Christ's body." Two of them, Terwort and Wielmacher, were burnt (July 22, 1575) "in great horror, "crying and roaring." Mr. Froude says that some having recanted "eleven who were obstinate were condemned in "the Bishop of London's court and handed over to the "secular arm." [3] Hale says that the prisoners (whom he calls Peters and Dirwert) were "convict of heresy before the "commissioners." There seems to be no positive evidence on the subject.

Whether any other executions of this nature took place

[1] 1 Hale, *P. C.* p 405. [2] Froude, x. pp. 345-346. [3] 1 Hale, *P. C.* 405.

 under Elizabeth it would, perhaps, be difficult to affirm positively. Hale knew of no others, and none are mentioned by Mr. Froude.

One other transaction of this sort took place in the year 1612 (10 Jas. 1). [1] Bartholomew Legate, an Arian, was burnt in Smithfield upon a writ *de hæretico comburendo*, issued after a conviction as an obstinate heretic, before the Bishop of London, and one Edward Wightman was at about the same time burnt in the city of Lichfield upon a similar writ issued after a similar conviction, before the Bishop of Lichfield and Coventry.

These appear to me to have been both on moral and legal grounds the least defensible executions for heresy, except indeed that of Sawtre, which ever took place in England. The executions from 1400 to the death of Henry VIII. were warranted by law, and the same may be said of those which took place in Queen Mary's time. The executions of Joan Bocher and Van Paar were, I think, illegal, but I do not think that Somerset and Cranmer were aware of the reasons for thinking them illegal. Besides, they took place at a time of revolutionary excitement, when the persons in authority had the strongest conceivable inducements to vindicate as far as possible their orthodoxy, and to separate the cause of which they were the representatives from the charge of sympathy with doctrines at that time universally regarded with horror.

The same remarks apply, though, as regards the political reasons for what was done, with less force, to the executions in the reign of Queen Elizabeth. If the Anabaptists were, as Hale says, convicted before the High Commissioners, the legality of their executions would depend upon the correctness of my view of the illegality of Sawtre's execution, for by the act under which the High Commission was issued all ecclesiastical jurisdiction was annexed to the crown, and therefore that of a provincial council if it possessed any.

[1] "Bartholomew Legate, native county, Essex; complexion, black; age, "about forty years; of a bold spirit, confident carriage, fluent tongue, excel- "lent skilled in the Scriptures. . . . His conversation (for aught I can learn "to the contrary) very unblameable, and the poison of heretical doctrine is "never more dangerous than when served in clean cups and washed dishes." —Fuller's *Church History*, quoted in 2 *State Trials*, p. 727.

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None of these reasons applies to the conduct of James I. in the cases of Legate and Wightman. It is difficult to find any other motive for the course taken than genuine theological enmity. James seems to have burnt Legate really because he thought that Legate was a heretic, and that he himself both as a king and as a divine was authorised and even required to put heretics to death; and it is probable that he liked it. [1] He disputed with him personally, if Fuller is to be believed, and showed indignation at Legate's avoiding a dilemma which he had prepared for him. As to the illegality of the punishment inflicted upon Legate it is to be observed that the precedent in Bracton, and even the writ in Sawtre's case, implies that in order to the issue of a writ *de hæretico comburendo* the conviction of the heretic must have taken place before a provincial council. No precedent has been produced of the issue of such a writ on a conviction before the ordinary, except whilst the statutes of Henry IV. and Henry V. were in force. In Legate's case the conviction was before the ordinary, not before a provincial council, nor was the illegality of the course taken unquestioned. Coke, then chief justice, was consulted on the issuing of the writ. He says, "[2] In this very term the attorney and solicitor-general "consulted with me if at this day, upon conviction of an "heretic before the ordinary, this writ *de hæretico comburendo* "lieth, and it seems to me clearly that it doth not." Four other judges certified the contrary, adding, however, "that "the most convenient and sure way was to convict the heretic "before the High Commissioners." James, therefore, issued his writ though he knew that Coke thought it clearly illegal,

[1] "King James caused this Legate often to be brought before him, and "seriously dealt with him to endeavour his conversion. One time the king "had a design to surprise him into a confession of Christ's deity, as his "Majesty afterwards declared to a right reverend prelate, by asking him "whether or no he hid not daily pray to Jesus Christ? Which, had he "acknowledged, the king would infallibly have inferred that Legate tacitly "consented to Christ's divinity as a searcher of hearts. But herein his "Majesty failed of his execution, Legate returning that indeed he had "prayed to Christ in the days of his ignorance, but not for these last seven "years. Hereupon the king in choler spurned at him with his foot. 'Away, "'base fellow," said he, 'it shall never be said that one stayeth in my presence "'that hath never prayed to our Saviour for seven years together.'"—Fuller, quoted in 2 *State Trials*, 727.

[2] *Reports*, p. xii. 93 (vol. vi. p. 323, edition of 1827).

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and that the other four judges who were consulted thought it to some extent doubtful.

These were the last executions for heresy that ever took place in England, but the law upon the subject had a curious subsequent history. Under James I. and Charles I. heresy, blasphemy, and similar offences were, as I have already shown, dealt with by the Court of High Commission, in important cases, and by the minor ecclesiastical courts in cases of less importance. In 1640 all the ecclesiastical courts fell together, and their existence was suspended till after the Restoration, in 1661. Theological controversy however was never so prominent in the whole course of the history of England as it was during this period; nor has there ever been a time in our history in which so many new and fervent religious sects came into existence, or at least into notice. The circumstance that their numbers and their powers were not very unevenly balanced was probably the principal reason why laws of extreme severity against heresy were not enacted. As it was, several attempts to enact such laws were made.

In 1643 the Westminster Assembly of Divines began its sittings, and in 1645, shortly before the battle of Naseby, [1] it accused one Paul Best before the House of Commons of asserting that Christ was a mere man. Best was imprisoned, and his case having been reported upon and compared to Legate's, "a bill was ordered in for the punishment of Best, "and two months afterwards it was voted that he should be "hanged for his offence." Best was examined, and avowed and maintained his opinions, [2] but he seems to have been discharged. The case, however, suggested legislation, and a bill was introduced into parliament, which finally passed into law in May, 1648, for the punishment of blasphemy and heresy. [3] This law provided that it should be felony, without benefit of clergy, to maintain, publish, or defend, by preaching or writing, certain heresies with obstinacy. If the party refused to abjure, on his trial, he was to be hanged. If he

[1] Goodwin's *Commonwealth*, ii. 252-255; Neal's *Puritans*, iii. 266.

[2] Neal says that "he confessed his belief of that doctrine" (the Trinity) "in general terms before he was brought to his trial, and that he hoped to be "saved thereby, but persisted in denying the personality as a Jesuitical tenet. "Upon this confession his trial was put off, and he was at length discharged.

[3] Goodwin's *Commonwealth*, ii. p. 254; Neal's *Puritans*, iii. p. 419.

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abjured, he was to be imprisoned till he found sureties that he would not maintain the same heresies any more. If he relapsed and was convicted a second time, he was to suffer death. The heresies in question were (1) That there is no God. (2) That God is not omnipresent, omniscient, almighty, eternal, and perfectly holy. (3) That the Father is not God, that the Son is not God, that the Holy Ghost is not God, or that these three are not one eternal God, or that Christ is not God equal with the Father. (4) (5) and (6) Certain opinions as to Christ. (7) The denying that the Holy Scriptures of the Old and New Testament are the word of God. (8) The denying of the resurrection of the dead and a future judgment. Sixteen other errors are specified as to which it was enacted, that whoever maintained them should, upon conviction on the oath of two witnesses, or on his own confession before two justices of the peace, be ordered to renounce his errors, and if he refused, be committed to prison till he found sureties that he should not publish them any more. The following are specimens:—"That all men "shall be saved." "That man, by nature, hath free will to "turn to God." "That man is bound to believe no more "than by his reason he can comprehend." "That the Sacra- "ments . . . are not ordinances commanded by the word of "God." "That magistracy is unlawful." "That all use of "arms, though for the public defence (and be the cause never "so great) is unlawful." It seems doubtful whether this act was ever put in force, at all events to its full extent.

In 1649, when the Independents had obtained the upper hand over the Presbyterians, a much milder ordinance was passed for punishing "blasphemous and execrable opinions." It punished with six months' imprisonment for a first offence, and with banishment (return from which without license was to be felony) for the second, the maintenance of a variety of strange opinions, some of which were, "for any person not "distempered in the brains to affirm of him or herself, or of "any mere creature, that he is God, or that the crimes of un- "cleanness and the like are not forbidden by God; or that "lying, stealing, and fraud, or murder, adultery, &c., are in

[1] Goodwin's *Commonwealth*, iii. p. 507 ; Neal's *Puritans*, iv. p. 27.



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CH. XXV. "their own nature as holy and righteous as the duties of "prayer, preaching, or thanksgiving; or that there is no such "thing as unrighteousness or sin but as a man or woman "judges thereof." [1]This act appears to have been regarded as superseding the other.

Whatever the law may have been, it was considered to be wholly insufficient to meet some of the cases which arose. [2]Naylor the Quaker, who seems to have been nearly if not quite mad, and who affirmed that he was God, and made an entry into Bristol in a style which was an obvious parody upon Christ's entry into Jerusalem, was brought up in 1656, before the House of Commons, and was in imminent danger of being put to death. [3]A vote that he should be executed was rejected only by 96 to 82. He was sentenced to be whipped from Westminster to the Old Exchange, to be there pilloried, to have his tongue bored with a hot iron, and to be branded on the forehead, and afterwards to be imprisoned and kept to hard labour indefinitely. This was one of several instances in which the Parliaments of the Commonwealth assumed judicial power—a practice for which the history of the House of Commons affords one or two precedents; but the state of things at the time was so peculiar that no inference can be drawn from it. Several persons, of a very different order from Naylor, underwent, under the Commonwealth, more or less persecution for their religious opinions. [4]Fox, the founder of Quakerism, and Biddle, the founder of English Unitarianism, are perhaps the most remarkable of the number.

At the Restoration the laws of the Commonwealth, good and bad, were treated as void, and the law relating to heresy fell back into the position in which the Act of 1640 left it, that is to say, the offence practically ceased to exist, as the ecclesiastical courts had been abolished, and there was no law for the punishment of heresy which the ordinary courts would

[1] This seems to have been Whitelocke's opinion. In his speech on Naylor's case, 5 *State Trials*, 825, he says, "It is held that the ordinance of the Long "Parliament concerning blasphemy is not now" (1655) "in force."

[2] The proceedings against him are reported in 5 *State Trials*, p. 802, &c.

[3] Goodwin, iv. p. 320.

[4] As to Fox, see Goodwin, iv. pp. 307-313, and Neal, iv. pp. 29-32; also v. pp. 206, 222-223, 228, &c. As to Biddle, see Goodwin, iii. pp. 510-513, and Neal, iv. pp. 122-123.

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administer. In 1661 the jurisdiction of the ordinary ecclesiastical courts was revived, but without the *ex officio* oath, and without any kind of definition of heresy except the one implied by that part of Queen Elizabeth's Act of Uniformity, which authorised the erection of the Court of High Commission. As this enactment applied only to the extinct court, and as all the legislation which had declared what amounted to heresy was repealed, it was difficult to say that the offence existed any longer. It never was supposed that to deny the thirty-nine articles was heresy, though a clergyman who did so was liable to [1] special ecclesiastical penalties by statute and otherwise. The law as to heresy accordingly fell into a state of obscurity, which has no doubt prevented its absolute extinction. Its history, however, has one step more.

In 1666, [2] "the great fire of London following in ominous "succession on the great plague of the year before, roused the "superstitious and intolerant passions of the people, and the "House of Commons embodied the general feeling in a bill "against atheism and profaneness. On the 17th October it "was ordered that the commission to which the bill was "referred 'shall be empowered to receive information touch-"'ing such books as tend to atheism, blasphemy, and profane-"'ness, or against the essence and attributes of God, and in "'particular the book published in the name of one White, "'and the book of Mr. Hobbes called the *Leviathan*, and to "'report the matter with their opinion to the House.'" Hobbes seems to have written upon this occasion an [3] historical tract upon heresy, which was published after his death. Attention must no doubt have been attracted by these proceedings to the laws relating to heresy, and to the absence of any legal provision for its suppression, except the supposed writ *de hæretico comburendo*. The bill which was intended to supplement the writ having failed, the writ itself did not long survive. Hobbes was the last person of eminence who went in fear of it. It was abolished in 1677 by 29 Chas. 2, c. 9, which also abolishes "all punishment of death in pursuance of

[1] See 13 Eliz. c. 12 (1570). This statute is still in force.

[2] Article "Hobbes" by Mr. Croom Robertson in the *Cyclopædia Britannica*, xii. 38.

[3] See his works, iv. p. 385, &c.



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"any ecclesiastical censures." Parliament, however, was careful to give the ecclesiastical courts the honours of war. The act accordingly contained a proviso that nothing in it shall "take "away or abridge the jurisdiction of Protestant archbishops "or bishops, or any other judges of any ecclesiastical courts, "in cases of atheism, blasphemy, heresy, or schism, and other "damnable doctrines and opinions, but that they may pro-"ceed to punish the same according to his Majesty's eccle-"siastical laws by excommunication, deprivation, degradation, "and other ecclesiastical censures not extending to death." This enactment contains the present law as to heresy, a law so obscure as to be practically inoperative. As a mere matter of legal theory, however, I know of no legal reason why to this day any [1] layman who is guilty of "atheism, blasphemy, "heresy, schism, or other damnable doctrine or opinion," should not be prosecuted in any ecclesiastical court and have penance enjoined upon him—for instance, the public recantation of his heretical opinions. If he refused to recant, he might be excommunicated, the effect of which would be [2] that the court pronouncing him excommunicate, might direct him to be imprisoned for any term not exceeding six months. I do not believe, however, that any prosecution for heresy has taken place since the year 1640. The only addition to the statute law upon this subject consists of a single Act of Parliament, namely, 9 Will. 3, c. 35, more commonly cited as 9 & 10 Will. 3, c. 32. [3] This bill originated in an address by the House of Commons to William III. calling upon him to suppress profaneness and immorality, and "pernicious books "and pamphlets, which contain in them impious doctrines "against the Holy Trinity and other fundamental articles of "our faith, leading to the subversion of the Christian

[1] Ministers of religion (Unitarians, *e.g.*) are protected in a curious indirect way.

[2] 53 Geo. 3, c. 127, ss. 1, 2, 3. This is an act "for the better regulation "of ecclesiastical courts." It was introduced by Lord Stowell, then Sir W. Scott, for the purpose of reforming the procedure of the ecclesiastical courts. The consequence pointed out in the text can hardly have been intended by its authors.

[3] Cobbett's *Parliamentary History*, vol. v. p. 1171. Its progress through the two Houses is traceable in the journals, but they disclose nothing of much interest, except that it was sent down by the Lords to the Commons, and afterwards amended by the Lords in such a way that but for the refusal of the Commons to accept the amendments it would have applied to Jews. See *Commons' Journals*, May 14, 18, 21, 25, 1698.

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"religion." The king expressed his satisfaction at the address, and "in immediate compliance to the request of the "Commons, published a proclamation for preventing and "punishing immorality and profaneness." The successor to this proclamation is still read at the opening of every Commission of Assize and Quarter Sessions in England, and echoes to a great extent the terms of the address to William III. It is not only a mere form, but is open to the objection that it affects to forbid many things (*e.g.*, the playing at cards on Sunday) which the Queen has no power to forbid. In practice, the act has been as much a dead letter as the proclamation. It makes it an offence in any person, educated in or having professed the Christian religion, to "*deny any* "*one of the three Persons in the Holy Trinity to be God*," or to "assert or maintain that there are more Gods than one, "or deny the Christian religion to be true, or the holy "scriptures of the Old and New Testament to be of divine "authority." The punishment is incapacity to hold any office, expulsion from any office held at the time of conviction; and on the second conviction, a variety of disabilities and imprisonment for three years. [1] The words in italics were repealed by 53 Geo. 3, c. 160, but the remainder of the act is still nominally in force, though I never heard of any prosecution under it having taken place at any time.

I now proceed to notice a set of offences which stood to the offences punished by the old ecclesiastical courts and the Court of High Commission in a relation not altogether unlike that in which those offences stood to heresy, as punished by the acts of Henry IV. and Henry V. I refer to the offences of blasphemy at common law and blasphemous libel.

One case only has been referred to [2] in which blasphemous or irreligious language was punished at common law before the Restoration of Charles II. This is the case of R. *v.* Atwood. It is, however, so imperfectly reported that no

[1] See *Ann. Reg.* for 1813. The bill for the repeal was brought in by the well-known Mr. W. Smith, of Norwich. Several bishops remarked in the House of Lords that they wished to say that the bill had not been made necessary by any desire on the part of the clergy of the Church of England to interfere with the Unitarians.

[2] Cro. Car. 421.

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inference can be drawn from it. The words constituting the offence may even have been regarded rather as being seditious than as being blasphemous.

After the Restoration, the Court of King's Bench treated as misdemeanours at common law many of the acts which the ancient common law left unpunished, and which the Star Chamber had converted into offences by treating them as such. Perjury, forgery, conspiracy, and, to a certain extent, political libels, were amongst the number. The same was the case with gross public acts of indecency, like those of which [1] Sir C. Sedley was convicted in 1663. He, amongst other things, "stripped himself naked, and with eloquence "preached blasphemy to the people." Thereupon the court told him, "Notwithstanding there was not then any Star "Chamber, yet they would have him know that the Court of "King's Bench was the *custos morum* of the king's subjects, "and that it was then high time to punish such profane "actions committed against all modesty, which were as fre-"quent as if not only Christianity but morality also had "been neglected."

The next reported case of the kind is [2] R. *v.* Taylor, in which the defendant used vile language of Christ. Hale upon this observed that "such kind of wicked and blasphemous words "were not only an offence against God and religion, but a "crime against the law, State, and government; and, there-"fore, punishable in this court; that to say 'religion is a "cheat' is to dissolve all those obligations whereby civil "societies are preserved, and Christianity being parcel of the "laws of England, therefore, to reproach the Christian "religion is to speak in subversion of the law." This was in 1676. [3] Some other cases of minor importance having been decided in the interval, Woolston was prosecuted in 1728 for "[4] publishing five libels wherein the miracles of Jesus Christ "were turned into ridicule, and his life and conversation vilified "and exposed." The court declared "they would not suffer

[1] 17 *State Trials*, p. 155.
[2] 3 Keble, 607; and see Folkard's Starkie, 595.
[3] See Strange, 789.
[4] Quoted in Folkard, 595; from Fitzgibbon, 64. There is a short note of the case in Strange, 834.

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"it to be debated whether to write against Christianity in "general was not an offence of temporal cognisance." Woolston had tried to represent the miracles as being to be taken in an allegorical sense, and it was said that therefore the book could not be considered as aimed at Christianity in general, but merely as attacking one proof of the divine mission, but the court was of opinion that "the attacking Christianity in "that way was attempting to destroy the very foundation of "it, and though there were professions in the book to the "effect that the design of it was to establish Christianity "upon a true foundation by considering those narratives as "emblematical and prophetical, yet those professions could "not be credited." This case is remarkable on account of the emphatic way in which it makes the matter and not the manner of the publication the gist of the offence. The same view seems to have been taken in [1] R. *v.* Ilive in 1756, and in [1] R. *v.* Annett in 1763 and on some other occasions.

The most celebrated reported case on this subject is that of [2] R. *v.* Williams, tried before Lord Kenyon in 1797 for publishing Paine's *Age of Reason.* The prosecution was instituted by what was called the [3] Proclamation Society, of which the then Bishop of London (Porteus), Mr. Wilberforce, and many other eminent persons were members. Erskine was counsel for the prosecution and Mr. Stewart Kyd for the defence. The indictment set forth seven passages taken from the *Age of Reason,* each of which was unquestionably expressed in the coarsest and roughest terms which Paine could find. On the other hand, each of his assertions was unquestionably put forward as a serious argument based on specific grounds.

Kyd had no difficulty in referring to a number of passages in the Old Testament which Paine might in good faith regard as immoral, and it is, I think, impossible to read his argument without admitting that he established the proposition that the *Age of Reason* is a genuine argument against the Christian religion which, however violent and indecent in some of its language, does convey the sentiments which its

[1] Folkard, 596.
[2] 26 *St. Tr.* 653.
[3] *i.e.* A society for enforcing the King's proclamation against vice, profaneness, and immorality.

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CH. XXV. author honestly held, and must therefore be presumed to have been published in order to benefit mankind by the propagation of views which the author regarded as true and important.

Kyd, who obviously thought of nothing but the opportunity of making himself notorious, and who, if he had done his duty to his client, would have defended him on the ground that he knew nothing whatever of the contents of the pamphlet which he sold, handled this topic in a needlessly offensive, clumsy way, but he might, if he had had more sense and knowledge, have used in his client's defence the whole of Erskine's argument in defence of Paine himself, upon his prosecution for the work called *Common Sense.* Erskine argued, on that occasion, in substance, that the decent expression of any political views, in which a man really believes, is not a seditious libel as it is not malicious. Kyd had only to substitute "religious" for "political" and every one of Erskine's arguments would have applied to the case of Williams. The whole trial however (notwithstanding a few passing expressions which look in the opposite direction) proceeded on the assumption that the matter and not the style of the *Age of Reason* was criminal. Erskine, indeed, argued that certain passages could not have been written in good faith, but he also contended that even if the whole book was so written it would still be illegal, because [1] "in a country "whose government and constitution rest for their very foun- "dations upon the truths of the Christian religion a bold, "impious, blasphemous, and public renunciation of them "must be a high crime and misdemeanour."

Lord Kenyon told the jury ([2] amongst other things) that

[1] 26 *St. Tr.* 703.

[2] *e.g.* "Christianity from its earliest institution met with its opposers. Its "professors were very soon called upon to publish their apologies for the "doctrines they had embraced. In what manner they did that, and whether "they had the advantage of their adversaries or sunk under the superiority of "their arguments, mankind for near two thousand years have had an oppor- "tunity of judging. They have seen what Julian, Justin Martyr, and other "apologists have written, and have been of opinion that the argument was in "favour of those very publications." Whether the judge or the shorthand writer was to blame for turning Julian into an apologist I do not pretend to guess. Lord Kenyon may possibly have meant that Julian had been heard on one side and Justin Martyr on the other, but in that case one would have expected Cyril rather than Justin Martyr to be opposed to Julian. If he really used these words, I should think Lord Kenyon attached little or no definite sense to them.

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"the Christian religion is part of the law of the land," and his summing-up implies, though it does not positively and directly state, that every attack on Christianity must, as such, be illegal. In delivering the judgment of the court, Ashurst, J., expressly based their sentence on the principle that attacks on Christianity are crimes "inasmuch as "they tend to destroy those obligations whereby civil society "is bound together," to destroy the solemnity of oaths, and to strip the law "of one of its principal sanctions, the dread "of future punishment."

Many subsequent cases proceeded on precisely the same principle. For instance, in [1] R. *v.* Eaton, which was also a trial for the publication of the *Age of Reason*, Lord Ellenborough treated the case exactly as Lord Kenyon had treated it. The case of [2] R. *v.* Carlisle, decided in 1819, recognised the principle that a blasphemous libel is an offence at common law. It throws no light on the definition of a blasphemous libel, but establishes the proposition that the statute 9 & 10 Will. 3, c. 32, does not affect the common law upon the subject. It is difficult to me to understand how it could ever have been supposed to do so. The statute creates certain special offences; for instance, it applies to the case of a person who alleges that there are more Gods than one, but not to the case of a person who denies the existence of any God. In [3] R. *v.* Waddington the defendant had "denied the "authenticity of the Scriptures, and one part of the libel stated "that Jesus Christ was an impostor and a murderer in principle "and a fanatic." All the judges held that the Lord Chief Justice (Abbott) was right in holding that this language was a libel. No question seems to have been raised as to the defendant's good faith. Best, J., said, "It is not necessary for me to say "whether it be libellous to argue from the Scriptures against "the divinity of Christ, that is not what the defendant pro- "fesses to do. He argues against the divinity of Christ by "denying the truth of the Scriptures. A work containing "such arguments published maliciously (which the jury have "found) is by the common law a libel, and the legislature "has never altered this law, nor can it ever do so whilst the

[1] 31 *St. Tr.* 927. [2] 3 B. and Ald. 161. [3] 1 B. and C. 26.

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"Christian religion is considered to be the basis of that "law." In [1] R. *v.* Hetherington Lord Denman directed the jury "that if they thought the publication tended to question "or cast disgrace upon the Old Testament, it was a libel." Lastly, it was decided in [2] Cowan *v.* Milbourne that a person was justified in refusing to carry out a contract to let certain rooms because the plaintiff proposed to deliver in them lectures, the titles of two of which were advertised as follows: "The Character and Teachings of Christ; the former defec-"tive, the latter misleading," "The Bible shown to be no "more inspired than any other book." This case was decided in 1867. Kelly, L. C. B., said that Christianity was part of the law of the land, and that the first proposition above-mentioned could not be maintained without blasphemy. Lord (then Baron) Bramwell was of the same opinion. This last decision is strong to show that the true legal doctrine upon the subject is that blasphemy consists in the character of the matter published and not in the manner in which it is stated. The propositions intended to be expressed in the placards which were thus held to be blasphemous could hardly have been expressed in less offensive language.

There is, no doubt, some authority in favour of a different view of the law. [3] In *Starkie on Libel* there is a passage the point of which is as follows: "A wilful intention to per-"vert, insult, and mislead others by means of licentious and "contumelious abuse applied to sacred subjects, or by wilful "misrepresentations or artful sophistry calculated to mislead "the ignorant and unwary, is the criterion and test of guilt. "A malicious and mischievous intention, or, what is equivalent "to such an intention in law as well as morals, a state of "apathy and indifference to the interests of society, is the "broad boundary between right and wrong." [4] At the trial of

[1] Folkard, 598, quoting 5 Jur. 529.

[2] L.R. 2 Ex. 230.

[3] Folkard's *Starkie*, p. 600.

[4] See my *Digest*, art. 161, for a note of this case, with which I was favoured by Lord Coleridge, who was counsel for the Crown on the occasion. Apart from this note, I may observe that in the course of the discussion to which the case gave rise Mr. Justice Coleridge told me that he pointed out to the jury that one of the offensive remarks made by Pooley upon the character of Jesus Christ might possibly have been intended as an argument, and not as mere railing, and that if they took this view of it they might acquit him on the count founded upon it. In the article referred to, I have

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a man named Pooley at Bodmin, in 1857, Coleridge, J., laid down the law to the jury in terms apparently founded upon this passage of Starkie. No judge who ever sat on the bench was less likely to understate the law relating to blasphemous libel than Mr. Justice Coleridge, and indeed the sentence which he passed upon Pooley was regarded as over severe, and was afterwards mitigated, and this circumstance gives special weight to his decision. I must however say that the weight of authority appears to me to be opposed to it. The cases cited all proceed upon the plain principle that the public importance of the Christian religion is so great that no one is to be allowed to deny its truth. The history of the offence confirms this view. In very early times heresy did not exist, and open attacks upon the Christian religion were unknown. As soon as doctrines regarded as being heretical became at all common they were treated as capital crimes, and heretics continued to be burnt from the reign of Henry V. to the reign of James I., though from the beginning of the reign of Elizabeth orthodoxy was more usually protected by the Court of High Commission. After the Restoration the Court of King's Bench punished as offences against the common law many offences which had formerly been dealt with by the Court of High Commission and the Star Chamber; and the grounds on which they put the punishment of blasphemous libel was that the law of the land derived its principal moral support from religion, and that therefore attacks on the truth of religion must be treated as temporal crimes. To say that the crime lies in the manner and not in the matter appears to me to be an attempt to evade and explain away a law which has no doubt ceased to be in harmony with the temper of the times. It is unquestionably true that in the course of the last thirty, but especially in the course of the last twenty, years, open avowals of disbelief of the truth of both natural and revealed religion have become so common that they have ceased to attract attention. To mention only the writings of foreigners, Strauss's *Leben Jesu*,

set side by side the two views of the law for which there is authority. On the fullest consideration of the subject, I am disposed to think that, in the case in question, Mr. Justice Coleridge laid down the law too favourably to Pooley.

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CH. XXV. Renan's *Vie de Jésus*, and the works of Auguste Comte, are read everywhere, and the opinions which they maintain are avowedly held and publicly maintained by large numbers of persons whose good faith and decency of language it would be absurd to dispute. If the cases to which I have referred are good law, every one of these works is a blasphemous libel, and every bookseller who sells a copy of any one of them, every master of a lending library who lets one out to hire, nay, every owner of any such book who lends it to a friend, is guilty of publishing a blasphemous libel, and is liable to fine and imprisonment. These are certainly strong reasons why the law should be altered. They might, if any one should try to put the law in force, be strong grounds for mitigation of punishment, but they are no reasons at all for saying that the law is not that which a long and uniform course of decisions has declared it to be.

In order to complete the subject of offences against religion, it is necessary to refer shortly to two classes of enactments which have ceased to have any other than a historical interest, and which may seem to belong more properly to the general history of the country than to a history of the criminal law. These are (1) the laws intended to secure uniformity of public worship, and (2) the laws against Roman Catholics. It would, for many reasons, be out of place to attempt to give here any account even of the leading details of these bodies of law, and it would obviously be impossible to discuss in this place the questions of policy which they suggest; but I will attempt to give some account of their general scope.

The relations between Church and State in this country may not at all times have been distinctly conceived or expressed by those who have at different times possessed public authority in England, but there can be no doubt that the theory of the identity of Church and State embodied in [1] the

[1] "Whereas by divers sundry old authentic histories and chronicles it is "manifestly declared and expressed that this realm of England is an empire, "and so has been accepted in the world, governed by one supreme head and "king, having the dignity and royal estate of the imperial crown of the "same, unto whom a body politic, compact of all sorts and degrees of people, "divided in terms and by names of spiritualty and temporalty, be bounden "and owe, next to God, a natural and humble obedience." It then goes on

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preamble of the Statute of Appeals, expressed, when it was adopted and acted upon, the view of the subject on which all subsequent legislation to our own times has proceeded. However this may be, the bodies of law to which I have referred illustrate the stages in a process which has lasted now for three hundred years, and which may be shortly stated as follows:—

The reigns of Henry VIII., Edward VI., and Mary, may be regarded as so many steps in a revolution, the final result of which, at the accession of Elizabeth, was a strenuous effort on her part to establish by law a form of religion which should satisfy that important part of the population who objected almost equally strongly to the Roman Catholic clergy, especially when they sided with the pope against the law of the land, and burnt people for theological opinions, and to Protestants, whose views appeared revolutionary, extravagant, or needlessly severe. This feat she was enabled by circumstances to accomplish to a great extent. Notwithstanding the Civil War and the Revolution of 1688, the system of which she was the author retained its leading features till about the year 1830. Even now there is a sense in which it may still be said to exist. The fundamental principle of it was that the regulation of public religious worship was a matter of public concern for which the legislature ought to make provision, and that it was the duty of all good subjects to accept and make use of the opportunities for public worship provided for them. A second equally fundamental principle was that to acknowledge the alleged right of a foreigner like the Pope to interfere with the laws of England on this subject was a step towards treason, and that to act in obedience to his authority in opposition to the law of the land was actual treason.

The principal laws founded on these principles were as follows:—The first was the Act of Uniformity of 1558 (1 Eliz. c. 2). This act revived the Prayer-book of Edward VI., and enforced its use in church by penalties extending, upon a third conviction, to imprisonment for life. It also punished all ridicule or "depraving" of the book with

with great amplitude of expression to say that the king is head, both of the body spiritual and the body temporal, and that each is capable of governing itself without any help or interference from the Pope.

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CH. XXV. similar penalties, and [1] provided that every one should attend public worship in the prescribed form regularly, under a penalty of twelve pence for every omission, and the censures of the Church. In 1581 the penalty for not going to church was increased to £20 a month, by 23 Eliz. c. 1, s. 5. In 1593 a statute of much greater severity was passed. This was 35 Eliz. c. 1. "An Act to retain the Queen's Majesty's "subjects in their due obedience." It provided that any person who obstinately refused to come to church, and persuaded others to withstand her Majesty's ecclesiastical authority, or persuaded any other person not to go to church and to go to any unlawful conventicle, should be imprisoned till he conformed. If he did not conform within three months, he was to abjure the realm, and if, after abjuration, he did not leave the realm, or returned to it without license, he became guilty of felony without benefit of clergy.

The law relating to Protestant dissenters stood thus till the Civil War, being enforced with various degrees of rigour according to the circumstances of the time; but in estimating its severity it must be remembered that the Court of High Commission and the ecclesiastical courts exercised their powers down to the year 1640 in the manner already sufficiently illustrated.

During the Civil War, and under the Commonwealth and Cromwell's protectorship, the law on this subject underwent a succession of remarkable changes. The first took place immediately after the battle of Naseby, when the Presbyterians were at the height of their power. It was effected by an [2] ordinance dated August 23, 1645, which ordered all ministers to make use of a new service-book called the Directory, then lately framed by the Westminster divines, and forbad the use of the Book of Common Prayer, not only in all places of public worship, but in any private place or family, under the penalty of £5, and £10 fine, and a year's imprisonment, for the first, second, and third offences respectively.

This ordinance was by no means satisfactory to the Inde-

[1] S. 14 in Pickering's *Statutes*. The *Revised Statutes* omit the repealed parts of the act, and renumber the parts which are unrepealed.
[2] Neal's *Puritans*, iii. p. 131.

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pendents, and [1] efforts were made to frame some scheme by which they could be comprehended under the Presbyterian government without oppression. These attempts, however, failed, as there was no room for a compromise between men who claimed the spiritual government of others by divine right, and those who peremptorily refused to admit their claim. By degrees, however, the Independents obtained the upper hand, and they established, especially under the Protectorate, a form of Church government much less stringent than Presbyterianism. The principal points in its history were as follows:—

On the point of his departure for Ireland in 1649, [2] Cromwell wrote to Parliament recommending the removal of all penal laws on religion, and in this he was seconded by Fairfax and his army. The Parliament thereupon [3] repealed all the acts of Elizabeth already referred to, but provided that, in order to prevent profane or licentious persons from neglecting the performance of religious duties, all persons should resort to some place of religious worship every Sunday. It also legislated against adultery and incest, which were made felony, and fornication, which on a first offence subjected the offender to three months' imprisonment, and on the second was felony without benefit of clergy. The law, already noticed, as to "blasphemous and execrable opinions," formed part of the same legislation.

The Irish campaign, the invasion of Scotland, the defeat of the Presbyterians at the battle of Dunbar, and the termination of the second civil war by the battle of Worcester, the expulsion of the last remnant of the Long Parliament, and the failure of the Barebone Parliament, led to the establishment of Cromwell as Protector, first under the Instrument of Government (December 16, 1653), and afterwards under the Humble Petition and Advice (March 29, 1657). Each of these memorable documents contained a statement of principles as to religious belief which represented fairly the practice of Cromwell during his tenure of power. [4] They were thus stated in the Instrument of Government:—

Art. 35. "That the Christian religion contained in the

[1] Neal's *Puritans*, iii. pp. 133-142. [2] *Ib.* iv. p. 8. [3] *Ib.* p. 26. [4] *Ib.* p. 69.

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"Scriptures be held forth and recommended as the public "profession of these nations; and that as soon as may be "a provision less subject to contention and more certain than "the present be made for the maintenance of ministers; and "that till such provision be made the present maintenance "continue."

36. "That none be compelled to conform to the public "religion by penalties or otherwise; but that endeavours be "made to win them by sound doctrine and the example of a "good conversation."

37. "That such as profess faith in God by Jesus Christ, "though differing in judgment from the doctrine, worship, or "discipline publicly held forth, shall not be restrained from, "but shall be protected in, the profession of their faith and "exercise of their religion, so as they abuse not this liberty "to the civil injury of others and to the actual disturbance of "the public peace on their parts: provided this liberty be not "extended to popery or prelacy, or to such as, under a pro-"fession of Christ, hold forth and practise licentiousness."

In its debates on this subject, [1] Parliament tried to abridge the generality of the 37th Article by drawing up a list of fundamental points on which agreement should be required, and they elaborated sixteen propositions "intended to exclude "not only Deists, Socinians, and Papists, but Arians, Anti-"nomians, Quakers, and others," but this seems to have come to nothing.

[2] The corresponding part of the Humble Petition and Advice goes into considerably greater detail than the Instrument of Government, but is to much the same effect. In substance, it provides that all forms of Christian worship are to be permitted and protected, except Deism or Socinianism, popery, and prelacy. Matters stood thus till the restoration of Charles II. Upon that event, the Commonwealth legislation being treated as void, except in some particular points on which it was confirmed by express enactments, the law as to conformity stood as Elizabeth had left it, the High Commission Court however being taken away and the ecclesiastical courts being greatly restrained in

[1] Neal, iv. pp. 89-91. [2] *Ib.* p. 153.

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their operations by the abolition of the *ex officio* oath. Under this state of the law those who dissented from the Church of England, as constituted by Edward VI.'s Prayer-book and Articles, were subject to severe penalties. They might be fined £20 a month if they did not go to church; they might be banished if they persuaded others to go to illegal religious meetings, and all such meetings were illegal except those of the Church by law established. This state of things, however, by no means satisfied the party which had regained power. They insisted upon and carried the act of Uniformity of 1662 (13 & 14 Chas. 2, c. 4), which was in various ways far more stringent than the older act. It required [1] far more explicit declarations of assent and consent to the articles and other contents of the new Book of Common Prayer than had been required to the old one. [2] It made episcopal ordination an absolutely essential condition to holding preferment in the Church of England. The new Prayer-book also contained matter which was not in the old one, and which was vehemently objected to by what we should call the Low Church party. The legal effect of the substitution of the new for the old Prayer-book and Act of Uniformity was largely to increase the class to whom all the severe penalties enacted by the statutes of Elizabeth applied, and to make it more difficult for them than it had been before to bring themselves to obey the law.

The legislation of Charles II. against Dissenters did not, as is well known, stop here. In 1665 was passed 17 Chas. 2, c. 2, known as the Five-mile Act. It provided in substance that no Nonconformist minister should "come or be within" five miles of any town represented in Parliament, or any place where he had acted as such minister, "unless only in "passing upon the road," without swearing to the doctrine that it is not lawful upon any pretence whatever to take up arms against the king, and that the person swearing "will "not at any time endeavour any alteration of government "either in Church or State." The persons in question were also prohibited from keeping schools (s. 4).

[1] See ss. 4 and 17, and compare 13 Eliz. c. 12, ss. 1 and 3 (Pickering).
[2] Ss. 13, 14.



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In 1670 was passed the act to suppress seditious conventicles (22 Chas. 2, c. 1). This act authorised, and in [1] stringent terms required, all peace officers to disperse all conventicles, breaking open doors if necessary (s. 9) for that purpose. Persons attending such conventicles were liable to 5*s.* penalty for a first, and to 10*s.* for a second offence, and preachers to penalties of £20 and £40, and the owners of houses who permitted their houses to be so used to a penalty of £20. "Lieutenants, or deputy-lieutenants, or any "commissionated officer of the militia or other his Majesty's "forces," were required on a certificate by one justice to disperse such conventicles by military force.

The law relating to Protestant Dissenters stood thus till the Revolution of 1688. Of the manner in which it was administered, and of the degree in which it contributed to the overthrow of the government of James II., I need say nothing; nor does it fall within my province to discuss the manner in which the Protestant Dissenters refused to be bribed by James II. into an approval of the obviously illegal measures by which he tried to gain their support in favouring the members of his own Church. Their reward was the Toleration Act (1 Will. & Mary, c. 18). It is a narrow and jealously-worded concession. It does not repeal one of the acts to which reference has been made, but after reciting that "some ease to scrupulous consciences in the exercise of "religion may be an effectual means to unite their Majesties' "Protestant subjects in interest and affection," it proceeds to enact that no one shall be liable to the penalties contained in the various acts which I have noticed who makes certain declarations or takes certain oaths set out in the act. It also provides (s. 5) that "if any assembly of persons dissenting "from the Church of England shall be found in any place "of religious worship with the doors locked, bolted, or "barred," the persons present are to receive no benefit from the act. It is also provided "that neither this act, nor any "clause, article, or thing therein contained, shall extend, "or be construed to extend, to give any ease, benefit, or

[1] "Any justice wilfully and willingly omitting to perform his duty was liable "to a penalty of £100 by s. 11, and every constable to a penalty of £5."

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"advantage to any papist or popish recusant whatever, or "any person who shall deny in his preaching or writing the "doctrine of the blessed Trinity as it is declared in the "Thirty-nine Articles."

Practically the Toleration Act put an end to the attempt to treat Protestant dissent as a crime, though theoretically it interfered in no degree with the general principle that the State ought to regulate religion, and that it is a duty to obey the law upon that as upon other subjects. The old statutes became obsolete, but they continued to exist upon paper for a great length of time.

The Five-mile Act and the Conventicle Act were repealed by 52 Geo. 3, c. 155, A.D. 1812, which also contains a section (s. 4) the effect of which is to extend to Unitarians the advantages of the Toleration Act; for it applies to every person officiating in or resorting to any congregation of Protestants whose place of meeting is duly certified under the act, and it makes no condition as to belief in the Trinity.

Two of the acts of Elizabeth—namely, the acts of 1581 and 1593—continued to be nominally in force, subject to the provisions of the Toleration Act, till 1844, when they were repealed by 7 & 8 Vic. c. 102. The section of Elizabeth's Act of Uniformity (1 Eliz. c. 2, s. 14) which made attendance at church obligatory under a penalty of a shilling, was repealed in 1846 by 9 & 10 Vic. c. 59. The result of the whole is that it may now be stated broadly that uniformity in public worship is no longer one of the objects sanctioned by the criminal law.

I now come to the legislation against Roman Catholics. It was extremely intricate and severe, and may be referred to three distinct periods, namely, the reign of Elizabeth, the reign of James I., and the reign of William III.

It is to be observed, in the first place, that the offence of nonconformity to the Established Church was one which was committed as much by a Roman Catholic as by a Protestant Dissenter. Each was equally bound by law to attend the services of the Established Church, and each was liable to the same penal consequences for refusing to do so. It is unnecessary, therefore, to repeat what has already been said on



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CH. XXV. this subject; though I may observe that the expression "popish recusant," which continually occurs in the acts on the subject, means [1] a Roman Catholic who, because he is one, refuses to come to church.

It must also be observed that practically several of the statutes by which it was made high treason or an offence punishable by *præmunire* to deny the royal supremacy may be regarded either as creating offences against the State or offences against religion. Having already referred to many of them in giving the history of the law relating to political offences, I need not return to the subject. I may, however, observe that several of the treasons created in Elizabeth's reign seem to fall rather under the head of offences against religion than under that of offences against the State, though no doubt they were passed principally, if not altogether, for political reasons.

The most important of the acts in question were as follows:—

In 1570, Pius V. issued a bull releasing Elizabeth's subjects from their allegiance.

By way of reply to this there was passed in the same year the act 13 Eliz. c. 2, which made it treason to "use or "put in ure" any bull of absolution or reconciliation, or to absolve or reconcile any person by virtue of any such bull. It was also made a *præmunire* to bring any *agnus dei* "or "any crosses, pictures, beads, or any such like vain and "superstitious things from the Bishop or See of Rome, or "from any person authorised or claiming authority by or from "the said Bishop of Rome, to consecrate or hallow the same."

In 1580, the contest between Catholic and Protestant was at its height. The massacre of St. Bartholomew had happened just eight years before. The Spanish Armada sailed eight years afterwards. The parliamentary association for the protection of Elizabeth against assassination was formed in 1584, and Mary Stuart was executed in 1587.

Under these circumstances the following Acts of Parliament

[1] "And first as to the said offence of not coming to church, so far as it "practically concerns those of the popish religion who, in respect thereof, are "commonly called popish recusants."—1 Hawkins, *P. C.* 386.

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were passed:—By 23 Eliz. c. 1, s. 2, it was made high treason "to pretend to have power, or by any ways and means put "in practice, to absolve, persuade, or withdraw any of the "queen's subjects from their natural obedience to her "Majesty, or to withdraw them for that intent from the "religion now by her Highness's authority established within "her Highness's dominions to the Romish religion, or to "move them to promise any obedience to any pretended "authority of the See of Rome," or do any overt act for that purpose. By s. 4 of the same act the saying or singing of mass was made an offence punishable by two hundred marks fine, and imprisonment for a year and till payment. To hear mass willingly was made an offence punishable by one hundred marks fine and a year's imprisonment.

In 1585 was passed 27 Eliz. c. 7, "An Act against Jesuits, "seminary priests, and other such like disobedient persons." It provided that all Jesuits, seminary priests, and other priests, ordained out of England or ordained in England since the beginning of the reign under the authority of the Pope, should within forty days leave the realm; that every such priest coming into the realm, or remaining in it after the forty days, should be guilty of high treason; and that it should be felony without benefit of clergy "wittingly and "willingly" to "receive, relieve, comfort, aid, or maintain any "such Jesuit, seminary priest, or other priest, being at liberty "and out of hold." Every subject being a student at a seminary was to return within six months after a proclamation made for that purpose under pain of high treason.

By the same act it was made a *præmunire* to send money to any Jesuit, or seminary or other priest abroad, and a misdemeanour to send any child or other person under the government of the offender abroad without special license.

In 1593, the effects of the defeat of the Spanish Armada had made themselves felt in various directions. The large body of persons who up to that time had been moderate Roman Catholics, or at least had favoured the Roman Catholic side, became members of the Church of England, and formed the High Church section of it. The Church of England was thus strongly reinforced, both as against the extreme Catholics

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and as against the Puritans, and the effect of this was shown in the legislation of 1593. In that year were passed two most severe acts—35 Eliz. c. 1, "The Act to retain the "Queen's Majesty's subjects in their due obedience," and 35 Eliz. c. 2, "An Act for restraining popish recusants to some "certain places of abode." Of the first act I have already spoken. The second provided that all popish recusants should within a certain time "repair to their place of dwelling "where they usually heretofore made their common abode, "and shall not at any time after pass or remove above five "miles from thence." A recusant having no place of abode was to "repair to the place where such person was born, or "where the father or mother of such person shall then be "dwelling, and not remove or pass above five miles from "thence." The penalty was forfeiture of goods and chattels, and of the profits of land for life. They were also to notify their names to the minister or constable of the parish. If an offender had nothing to forfeit, he was to abjure the realm.

The result of this legislation was that at the end of the reign of Elizabeth every Roman Catholic priest in England, except the few who might have been ordained in the reign of Queen Mary, was by the very fact of his presence in England guilty of high treason; that to celebrate the mass was an offence in itself punishable with fine and imprisonment, and that popish recusants were not only liable to ruinous penalties, but were forbidden to travel above five miles from their registered places of abode.

In 1605 the Gunpowder Plot was discovered, and two statutes were passed in consequence, namely 3 Jas. 1, c. 4, and 3 Jas. 1, c. 5. They greatly increased the severity of the law upon this subject. By c. 4 [1] the king was enabled to refuse £20 a month penalty, and to take instead of it two-thirds of the recusant's whole estate, [2] his mansion house excepted. Moreover an [3] oath abjuring the Pope's authority to depose the king was drawn up, and any [4] two justices were empowered to

[1] S. 11.

[2] S. 12.

[3] S. 15. By 7 Jas. 1, c. 6, this oath was to be administered to every person over eighteen in the whole country.

[4] S. 13.

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administer it to any person, not being a nobleman, who had not received the sacrament twice in the year before, and to all travellers who would not upon oath say that they had done so. [1] Six privy councillors might tender the oath to a nobleman. [2] Every one who refused the oath was to be committed to prison till the next quarter sessions or assizes, when the oath was to be tendered a second time, and if it was still refused the person refusing was guilty of a *præmunire*. [3] Lastly, the provisions of the act of 23 Eliz. c. 1, which made it treason to reconcile any person to Rome, or to be willingly reconciled, were reenacted in a somewhat severer form.

The statute 3 Jas. 1, c. 5, contained further provisions. It [4] offered rewards for the discovery of any person entertaining or relieving a Jesuit or priest. It [5] prohibited recusants from coming to Court, and [6] required all popish recusants ([7] except mechanics and persons having no other place of abode) to leave London and go to at least ten miles from it.

Other provisions [8] disabled recusant convicts from practising as barristers, attorneys, solicitors, advocates, or proctors: from practising physic and from being apothecaries, from being judges in any court, and from holding any military office. Popish recusants convict, and every one married to a wife being a popish recusant convict, were forbidden to "exercise any public office or charge in the commonwealth "by himself or by his deputy," unless the husband and all his children above nine went to church once a month. [9] All popish recusants were excommunicated *ipso facto*, [10] but not so as to be prevented from suing. There were also provisions imposing a penalty of £100 on all persons [11] married or causing any dead body to be [12] buried otherwise than according to the rites of the Established Church, or not having their children so [13] baptized within a month after birth.

[14] Popish books were prohibited, and [15] justices were authorised to search for them as well as for "relics of popery,"

[1] S. 41. [2] S. 14. [3] Ss. 22 and 23. [4] S. 1. [5] S. 2. [6] S. 3. [7] S. 5.
[8] S. 8. I suppose "recusant" in this section meant "popish recusant," which is the expression used in other parts of the act, but this is not the natural meaning of the word.
[9] S. 11. [10] S. 12. [11] S. 13. [12] S. 15. [13] S. 14. [14] S. 25. [15] S. 26.

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CH. XXV. and if any "altar, pix, beads, pictures, or such like popish "relics or books" were found, the justice, if he "thought them "unmeet for such recusant," might cause them to be presently defaced and burnt.

[1] Finally all arms, gunpowder, and munition, except only such weapons as four justices might consider necessary for the defence of the person or house of the recusant, were to be taken from him, and be kept and maintained at the recusant's cost in any place which the justices might appoint.

It is well known that the execution of these laws under James I. and Charles I. was very uncertain. It was constantly suspended by both of these sovereigns, but instances occurred even in the reign of Charles II. in which the most severe of them, those by which the mere fact of being a priest in England amounted to high treason, were executed in their full rigour. They not only remained in force all through the seventeenth century, but they were increased in severity on two occasions.

In 1678, in consequence of the excitement caused by Oates's story about the Popish Plot, was passed [2] 30 Chas. 2, st. 2, c. 1, by which Roman Catholics were excluded from Parliament by a test oath denying transubstantiation, and describing "the invocation or adoration of the Virgin Mary, "or any other saint, and the sacrifice of the mass, as they "are now used in the Church of Rome, as superstitious and "idolatrous."

All these acts were passed under the influence of passionate excitement and great fear caused by real danger. There could be no mistake about the dangers to which Elizabeth was exposed by the Roman Catholics at home and abroad, nor as to the Gunpowder Plot; and though Oates was one of the worst and most false of mankind, the relations between Louis XIV. and Charles II. which existed in 1678, were in fact even more alarming than public opinion excited by Oates's lies supposed them to be. It is thus easy to understand the legislation of which I have just given the effect.

[1] Ss. 28, 29.
[2] In Pickering's *Statutes* this act is dated 1677, which is clearly wrong.

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The last, and in some respects the most severe, of the penal laws was passed under very different circumstances. It was 11 & 12 Will. 3, c. 4. It provided [1] that every one who should take any popish bishop, priest, or Jesuit, and prosecute him to conviction for saying mass, or executing any other part of his functions, should receive £100 reward. [2] Every popish bishop, priest, or Jesuit, saying mass or exercising any other part of the function of a popish bishop or priest, and every papist keeping school or taking upon himself the education or government, or boarding of youth, was to suffer perpetual imprisonment. [3] Every person educated in the popish religion, or professing the same, was to take the oaths of allegiance and supremacy within six months after attaining the age of eighteen, and to make the declaration in the act excluding Roman Catholics from Parliament. In default, every such person, but not his heirs, was to be disabled and made incapable to inherit land, and during his life or till he should take the oaths, "[4] the next of his kindred, which "shall be a Protestant, shall have and enjoy the said lands, "tenements, and hereditaments," being accountable only for wilful waste. Moreover, every papist was disabled and made incapable to purchase land after a certain date, and uses and trusts for the benefit of any such person, subsequent to that date, were declared to be void.

The object of this clause, no doubt, was gradually to deprive the Roman Catholic gentry of their landed property, in particular by forcing them to sell it. They were to be prevented absolutely from buying land, and put under such a restriction as to inheriting land that many persons would wish not to run the risk of it. This is pointed out by [5] Burnet as follows:—"This act hurt no man that was in "the present possession of an estate, it only incapacitated "his next heir to succeed to that estate if he continued a "papist; so the danger of this, in case the act should be "well looked to, would put those of that religion, who are "men of conscience, on the selling their estates; and in the "course of a few years might deliver us from having any "papists left among us. But this act wanted several neces-

[1] S. 2. [2] S. 3. [3] S. 4. [4] S. 4. [5] *Own Times*, iii. 253.

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CH. XXV.

"sary clauses to enforce the due execution of it: the word "'next of kin' was very indefinite, and the 'next of kin' "was not obliged to claim the benefit of this act; nor did "the right descend to the remoter heirs if the more imme- "diate ones should not take the benefit of it." The language of this part of the act no doubt is vague—perhaps intentionally so. This, however, cannot be said of other clauses, [1] one of which enacted that "if any popish parent, in order to the "compelling his Protestant child to change his religion, shall "refuse to allow such child a fitting maintenance suitable to "the degree and ability of such parent, and to the age and "education of such child," the Lord Chancellor might make such order therein as should be agreeable to this act.

The following is Burnet's account of the objects of the act:—"Upon the peace of Ryswick a great swarm of priests "came over to England, not only those whom the Revolution "had frighted away, but many more new men who appeared "in many places with great insolence; and it was said that "they boasted of the favour and protection of which they "were assured. Some enemies of the government began to "give it out that the favouring that religion was a secret "article of the peace; and so absurd is malice and calumny "that the Jacobites began to say that the king was either of "that religion, or at least a favourer of it. Complaints of "the avowed practices and insolence of the priests were "brought from several places during the last session of "Parliament, and those were maliciously aggravated by some "who cast the blame of all on the king." He then states the effect of part of the bill, and proceeds, "Those who brought "this into the House of Commons hoped that the court "would have opposed it; but the court promoted the bill, so "when the party saw their mistake they seemed willing to "let the bill fall; and when that could not be done they "clogged the bill with many severe and some unreasonable "clauses, hoping that the Lords would not pass the act; and "it was said that if the Lords should make the least alter- "ation in it, they in the House of Commons who had set it "on were resolved to let it lie on their table when it should

[1] S. 7.

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"be sent back to them. Many lords, who secretly favoured "papists on the Jacobite account, did for this very reason "move for several alterations; some of them importing a "greater severity; but the zeal against popery was such in "that House that the bill passed without any amendment, "and it had the royal assent."

This was the last of the penal laws against the Roman Catholics. I may shortly sum up their effect as follows:—

The presence of a Roman Catholic bishop or priest in England was high treason. To reconcile any person to Rome or to be willingly reconciled was also treason. If any bishop or priest performed any of the functions of his office he was liable in the alternative to perpetual imprisonment under the act of William, or to fine and imprisonment under the act of Elizabeth. To harbour a priest was felony without benefit of clergy. The other disabilities of Roman Catholics are summed up with admirable terseness by Serjeant Hawkins (1 *P. C.* 387).

First, They are under the following disabilities:—1. That of bringing an action. 2. That of presenting to a church. 3. That of bearing any public office or charge. 4. That of claiming any part of a husband's personal estate. 5. That of claiming an estate by courtesy or by way of dower after a marriage against law.

Secondly, They are put under the following restraints 1. From going five miles from home. 2. From coming to Court. 3. From keeping arms. 4. From coming within ten miles of London.

Thirdly, They are liable to the following forfeitures:— 1. That of two parts of a jointure or dower. 2. That of £20 for not receiving the sacrament yearly after conformity. 3. That of £100 for an unlawful marriage. 4. That of £100 for an omission of lawful baptism. 5. That of £20 for an unlawful burial.

Lastly, They are subject to the following inconveniences:—1. That their houses may be searched for relics, whether they be men or women. 2. That if they be women, and married, they may be committed, &c.

I have omitted some of the forfeitures and inconveniences,

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CH. XXV. as a full account of them would render the statement of the law tediously minute.

The subsequent history of these laws is curious, and is as follows:—The Roman Catholics, as I have already said, got no benefit from the Toleration Act; and though the laws against them fell into disuse, and were seldom, if ever, put in execution during the eighteenth century, their legal validity long remained unaffected. In his speech in opening the case against Lord George Gordon, Wallace, then Attorney-General, gave some account of the manner in which these laws, and especially the act of William III., acted. [1] He said, "The penalties and "punishments appeared to everybody so extremely harsh and "severe, that very few prosecutions were carried on upon this "act: in my own time I only remember one, which was "against a person for saying mass in a house somewhere about "Wapping; he was committed, and of course doomed by "the provisions of this act to perpetual imprisonment. But "the Roman Catholics were still liable to private extor-"tionary demands, which they yielded to to avoid either "prosecution or that they might have the liberty of enjoying "what had long been in their families and had descended to "them as their birthright." In 1778, there was passed an act, 18 Geo. 3, c. 60, known as Sir George Saville's Act. This act repealed practically all the penal clauses of the act of William III. as against all persons who would take an oath of allegiance to George III., disclaiming the Stuarts, and also disclaiming the deposing power of the Pope, and some other doctrines ascribed to the Roman Catholic Church. This act, for the first time for nearly two hundred years, allowed mass to be said in England without the risk of perpetual imprisonment, but from a merely legal point of view this was of no importance, as the bare presence of a Roman Catholic priest in England was still treason under the act of Elizabeth, and the saying of mass was still an offence which involved a fine of 200 marks and a year's imprisonment.

Some similar legislation was afterwards proposed for

[1] 21 *State Trials*, p. 501.

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Scotland, but was opposed with violence and rioting, which led ultimately to the Gordon riots of 1780.

In the course, however, of the next few years a great change of sentiment took place, and in 1791 an act was passed (31 Geo. 3, c. 32) which, following the precedent of the Toleration Act, exempted from all the penalties of the acts of Elizabeth and James I. all Roman Catholics who were willing to make a declaration renouncing certain doctrines imputed to the Roman Catholic Church, and promising fidelity to the Hanoverian family. This act still, however, left Roman Catholics subject to many disabilities as to holding office, and especially as to sitting in Parliament. All of these were removed by the act known as the Catholic Emancipation Act, 10 Geo. 4, c. 7, passed in 1829. This act, however, contains (ss. 28-36) severe enactments against Jesuits and members of other male religious communities. Jesuits and monks residing in the kingdom at the time when the act passed were to be registered. Natural-born subjects being Jesuits or monks were empowered to return, and required to register themselves within six months of their return, under a penalty of £50 a month. Jesuits and monks coming into the realm from foreign parts were made guilty of a misdemeanour, upon conviction of which they must be banished for life, though under a Secretary of State's license a Jesuit may remain in England for six months. To admit any person in England to become a member of any religious order is by s. 33 a high misdemeanour, punishable by banishment for life. Any person banished who does not leave England within three months, or is afterwards at large in England, is liable to transportation for life.

These provisions have never been modified, and I believe have been treated ever since they were passed as an absolutely dead letter.

The numerous acts which I have enumerated remained on the statute book long after the acts of 1791 and 1829 had made them practically inoperative. Most of these were repealed in 1844 by 7 & 8 Vic. c. 102, which is entitled "An "Act to repeal certain penal enactments made against her "Majesty's Roman Catholic subjects." Some were repealed in

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CH. XXV. 1846 by 9 & 10 Vic. c. 59, "An Act to relieve her Majesty's "subjects from certain penalties and disabilities in regard to "religious opinions."

Such is the history of the laws relating to offences against religion. The following is a short summary of it.

When this island was converted to Christianity, and for many centuries afterwards, the temporal and spiritual authorities were in the closest possible alliance and union. The temporal authorities dealt with crimes, the spiritual authorities with sins. The judges of both sat in the same courts and seem to have followed the same or similar procedure. At the Norman Conquest the jurisdictions were separated, the bishops sat in their own courts and proceeded according to their own laws, and the lay courts, in case of need, enforced their decisions. For several centuries, however, their criminal jurisdiction was confined to sins, and had little to do with heretical opinions, for the simple reason that there were no heretics. Though this jurisdiction was, according to our modern notions, intolerable, on account of the interference which it involved with private life, and also on account of the inquisitorial method in which it was carried on, it cannot be said to have been cruel. It affected neither life nor limb, nor even property or personal liberty, except in a roundabout way through the agency of the lay courts.

Towards the end of the fourteenth century the great controversies began which have ever since been growing wider and deeper. Heresy was now viewed as a capital crime for which people were to be burnt alive, and measures were taken for the purpose of so burning them, first fraudulently and afterwards straightforwardly, by passing the acts of Henry IV. and Henry V., which gave the clergy the power of defining heresy just as they pleased. This state of things lasted, and persons adjudged to be heretics continued to be burnt as such at intervals, for about 135 years, namely from 1400 to 1535. In 1535 a great check was put upon the punishment of heretics by the act of Henry VIII. which declared negatively what should not be heresy, and though the Act of the Six Articles declaring affirmatively what should be heresy made the law more severe than it had been in the preceding years,

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it did not make it nearly as severe as it had been throughout the whole of the fifteenth and the first half of the sixteenth century. Under Edward VI. there were two executions for heresy. Mary restored the old system for a short period, during which about 300 persons were burnt. Under Elizabeth two were burnt, under James I. two, and after some slight attempts at persecution at later dates the writ *de hæretico comburendo* was abolished in 1678.

Though theological persecution proper hardly outlived the reign of Henry VIII. it was followed by ecclesiastical and political prosecutions of Dissenters and Roman Catholics, which were the main causes of the great events of the seventeenth century. The old ecclesiastical courts, reinforced, constituted, and regulated by the Court of High Commission, sought to enforce uniformity of worship and decency of conduct by means so repulsive to all the strongest feelings of the country that the courts themselves were abolished, their fall, and that of the hierarchy which they specially represented, being perhaps the main cause of the Civil War, and the kings' execution. After the Restoration the old ecclesiastical courts, though in a sense restored, were paralysed, but the old differences in slightly different shapes became the causes of troubles hardly less violent than those of earlier times. Sins ceased practically to be punishable as such, but the questions, Whether, on the one hand, conformity to the Established Church should be enforced on Protestants? and Whether, on the other, Roman Catholics should be allowed free scope in their endeavours to regain what they had lost? were the great questions of the reigns of Charles II. and James II. The Established Church retained, and even greatly increased, the severity of the old laws against nonconformity, though the destruction of the High Commission and the mitigation of the procedure of the ordinary ecclesiastical courts caused the new laws to be less oppressively executed than the old ones. On the other hand the laws against the Catholics were upheld by popular and patriotic sentiment against the personal wishes and sympathies of Charles II. and against the illegal efforts of James II. to dispense with them.

The purely theological view of heresy was represented in

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 this period by the assumption on the part of the Court of King's Bench of the power to punish blasphemous words and libels as temporal offences at common law—a power which in theory still exists, though the base of the theory may have been to some extent shifted.

The Revolution of 1688 produced a narrowly limited toleration, in the strict sense of the word, for Protestant Dissenters. "You are a set of narrow-minded bigots, but "we will not punish you for it," was the language of the legislature towards them. The Roman Catholics, on the other hand, were treated as men who would be rebels if they dared, and were placed under laws nominally harsher than any which had been in force before. The laws, however, were not executed, and, after being practically repealed in 1791 and 1829, were formally repealed in 1844 and 1846.

This is hardly the place to speculate on the vast questions which this remarkable history suggests. I will, however, venture to make one observation upon it. The remark usually suggested by it is that our ancestors walked in darkness, and that we have solved the problem which was too hard for them by recognising liberty of conscience as a principle of universal application which avoids all difficulty. There is a good deal of truth in this, as there is in most commonplaces. To legislate on the principle that no religion is to be regarded by the legislature as truer than any other does no doubt avoid many difficulties, though it is a long step towards legislating on the principle that all existing religions are false—an opinion which in these days prevails extensively, but which could not, without a revolution of the most violent kind, be avowedly made the principle of legislation.

Much violence is no doubt avoided by accepting scepticism on all the great controversies relating to human life as the basis of legislation, but such a course has its disadvantages. It tends to reduce politics, government, and legislation to a low level, and to make them vulgar, uninteresting, and effective only for small purposes of trade and the administration of a petty kind of justice. If such a basis had been accepted for legislation, say at and after the barbarian conquests, it is difficult to see how Western Europe could ever have ceased

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to be barbarous. Or if the same view had prevailed in the fifteenth, sixteenth, and seventeenth centuries it is difficult to see how the oppressions of the clergy could ever have been removed. If no religion is particularly true, and one happens to be established, people in general will support it. But where any religion is really and generally believed people will, in legislation as in other matters, act upon the supposition of its truth, and if two or more religions are believed to be true and false respectively by large numbers of people, the result must be conflict more or less serious according to circumstances. The transition from general belief to general disbelief is a comparatively peaceable condition so long as the belief and the disbelief are not unequally matched, but I do not think it would continue to be peaceable if active disbelief got the upper hand. If convinced unbelievers ever became a practical majority, I think they would legislate against believers in a way hardly distinguishable from persecution. They would, for instance, confiscate all existing endowments for religious purposes—especially all places of worship, all places of religious education, all places intended for the education of the clergy of any religious body. They would suppress all convents, monasteries, and similar institutions. They would substitute for them other institutions for teaching the public whatever they thought important to be known, especially in the way of morality.

Of course such a policy could not be pursued without a revolution in our existing habits of thought which as yet is far distant, if it ever happens at all; but, in the face of such a possibility, the glorification of our existing compromises as if they were the final result of human wisdom appears to me weak and foolish.

END OF VOL. II.



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