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OUTLINES OF CRIMINAL LAW

BASED ON LECTURES DELIVERED IN THE UNIVERSITY OF CAMBRIDGE

by

COURTNEY STANHOPE KENNY
LL.D., F.B.A.

Sontibus unde tremor, civibus inde salus

FIFTEENTH EDITION

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PREFACE TO THE THIRTEENTH EDITION

THE present volume embodies the lectures which I gave at Cambridge, in the course of some forty years. When reducing them into the form of a book, I kept in view the needs of two classes of readers. For a general outline of Criminal Law may prove useful not only to young men preparing for academical or professional examinations, but also to many older men when called upon to undertake, without previous legal training, the duties of a justice of the peace. Both these classes find it important, moreover, to familiarize themselves with the foundations of the law of Evidence; and I therefore included that subject.

I have aimed at making the range of topics no wider than may be grasped upon a first perusal, even by a reader previously unfamiliar with law. But I have tried to treat each individual topic with such fulness as may serve to fix it effectually in the reader's memory. Yet the susceptibility of his memory must depend very much (as all lecturers soon discover) upon the extent to which the matter in hand arouses his interest. Fortunately the law of Crime—when once the preliminary difficulties attendant upon the chaotic form which it still retains in England have been faced and surmounted—is a branch of jurisprudence peculiarly capable of being rendered interesting. It is closely linked with history, with ethics, with politics, with philanthropy. My endeavour has been to supply illustrative examples that may give vividness and reality to the abstract principles of our Criminal Law; and to explain, by its connexion with the past, the various historical anomalies which still encumber it; and, moreover, to suggest the most important controversies—

psychological, social, juridical—that it is likely to arouse in the near future. Partly for the last-mentioned purpose, and partly because their importance even for present-day practice seems to me to be greater than is often supposed, I have given more than usual prominence to the subjects of Malice, Responsibility, and the Measure of Punishment. I also have made frequent use of the official statistics of our courts and prisons; in the hopes of presenting a precise idea both of the present administration of criminal justice in this country, and of the comparative importance of the various forms of its procedure.

To readers who have time to utilize the references given in the footnotes, it may be well to explain that the cases cited as from "K.S.C." will be found in my volume of *Select Cases in Criminal Law*.[1]

Should any one find Chapter I, which attempts to define the nature of Crime, to be at all difficult, I advise him to postpone its perusal until after reading the rest of the work. Definitions belong indeed rather to the end of our knowledge than to the beginning of it.

I am glad to know that this book was thought worthy of adaptation by an American editor for use in the University of Yale. An admirably rendered French translation of it has already been published.

In the last (the twelfth) edition I made extensive changes; parts of it were entirely re-written. In preparing the present issue, my endeavour has been to keep pace with the current of new enactments and new decisions. I have also added a Supplement; giving notes upon some topics which, though only subsidiary, are sufficiently important or interesting to deserve attention.

DOWNING COLLEGE, CAMBRIDGE

1929

[1] The references in this edition are to the eighth edition with Supplement by E. Garth Moore.

PREFACE TO THE FIFTEENTH EDITION

I MUST first express my gratitude to those, and in particular to the reviewers, who have made suggestions arising out of the last edition of this book. I have had the opportunity not only to make use of those suggestions, but also again to revise the whole text and to discover further necessary emendations.

There has been no major statutory change in the substantive law since the last edition, but the Administration of Justice (Miscellaneous Provisions) Act, 1933 has radically changed the procedure in relation to indictment. Of special note also are the Children and Young Persons Act, 1933 and the Summary Jurisdiction (Appeals) Act, 1933. Outstanding cases are *Rex* v. *Manley*, *Maxwell* v. *Director of Public Prosecutions* and *Woolmington* v. *Director of Public Prosecutions*. A short section has been added dealing with Bribery and Corruption. Numerous additions have been made to the text and notes and all recent cases and statutes of importance have, I hope, been noted. The chapters on Evidence and Procedure have been enlarged and in part re-written. It is hoped that this enlargement will be of value to those studying Procedure. In particular I have re-written that part of the text which deals with Evidence of Similar Facts and also the passages relating to Bills of Indictment, Appeals to Quarter Sessions and the conduct of Prosecutions. The sections relating to *Mens Rea*, Attempts, Manslaughter and Larceny by a Trick have been considerably altered in the light of recent decisions and new views with which I have ventured to think that the author would have agreed. The dates of all cases now appear in the footnotes.

I must express my special obligation to the series of articles comparing English and Italian Criminal Law written by Dr W. T. S. Stallybrass which appeared in the *Journal of Comparative Legislation and International Law*; and also to Mr Pendleton Howard's *Criminal Justice in England*, to which I am much indebted, in particular in relation to the work of the Director of Public Prosecutions and the enlargement of Summary Jurisdiction.

G. G. P.

SHANGHAI
July 1936

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CHAPTER I
THE NATURE OF A CRIME

THROUGHOUT forty years' experience as an academical lecturer upon various legal subjects, I found criminal law to be usually regarded, both by its students and by its teachers, as one of the most attractive portions of their work. It has of course a great practical importance; on account of the large number of our criminal tribunals and, consequently, of the persons who have to take part in their administration. For to young counsel and solicitors these criminal courts offer the readiest access to professional employment and thus to experience, instructive if not lucrative, in the practical details of advocacy. And even persons who have no professional interest in legal matters often find themselves engaged, as jurymen or Justices of the Peace, in discharging public duties in which a knowledge of the criminal law is of great assistance to them. Again, without any such call either of public duty or of professional activity, the plainest private citizen may easily have direct personal cause to realise the value of this kind of knowledge. For our civilisation is not yet so perfect that a man can be sure that even the most prudent administration of his affairs will save him from having to invoke the protection of the criminal law, or that even the highest moral rectitude will remove all risk of his having to defend himself against groundless and malicious criminal

accusations. But there are also other causes, less utilitarian than any of these, which nevertheless play a still greater part in giving the criminal portion of our law that special attractiveness which it unquestionably has, not only for professional students but even for ordinary readers. For this branch of study is rendered attractive to all thoughtful men by its direct bearing on the most urgent social difficulties of our time and on the deepest ethical problems of all times. And almost all men, whether thoughtful or thoughtless, are fascinated by its dramatic character—the vivid and violent nature of the events which criminal courts notice and repress, as well as of those by which they effect the repression. Forcible interferences with property and liberty, with person and life, are the causes which bring criminal law into operation; and its operations are themselves directed to the infliction of similar acts of seizure, suffering, and slaughter. The utmost violence which administrators of civil justice have power to inflict ranks only amongst the gentlest of those penalties by which the criminal courts do their work. Hence of all branches of legal study there is no other which stirs men's imaginations and sympathies so readily and so deeply.

The interest thus aroused tends naturally to facilitate the progress of law students through the difficulties of this subject; and has done much to produce the impression, which happily prevails in the minds of most of them, that this branch of their work is peculiarly easy. That impression is erroneous; though, no doubt, the beginner may acquire such a knowledge of criminal law as suffices for ordinary needs, either of examination or of everyday practice, without having to face so many points of intrinsic difficulty as he will usually find it necessary to master, whether for practice or for examination, in any other leading branch of our law.

But there is one grave—if not indeed insoluble—

difficulty which has to be faced in studying the law of crime. And this difficulty comes at the very outset of the subject.[1] For it consists of the fundamental problem—*What is a Crime?* Clearly the criminal law is concerned with crimes alone, not with illegal acts in general. But how are we to distinguish those breaches of law which are crimes from those which are merely illegal without being criminal?[2]

Many attempts have been made to answer this question, and to propound a general definition of crime which shall distinguish wrongs which are criminal from those which are merely "civil". Moreover, as the distinction between criminal and non-criminal law is not peculiar to England but is familiar in every civilised country, attempts have naturally been made to go a step further, and to look for such a definition of crime as will express this difference in a form so general as to be applicable, not merely to England, but to all countries in which this distinction between criminal and civil prevails.

In attempting, whether for this general purpose or merely with reference to English law, to frame a definition of crime which shall separate the illegal acts that are criminal from those which must be treated in another branch of the law of Wrongs, the first course which naturally occurs to us is to see if some peculiarity, which may serve as a basis for our definition, can be found in the very nature of the criminal act itself.

(1) This was a course adopted by Sir William Blackstone when writing the great classical text-book of English law. The fourth volume of his *Commentaries on the Laws of England* is devoted to "Public Wrongs", or crimes; and his definition of a public wrong is given at the outset of it, though in two somewhat dissimilar forms. Of these the

[1] If a student find the present chapter too difficult, he should postpone it until after reading the rest of the book.

[2] See Salmond's *Jurisprudence*, 8th ed., § 27.

first is, "an act committed or omitted in violation of a *public law* forbidding or commanding it".[1] This answer, however, only drives us to the further question, What is meant by "public" law? That phrase has several well-accepted senses, but none of them seems applicable here. For if, with Austin,[2] we take public to be identical with constitutional law, then Blackstone's definition will cover political offences alone, though they are only an extremely small portion of the whole field of crime. If again, with the Germans, we take public law to include, along with constitutional law, criminal law itself,[3] the definition ceases to define. And if, finally, we adopt the only other familiar sense, and consider public law as equivalent to what is now more commonly called "positive law" or "municipal law"—that is to say, all law which has been made by the public authorities of a State[4]—the definition will obviously become too wide; for it will cover every legal wrong.

(2) We must therefore pass to Blackstone's next definition. According to this, a crime is "a violation of the *public* rights and duties due to the whole community, considered as a community".[5] Blackstone, of course, does not intend to suggest by this that crimes violate no other rights besides public ones; for obviously every theft violates some private right of property. What he meant is expressed more clearly in the form given to this definition by Serjeant Stephen in editing, or rather reconstructing, the Commentaries: "A crime is a violation of a right, considered in reference to the evil tendency of such violation as regards the community at large." It may be remarked, in passing, that this form of words introduces a new error, by limiting crimes to violations "of rights"; whereas, as Blackstone had well pointed out, a crime may

[1] 4 Bl. Comm. 5. [2] *Jurisprudence*, Lect. xliv, p. 770.
[3] Holland, *Jurisprudence*, chs. ix, xvi.
[4] Austin, pp. 781, 787. [5] 4 Bl. Comm. 5.

be a violation either of a right or only of a duty. For one remarkable difference between criminal and "civil" (*i.e.* non-criminal) law lies, as we shall subsequently see, in the fact that, whilst breaches of the latter always involve an infringement of some person's right, the criminal law makes it our duty to abstain from various objectionable acts although no particular person's rights would be invaded by our doing them. Instances of crimes which do not violate any one's right may be found in the offences of engraving upon any metal plate (even when it is your own) the words of a bank-note, without lawful excuse for so doing;[1] or of being found in possession of housebreaking tools by night;[2] or of keeping a live Colorado beetle.[3]

The idea which Blackstone and Stephen are here attempting to embody is one of great importance, if only on account of the wide currency it has obtained; and it deserves a very close scrutiny. Crimes, according to this idea, are such breaches of law as injure the community. Now there can be no doubt that if we make a merely general contrast between crimes, taken as a mass, and the remaining forms of illegal conduct, taken similarly as a mass, the amount of harm produced by the former group will be much greater and much more widespread than that produced by the latter. This fact was observed even so early as in the days of the Roman Empire. Roman jurists who noted this specially strong tendency of crimes to injure the public, supposed it to be the reason why their forefathers had called crimes "delicta *publica*" and criminal trials "judicia *publica*". As a matter of actual history, those phrases were not suggested originally by this; nor even, as Justinian fancied (Inst. 4. 18. 1), by the rule that any member of the public can prosecute a criminal; but by the fact that in early Rome all charges of crimes were *tried* by the public itself, *i.e.* by the whole

[1] Forgery Act, 1913, s. 9 (*c*).
[2] 6 and 7 Geo. 5, c. 50, s. 28.
[3] 40 and 41 Vict. c. 68.

Roman people assembled in comitia centuriata (see p. 25 *post*). Long after this form of trial had become obsolete, and the origin of the epithet consequently obscure, crimes still continued to be called "public". And the phrase did not end with the Roman law; but, as we have seen, plays a prominent part in the classifications and the definitions of our own Blackstone. Its survival was doubtless due to the recognition of the unmistakable public mischief which most crimes produce. Were only a rough general description to be attempted, this public mischief ought undoubtedly to be made the salient feature. But can we accept it as sufficient foundation for the precise accuracy necessary in a formal definition? Such a definition must give us "the whole thing and the sole thing"; telling us something that shall be true of every crime, and yet not true of any conceivable non-criminal breach of law. Clearly then we cannot define crimes by mere help of the vague fact that "they usually injure the community". For every illegal act whatever, even a mere breach of contract, must be injurious to the community, by causing it alarm at least, if not in other ways also. Indeed had not this been the case, the community would not have taken the trouble to legislate against the act. Moreover we cannot even make the question one of degree, and say that crimes are always *more* injurious to the community than civil wrongs are. For it is easy to find instances to the contrary.[1] Thus, until 9 Geo. 1, c. 22, English law made it no crime to kill another person's horses, though it was a crime to steal them; yet the former wrong, since it involved the actual destruction of wealth, was obviously the more injurious to the community.

Similarly, even at the present day, it is possible that, without committing any crime at all, a man may by a breach of trust, or by negligent mismanagement of a Company's affairs, bring about a calamity incomparably

[1] Cf. p. 20 n. 1 *post*.

more widespread and more severe than that produced by stealing a cotton pocket handkerchief, though that petty theft is a felonious crime. Indeed a person's conduct may amount to a crime even though, instead of being an evil to the community, it is, on the whole, a benefit; as where a defendant was held guilty of the offence of a common nuisance, because he had erected in Cowes Harbour a sloping causeway which to some extent hindered navigation, though by facilitating the landing of passengers and goods it produced advantages which were considered by the jury to more than counterbalance that hindrance.[1]

Hence we cannot say, with anything like that unvarying precision which a definition requires, that a legal wrong is a crime if it tends to cause evil to the community. Nay, it does not necessarily become a crime even when this public evil tendency is expressly recognised by law, and made the sole ground for legally prohibiting the hurtful conduct. For there exists a well-known class of proceedings called "penal actions", by which pecuniary penalties can be recovered—in some cases[2] by any person who will sue for them—from the doers of various prohibited acts; these acts being thus prohibited, and visited with penalties,[3] solely on account of their tendency to cause evil to the community at large, "considered as a community." For example, a person who, in advertising a reward for the return of lost property, adds that "no questions will be asked", incurs by the Larceny Act, 1861[4], a penalty of

[1] *Rex* v. *Ward* (1836), 4 A. and E. 384.

[2] Styled "Popular" actions. In 1912 an informer sued Sir S. Samuel, M.P., for £46,500 as penalties. The words "Henslow, common informer", still legible on the front of Corpus Christi College at Cambridge, are a wrong-doer's protest against a Professor's public-spirited attempt thus to punish bribery at a Parliamentary election; see *The Times*, March 23, 1835.

[3] But "penalty" is *primâ facie* a criminal term; so express words in the Statute are necessary to make a penalty recoverable by civil proceedings, or, even then, by an unofficial informer.

[4] 24 and 25 Vict. c. 96, s. 102. See *Mirams* v. *Our Dogs Publishing Co.*, [1901] 2 K. B. 564.

£50 recoverable by anyone who will sue for it.[1] Yet the litigation by which an informer enforces such a penalty against a wrong-doer is not treated by English law as a criminal, but as a "civil", proceeding; and the wrong-doing itself is not regarded as a crime.[2] This anomalous method of checking ill-doing has long been discredited; but in the early part of the nineteenth century it was so popular with Parliament that every session saw new instances of it enacted.

Hence to speak of crimes as those forms of legal wrong which are regarded by the law as being especially injurious to the public at large, may be an instructive general description of them; but it is not an accurate definition.

(3) The same may be said of a way of distinguishing them which is often adopted in the course of political discussions, and which probably is the one that most naturally suggests itself to an ordinary man's mind—the limitation of the idea of crime to those legal wrongs which violently offend our moral feelings. Here again, however, we only find a rough test; it holds of *grave*[3] crimes in the mass, as contrasted with civil wrongs in the mass, but breaks down when we come to apply it with the universality of a definition. It is in recognition of the fact that many crimes involve little or no ethical blame that Natal

[1] Similarly by 31 Eliz. c. 6, at every election of a fellow or scholar in a College the statutes relating thereto must be publicly read to the meeting, or a penalty of £40 may be recovered from each defaulter "by any person that will sue for the same". Yet this penalty is far from having secured habitual obedience.

[2] *Atcheson* v. *Everitt* (1776), Cowp. 382 (K. S. C. 4). Yet in Private International Law the proceeding is included amongst "penal" actions; and therefore cannot be brought in the courts of a foreign country.

[3] *E.g.* of nearly all indictable offences; but not of more than a tenth of the petty offences that are punished summarily, like cycling offences, or selling bread "otherwise than by weight", or paying wages in a public-house (46 and 47 Vict. c. 31, s. 3). Hence even the official statistics distinguish the "fully, really, and strictly criminal" offences from the mere "quasi-criminal" ones which, though they affect public convenience, involve no dishonesty or violence. See [1915] 1 K. B. 600.

and West Australia, when legally prohibiting the immigration of convicted criminals, limited the prohibition to those whose offences "involved moral turpitude". Thus, for example, Treason is legally the gravest of all crimes, yet often, as Sir Walter Scott says, remembering Flora Macdonald and George Washington,[1] "it arises from mistaken virtue, and therefore, however highly criminal, cannot be considered disgraceful";—a view which has received even legislative approval, in the exclusion of treason and other political offences from international arrangements for extradition. Again, to take a very different example, the mere omission to keep a highway in repair shocks nobody, but it is a crime;[2] whilst many grossly cruel and fraudulent breaches of trust are mere civil wrongs. Directors of a company may ruin it by the grossest negligence, bringing many shareholders to poverty; and yet incur no criminal liability. Conduct may, indeed, be grossly wicked and yet be no breach of law at all. A man who should callously stand by and watch a child drowning in a shallow pond, would arouse universal indignation; but in England (unlike France) he would have committed neither a criminal nor even a civil wrong.[3] Cf. p. 137 *post.*

This failure of the most approved tests of criminality that are based on the nature or the natural consequences of the criminal acts themselves, may lead us to suspect that there exists no intrinsic distinction between those acts which are crimes and those which are not. It may nevertheless be possible to trace some extrinsic one. For

[1] These historical references were unfortunately reproduced to the author in a Tripos paper thus: "The conduct of Flora Macdonald towards George Washington was treasonable, yet quite praiseworthy."

[2] Yet indictments for it have become rare since 1894, when the Local Government Act empowered the local Road Authority to effect the repairs and recover the cost from the person liable to repair.

[3] Unless he had some *special* duty to the child. A father would have; a grandfather usually would not, *Reg.* v. *White* (1871), 1 C. C. R. 311. See also *Rex* v. *Russell*, [1933] V. L. R. 59.

there may be some unmistakable difference between the respective legal consequences of these two classes of acts. It would, indeed, be purely technical; amounting merely to a distinction between criminal procedure and civil procedure. But it would at any rate enable us to distinguish between these two, and then to define a crime as being "an act which gives rise to that kind of procedure which is styled criminal".

(4) Some writers have laid stress upon a difference between the respective degrees of activity manifested by the State in the two cases. In "civil" matters, say they, the State does not interpose until actual wrong has been done; and, even then, it does not interpose unless some private person institutes litigation; and no person is allowed to institute it except the one who has been directly injured by the wrong. In criminal matters, on the other hand, every fully civilised State maintains an elaborate staff of police to prevent offences from being committed; and, if one be committed, a prosecution may always be—indeed in many countries, it can only be[1]—instituted by public functionaries, without any co-operation on the part of the person injured; and possibly the law may[2] give every person in the community, whether injured or not, a right to institute a prosecution. This contrast is a genuine and a vivid one; and the tendency of modern criminal legislation is to intensify it. Yet it cannot be applied with such unvarying precision as to afford the basis for a definition. For, on the one hand, civil proceedings are often taken in

[1] Thus in France the Code d'Instruction Criminelle provides (Art. 1) that "L'action pour l'application des peines n'appartient qu'aux fonctionnaires". In Scotland, though it is theoretically possible for an injured person to prosecute, such private prosecutions, except in mere petty complaints, are obsolete. *Coats* v. *Brown*, [1909] S. C. 29, was the first for very many (some say four hundred) years. The Lord Advocate must prosecute; or at least authorise the prosecution. Hence actions for Malicious Prosecution, familiar in England, are unknown in Scotland.

[2] It does so in England; *X* can prosecute *Y* for assaulting or libelling *Z*; even though *Z* forbid the prosecution. See p. 185 *post*.

order to obtain an "injunction" against some anticipated wrong which has not yet been actually committed; and, on the other, many offences that are undeniably criminal are so trivial that the police would not interfere beforehand to prevent them. Again, there are some few crimes for which, even in English law, a prosecution cannot be initiated by any private person, even though it be the victim himself, except by direct permission from the State;[1] whilst, as we have seen, those "penal actions" which may be instituted by any private person who chooses to turn informer, are classed amongst civil proceedings. And the fact that there still survive many old local "Associations for the Prosecution of Felons" serves at least to shew that the activity of the State in instituting criminal prosecutions has not always been found adequate.

(5) It might, again, be expected that the two procedures could be distinguished by a difference in the tribunals in which they are employed. But this is not so; for as we shall hereafter see, it often happens, alike in the case of the humblest and of the most dignified tribunals, that both criminal and civil proceedings may be taken in the same court.

(6) But between the two kinds of proceedings themselves various points of contrast have been remarked. It is evident, for instance, that the object of criminal procedure always is *Punishment*; the convicted offender is made to undergo evil which is inflicted on him not for the sake of redress but for the sake of example.[2] The infliction does not provide compensation to the person who has

[1] *E.g.* under the Judicial Proceedings (Regulation of Reports) Act, 1926 (16 and 17 Geo. 5, c. 61), it is an offence to print or publish demoralisingly indecent details of judicial proceedings, or other than certain specified details of matrimonial causes, but no prosecution may be commenced without the consent of the Attorney-General.

[2] The conditional Evil which persons will incur if they break a law, and which thus renders that law binding (*sancit*), is called by jurists its Sanction. Hence they say (paradoxical though it sounds to non-legal hearers) that "Punishment is the Sanction of crimes".

been injured by the crime, but is simply a warning—a *documentum*, as the Roman lawyers called it—to persons in general not to cause such injuries. In civil proceedings, on the other hand, the order which is made against an unsuccessful defendant is usually concerned with no interests but those of the parties to the litigation; the defendant is forbidden to infringe the plaintiff's rights or, still more frequently, is directed to pay him a sum of money in reparation of some right which he already has actually infringed. In assessing that sum of money, the tribunal will usually be guided by the amount of loss the plaintiff has sustained through the wrong, without considering whether or not that amount is large enough to render the payment of it so inconvenient to the defendant as to be a lesson to him. And even in those cases where civil proceedings result, not in a payment of money, but in the defendant's being sent to prison, a similar distinction is traceable. For he will be set free as soon as he is willing to do what the court has ordered; civil imprisonment being only "coercive", and not, like criminal imprisonment, "punitive". At first sight, therefore, it may seem to be quite easy to distinguish civil proceedings from criminal ones, by saying that punishment is always the aim of the latter but never the aim of the former. But when we take a more comprehensive view of civil litigation, we find that there are cases in which a part of its object—and indeed others in which the whole of its object—is to punish. Thus there is a large class of ordinary civil cases in which "exemplary" damages are permitted.[1] Where, for example, a plaintiff has been assaulted or slandered or defrauded, the jury need not limit the damages to such an amount as suffices to make good his loss; they may also take into account the degree of violence or oppressiveness or malice of which the defendant has been guilty, and give more liberal damages in

[1] Pollock's *Law of Torts*, 13th ed., Bk. 1, ch. 5.

retribution of it. Thus in a case of assault, as much as £500 damages have been given for knocking off a man's hat, and a higher court has refused to treat the amount as excessive.[1] Moreover that peculiar class of proceedings called penal actions belong, as we have seen, to civil procedure; and yet they exist solely for the purpose of inflicting punishment. When in such an action, an informer recovers a penalty from some one who—for instance—has opened a place of amusement on a Sunday (cf. p. 17, n. 1), the money is not exacted because the informer has suffered by the wrong-doing, but only because the community desires to prevent such wrong-doings from being repeated. The law inflicts these penalties from precisely the same motive which leads it to send thieves to gaol or murderers to the gallows. We are brought, then, to the conclusion that, whilst punishment is admittedly the object of all criminal proceedings, it sometimes is the object of civil ones also. If the aim of the legislature, in creating any particular form of litigation, clearly was to punish, this raises a strong probability that the litigation ought to be treated as a criminal proceeding. But it gives us a probability only; and not that positive certainty which a definition requires.

(7) If, however, we pass from the purpose with which (in either case) the unsuccessful defendant is made to undergo some evil, or "sanction", to the differences perceptible between the respective sanctions themselves, a more plausible ground of distinction is reached. For it may be said that, on the one hand, all civil sanctions, even those of penal actions, directly enrich some *individual* (whether by awarding him money or by securing him the specific performance of some act to which he has a right); whilst criminal sanctions inflict a loss or suffering that never enriches any individual—though occasionally, as in the cases of fines or confiscations, it may enrich the State.

[1] Cited in 5 Taunton 442.

This is almost precisely true, but not quite. For in "penal actions", unless the statute expressly authorises private persons to act as informers, the State alone can sue and recover the penalty; and yet there is full authority for ranking such suits by it as merely civil proceedings.[1] And, conversely, mere civil actions for debt used, in former days, often to end not in enriching the plaintiff, but merely in imprisoning the debtor; for if the defendant had no property out of which the amount for which judgment had been given could be realised, he himself could generally be seized in execution. And even now, although the Debtors' Act, 1869,[2] has abolished the old matter-of-course imprisonment for debt, yet even under it (s. 5), if the non-payment of a judgment debt is wilful, the debtor may be committed to prison; as also may those who disobey various kinds of orders made at petty sessions for payment of money, *e.g.* for rates, or for maintenance of wives. Several thousands of such orders of commitment are made every year. Such imprisonment of course is, as we have seen, not punitive but only coercive; for the debtor will be at once released if he consents to pay what he owes.

(8) But a real and salient difference between civil and criminal proceedings may be discovered, if we look at the respective degrees of control exercised over them by the Sovereign; not so much in respect (as we have already said) of their commencement as of their termination. Austin[3] has established that the distinctive attribute of criminal procedure, in all countries, lies really in the fact that "its sanctions are enforced at the discretion of the Sovereign". This does not mean that the Sovereign's permission must be obtained before any criminal pro-

[1] See *Rex* v. *Hausmann* (1909), 3 Cr. App. R. 3; *Att.-Gen.* v. *Bradlaugh* (1885), 14 Q. B. D. 667 (K. S. C. 7); *Att.-Gen.* v. *Bowman* (1791), 2 B. and P. 532.

[2] 32 and 33 Vict. c. 62.

[3] *Lectures on Jurisprudence*, Lect. xxvii.

ceedings can be taken, but that he can at any time interfere so as to prevent those proceedings from being continued, and can even grant a pardon which will release an offender from all possibility of punishment. Thus the "sanctions", the punishments, of criminal procedure are remissible by the Crown. Moreover they are not remissible by any private person. Such a person may be the sole victim of the crime, he may even have taken the trouble to commence a prosecution for it, yet these facts will not give him any power of final control over the proceedings; and no settlement which he may make with the accused offenders will afford the latter any legal immunity. The prosecution which has been thus settled and abandoned by him may at any subsequent time, however remote, be taken up again by the Attorney-General or even by any private person. Thus in *Rex* v. *Wood* (1831)[1], a man had begun a prosecution against the keeper of a gaming house, and employed a particular solicitor to conduct the proceedings. He afterwards changed his lawyer; and subsequently arranged matters with the defendant and dropped the prosecution. Thereupon the original solicitor took it up, and brought it to trial. The former prosecutor protested against this activity, but in vain; the Court of King's Bench insisted that the case must proceed. All this is in striking contrast to the rules of civil procedure, where the party injured usually has an absolute legal power of settling the matter and of remitting the sanction, alike before he has commenced proceedings and after he has commenced them; whilst the Sovereign, on the other hand, has usually no power to interfere, and no pardon granted by him could relieve the offender from his liability to make redress to the injured person.

Austin here has suggested a true principle of demarcation; (though, to avoid including actions for recovery of the Crown's debts or other civil rights, we should add that

[1] 3 B. and Ad. 657. Cf. *Smith* v. *Dear* (1903), 88 L. T. 664.

all criminal sanctions "are imposed with a punitive purpose"). But he suggested it only in general terms; so that, for any particular system of criminal law, some difficulty may arise in expressing it with the completeness locally necessary. Thus in English law two exceptional rules must not be overlooked. One is that the Crown's power of pardon, though nearly universal, is not absolutely so (*post*, p. 592). For by the common law a public nuisance, whilst still unabated, cannot be pardoned; and by the Habeas Corpus Act, another offence, that of sending a man to prison outside England, is also made unpardonable, lest politicians obnoxious to the Crown should be kidnapped by Crown servants with impunity. Accordingly the punishment of these two offences is not remissible; (except, of course, by passing a special Act of Parliament, an anomalous interference with the rules of law such as would equally suffice to remit any non-criminal sanction). We must therefore modify Austin, and not say more than that "crimes are wrongs whose sanction is punitive, and is in no way remissible by any private person, but is remissible by the Crown alone, *if remissible at all*".[1] The other qualification in English law arises from the anomalous character of those penal actions by a "common informer" which in this country complicate so artificially the natural boundary between criminal and civil law. Were it not for them, it would be sufficient to say simply, with Austin, that the sanctions of civil procedure are always remissible by the party suing and are never remissible by the Crown (unless it be itself that party). But penal actions have long ceased to be remissible quite freely by the party suing; for 18 Eliz. c. 5 requires him to obtain leave from the court before compromising the action. Moreover they have always been to

[1] This definition is discussed and criticised in *The Province of the Law of Tort* by Prof. P. H. Winfield, ch. VIII, "Tort and Crime". Cf. C. K. Allen, *Legal Duties*, pp. 221–252.

some extent remissible by the Crown; for, even at common law, the Crown always had power to give a valid pardon before any informer had commenced an actual suit; (though not after he had commenced one and so secured to himself a vested interest in the penalty). And under some statutes, like the Remission of Penalties Act, 1875, the power is not terminated even by a suit being brought.[1] Hence, to allow for the peculiarities of this form of civil procedure, we must modify Austin's account of civil wrongs, and say that a wrong is civil if *any* power of remitting its sanction can be exercised, whether freely or even under restrictions, by any private person. The Crown may, as we have seen, though only in one rare and peculiar class of cases, have the power of remitting a civil sanction. But no private person can ever grant a valid remission of any criminal sanction. Herein lies the only ultimate and unvarying distinction between the two kinds of procedure (though, as we have seen, the familiar everyday instances of both are characterised by other and more conspicuous, though less indispensable, distinctions). For the judicial proceedings taken against a wrong-doer may produce a variety of results. There may be:

1. Civil proceedings producing merely restitution or compensatory damages. Plaintiff is actually out of pocket by paying his own costs.

2. Civil proceedings producing efficient redress (*i.e.* both damages and also costs, or specific redress, or prevention). A "documentum" to defendant; but plaintiff is not enriched.

3. Civil proceedings producing exemplary damages. A

[1] See for instance the effect of this Act (38 and 39 Vict. c. 80) in extending the Crown's power of pardoning offences committed against 21 Geo. 3, c. 49 which restrains the holding of concerts and other public entertainments on Sunday. Cf. *Orpen* v. *New Empire Ltd.* (1931), 48. T. L. R. 8, and see Sunday Entertainments Act, 1932.

documentum to defendant, and an actual profit to plaintiff.

4. Civil proceedings in which an informer receives or shares a penalty. A documentum to defendant, and an actual profit to plaintiff. See instances on p. 7.

5. Civil proceedings in which the Crown receives the whole of a penalty.[1] A documentum to defendant, but a profit to the State alone.[2]

6. Criminal proceedings. A documentum to the defendant; either a profit to the State alone, or, more usually, no profit even to it.

In recent years the question as to the dividing line between civil and criminal proceedings has assumed great practical importance, and has occupied the attention of the English courts with unusual frequency. For many controversies have arisen under the Judicature Act, 1873, which, when creating a general Court of Appeal for *civil* cases, enacted (by s. 47) that no appeal to it should lie "in any criminal cause or matter".[3]

In dealing with these cases,[4] the courts have recognised that a matter may be criminal even though it be too trivial to end in trial by a jury or in an imprisonment. Thus it is a "crime" not to send your child to school;[5] though it

[1] These are now decided to be civil (and even when the penalty is enforceable by an imprisonment, if it be a Coercive—not a Punitive—one). See p. 14, n. 1, *ante*.

[2] *E.g.* proceedings against an M.P. for voting before taking the Parliamentary oath. Or proceedings for smuggling. Or for making a false return of income for the purpose of income tax (here the offender may also be prosecuted *criminally*, under s. 5 of the Perjury Act, *post*, p. 355).

[3] Re-enacted in effect by 15 and 16 Geo. 5, c. 49, s. 31. The question whether proceedings are criminal or civil is of practical moment also as affecting the rules of Evidence, the parties' power of compromising the dispute or of waiving the rules of procedure, the Crown's power of pardon, and the risk of an action for malicious prosecution.

[4] The cases are cited and their effect discussed in "The Nature of a Crime", *Legal Duties*, by C. K. Allen, pp. 230 *et seq.*

[5] *Mellor* v. *Denham* (1879), 5 Q. B. D. 467. Everyone commits a misdemeanor who wilfully disobeys any statute by doing any act which it forbids, or by omitting to do any act which it requires to be done, and which concerns the public or any part of the public, unless it appears

cannot be prosecuted in any higher tribunal than a police-magistrate's, and the utmost possible punishment for it is a fine of a sovereign. Similarly they recognise that a matter may be criminal without involving any moral turpitude; as where a limited company omits to send to the Registrar of Joint Stock Companies the annual list of its members.[1] Up to the present time, they have found it a practically sufficient test to inquire whether the object of the proceedings is punitive or not. They regard any proceedings as "criminal" which may terminate in the infliction of a Punishment; even though it be merely a pecuniary fine; and even though this fine be not inevitable but only alternative, *e.g.* where the defendant might either have been ordered to pay a fine or to abate the nuisance complained of, and in fact only the abatement was ordered, so that no fine was imposed.[2] For proceedings which are not punitive cannot (*ante*, p. 12) be criminal, and proceedings which are civil are very seldom punitive; so that in the vast majority of cases this simple test, punitiveness or nonpunitiveness, will answer the question as to who has the legal power of remitting the sanction.[3] But it is upon this last and fundamental question that, as we saw (p. 14), the criminal or civil character of the proceedings finally depends.

from the statute that it was the intention of the legislature to provide some other penalty for such disobedience (Stephen, *Digest of Criminal Law*, 7th ed. Art. 166).

[1] 19 and 20 Geo. 5, c. 23, s. 108.

[2] *Reg.* v. *Whitchurch* (1881), 7 Q. B. D. 534. As non-civil imprisonment may follow (*post*, ch. XXIX) in default, sometimes even non-wilful default, of payment of a punitive fine, the essential mark of Crime is usually spoken of as being liability (either immediate or on default)—not to *Punishment*, in general, but—to such imprisonment. Cf. *Robson* v. *Biggar*, [1908] 1 K. B. 672, where the penalty imposed on a distrainor who overcharges, though it can be recovered only by the party aggrieved, was held to be criminal; because imprisonment could be inflicted in default of payment. See also *Seaman* v. *Burley*, [1896] 2 Q. B. 344.

[3] *E.g.* if a commitment for contempt of court was meant to be a punitive one, the Sovereign (or similarly a colonial governor acting on his behalf) can release the offender; *Bahama Islands* (*In the matter of*), [1893] A. C. 138.

Inasmuch as the difference between crimes and civil injuries does not consist of any intrinsic difference in the nature of the wrongful acts themselves, but only in the legal proceedings[1] which are taken upon them, the same injury may be both civil and criminal; for the law may allow both forms of procedure if it like. And, in this very way, the distinction between civil wrongs and crimes was formerly much obscured in England, when our civil courts were allowed to try "Appeals of Felony". The sole object of such a proceeding was to inflict capital punishment upon a man guilty of heinous crime. Yet the proceeding was taken in a civil court; and was conducted by civil rules of procedure (the accused, for example, being defended by counsel, though none would have been allowed to him in a criminal court); and, whilst it might be compromised by the plaintiff,[2] it could not be defeated by any pardon from the Crown. This anomalous remedy was not formally abolished until 1819; and so late as in 1818, in *Ashford* v. *Thornton*,[3] an accuser actually instituted an "Appeal". Even then the abolition was resisted by some of the most progressive politicians, on the ground that such proceedings afforded the only sure means by which over-zealous soldiers or constables, who acted with an illegal excess of violence, could be brought to punishment without the possibility of their being shielded by the Crown.[4] From this point of view, no less eminent a judge than Chief Justice Holt had eulogised Appeals as "a true badge of English liberty".

[1] Thus proceedings to enforce payment of rates are (1) for a general district rate, civil ([1899] 1 Q. B. 273); yet (2) for a poor-rate, criminal ([1896] 2 Q. B. 344); though the ethical guilt and the evil to the community are alike in both cases.

[2] "An 'appeal' is a private suit, wholly under the control of the party suing. *Execution is at his option.* His sole object may be to get money" (Bayley, J.).

[3] 1 B. and Ald. 423. For the details of this remarkable case see *All the Year Round* for May, 1867.

[4] See Bentham's *Works*, VIII, 539.

But, though Appeals have been abolished, it still remains possible that the same wrongful act may be followed up by both civil and criminal proceedings. For almost every crime admits of being treated as a "tort", *i.e.* as a civil injury, so that the person wronged by it can sue the wrong-doer for pecuniary compensation. Blackstone even goes so far as to say, universally, that every crime is thus also a private injury;[1] but of course this cannot be the case with those offences which do not happen to injure any particular private individual. Of such offences there are three groups. There are the cases in which a crime affects the State alone; as where a man publishes a seditious libel or enlists recruits for the service of some foreign belligerent. Again, there are the cases in which, though the crime is aimed against a private individual, its course is checked before it has reached the point of doing any actual harm; as where an intending forger is charged only with "having in his possession a block for the purpose of forging a trade-mark", or with possessing bank-note paper without lawful excuse, or with engraving a bank-note plate without lawful excuse. And, thirdly, there are cases in which though a private individual does actually suffer by the offence, yet this sufferer is no other than the actual criminal (who, of course, cannot claim compensation from himself); as in cases of attempted suicide, or (under 20 and 21 Geo. 5, c. 17) of a tramp's "wilfully destroying" his own clothes whilst receiving shelter in the casual ward of a workhouse.[2]

In, however, the vast majority of cases, he who commits a crime does thereby cause actual hurt to the person or property of some other man; and whenever this is so, the crime is also a tort.[3] But though most criminals are thus liable to be sued, in civil proceedings, for pecuniary

[1] 4 Bl. Comm. 5. [2] See p. 382 *post.*

[3] Thus after acquittal when indicted for assault, a man may still be sued civilly for damages for it; 12 East 409, but see p. 185 *post.*

compensation for the harm which they have done, such proceedings are rarely brought. For most crimes are committed by persons so poor that no compensation could be obtained from them. Hence libel and assault, since they are the crimes least unlikely to be committed by rich people, are the only crimes for which a resort to civil proceedings is at all common in practice; but they are very far from being (as is sometimes hastily inferred) the only crimes where it is possible. The victim of a rape has brought an action for damages against her ravisher;[1] and the circumstances which give rise to a prosecution for bigamy would often support civil proceedings for the tort of Deceit. Criminal wrongs and civil wrongs thus are not sharply separated groups of acts; but are often one and the same act as viewed from different standpoints, the difference being one not of nature but only of relation. To ask concerning any occurrence, "Is this a crime or is it a tort?" is—to borrow Sir James Stephen's apt illustration —no wiser than it would be to ask concerning a man, "Is he a father or a son?" For he may well be both.

If we know any particular occurrence to be a crime, it is easy—as we have seen—to ascertain whether or not it is also a tort, by asking if it damages any assignable individual. But there is no corresponding test whereby, when we know an occurrence to be a tort, we can readily ascertain whether or not it is also a crime. We cannot go beyond the rough historical generalisation that torts were erected into crimes whenever the law-making power had come to regard the mere civil remedy for them as being inadequate. Inadequate it may have been on account of their great immorality, or of their great hurtfulness to the community, or of the greatness of the temptation to commit them, or of the likelihood of their being committed by persons too poor[2] to pay pecuniary damages. The

[1] *S.* v. *S.* (1889), 16 Cox 566.

[2] Thus the Musical Copyright Act, 1906, was enacted to check the sale of pirated music by penniless street-hawkers.

easiness of the legal transition from tort to crime is vividly illustrated by the ancient Norman custom of the "Clameur de Haro", still surviving in our Channel Islands, by which a person who is suffering from a tort may cause any further continuance of that tort to become an actual crime, by merely uttering, in the wrong-doer's presence, an archaic invocation of the protection of Duke Rollo.[1]

By a paradox, familiar to all readers of Sir Henry Maine's *Ancient Law*, the codes of archaic civilisations may equally well be described as utterly ignoring crime or as being mainly occupied with it.[2] For whilst the chief task of a primitive lawgiver is to cope with those acts of serious violence which mature civilisations repress by criminal punishment, yet his only means of coping with them is by exacting the claims of the private individuals who have been injured. The idea of repressing them by a further sanction, imposed in the collective interests of the community, is not reached until a late stage of legal development. The process of evolution may sometimes be traced through successive periods. In the earliest, the State recognises the need for redress, but only as for a merely private wrong; and so the amount of redress, and sometimes even the mode of redress, are left to the discretion of the injured person or his relatives. Even the Mosaic legislation left this primitive Bedouin rule in force for every homicide that was wilful, and bade the elders of the murderer's own city "fetch him and deliver him into the hands of the Avenger of Blood" (Deut. xix. 12). Even within living memory popular sentiment in Corsica recognised these vendettas as permissible, if not even obligatory. In Abyssinia the penalty for manslaughter is death; but the family of the victim may (A.D. 1923) waive it by accepting money instead.[3] A decided advance in

[1] See M. Glasson's article on the Clameur, in *La Grande Encyclopédie*.

[2] Study *Legal Duties*, by C. K. Allen, pp. 221–226.

[3] Rey's *Unconquered Abyssinia*, p. 117. Similarly in Tunis the first French code allowed (s. 216) a *prix du sang*, accepted by the victim's family, to release even a murderer.

civilisation is made when the penalty of any given class of crimes is specified and limited; a fine of sheep or cattle, it may be. The injured persons still retain the privilege of exacting it, but it is all that they can exact. A good instance is that law ascribed to Numa Pompilius which mitigated in this way the vengeance for mere manslaughter: "Si quis occidisset hominem, pro capite occisi agnatis ejus in concione offeret arietem."[1] And, nearer home, a more familiar instance may be found in the Anglo-Saxon wér-gild, claimable by the kinsmen of a murdered man, and nicely graduated according to his status; twelve hundred shillings for a thegn, but only two hundred for a villein, and forty for a slave, and less for a Welshman than for a Saxon.[2] Later on, again, it comes to be perceived that when one member suffers the community suffer; and hence that a compensatory expiation is due not only to the victim and his kindred but also to the State. So perhaps a fine is exacted on behalf of the community, either in addition to or instead of the private one; and probably some person is specified who shall exact it. The fourth and final stage of the process[3] is reached when the State realises that her interest in the preservation of order is so great that she must no longer remain content with saying that those who violate order shall afterwards compensate her; she must now by severer threats deter them from committing any such violation. The idea of a true Punishment is thus made to supersede all idea of compensation to the community. It overshadows even the idea of compensation to the injured; though for some time the consent of the injured may perhaps be thought

[1] Clark's *Early Roman Law*, pp. 44–50.

[2] Pollock and Maitland's *Hist. Eng. Law*, I, 26, II, 448. Maitland's *Domesday Book and Beyond*, p. 31. Cf. Homer's "blood-price", Pope's *Iliad* ix, 632 and xviii, 497; and the dissertation in Butcher and Lang's *Odyssey*, p. 408.

[3] The stages of evolution are well illustrated in the Babylonian code of Hammurabi; see Dr Johns' cheap and excellent translation.

necessary, at the outset of prosecutions, to enable the public punishment to take precedence of the private penalty or supersede it. (Traces of that conception are discoverable even now in our own English criminal courts when, in dealing with some slight offence, they mitigate the punishment "because the prosecutor does not press the case",[1] or they even give him leave to settle the matter and withdraw the prosecution.) A good example of the introduction of true punishment is afforded by the law, attributed to Numa Pompilius, which punished murder: "Si qui hominem liberum dolo sciens morti duit, paricidas esto."[2] But no additional example is afforded by early Roman legislation, even when we come down to the XII Tables; unless it be in the penalty of retaliation for a "membrum ruptum", but even this was perhaps regarded by the lawgivers rather as a source of gratification to the party originally maimed, than as a punishment by which the State sought to deter men from maiming its citizens. In like manner, the English conquerors of Ireland superseded the ancient fines for homicide by the punishment of death. They pronounced those Brehon fines to be "contrary both to God's law and man's"; yet it was only late in the twelfth century that such fines had been superseded in their own England.[3] Punishments thus instituted in the interests of the State would at first be imposed by direct action of the State itself or its delegate; thus in early Rome each sentence was pronounced by a special lex of the great national assembly, the Comitia (see p. 6 *ante*). As time went on, the function of administering criminal justice would come to be delegated to representatives. Sir Henry Maine[4] has shewn how, in the typical case of Rome, the Comitia came to delegate criminal cases, one by one, each to a special committee (quaestio), nominated for the particular occasion; and later on, to

[1] 8 Cr. App. R. 271. [2] Clark's *Early Roman Law*, pp. 42, 45.
[3] Pollock and Maitland, II, 458. [4] *Ancient Law*, ch. x.

adopt the practice of appointing these quaestiones for a period, with power to try all cases, of a given class, that might arise during that time; whilst, ultimately, they were appointed permanently, as true forensic Courts.

Even in England the process of turning private wrongs into public ones is not yet complete; but goes forward year by year, whenever any class of private wrong—or even of acts that have never yet been treated as wrongs at all—comes to inspire the community with new apprehension, either on account of its unusual frequency or of some new discovery of its ill effects. Thus it was not until Hanoverian reigns that the maiming or killing of another man's cattle, or the burning of his standing corn, were made crimes; though they were wrongs as injurious to the owner as theft, and to the community still more injurious than theft. It was not until 1857 that it was made a crime for a trustee to commit a breach of trust;[1] and not until 1868 that it was made a crime for a partner to steal the partnership property.[2] Every year sees Parliament create some new crime; though, in most cases, of a character much more trivial than such instances as those just now quoted. Probably the multiplication of crimes would have gone on even more rapidly than it has done, but for the fact that various forms of misconduct, which otherwise would naturally have come to be restrained by criminal prohibitions, were already under an adequate deterrent sanction in the shape of some abnormal form of civil proceedings, such as an action for "exemplary damages",[3] or, again, for a penalty recoverable by the first informer.[4]

Whilst a quickened public conscience thus extends the criminal law, that law in its turn stimulates the public conscience; as has been vividly shewn during the past

[1] 20 and 21 Vict. c. 54. See p. 216 *post*.
[2] 31 and 32 Vict. c. 116.
[3] *Ante*, p. 12.
[4] *Ante*, p. 7.

century in the instances of duelling, of cruelty to animals, and of bribery at elections. And the same advance in civilisation which expands the law of crime should see crime itself diminish—more forms of evil prohibited, but fewer evil acts committed.

As criminal law develops, it moreover scrutinises more closely the mental condition of offenders; both for the punishing and for the preventing of crimes. Primitive lawgivers looked to physical conduct; and concerned themselves very little with its physical cause. They punished an injury even if it were merely accidental; but ignored evil endeavours that fell short of accomplishment. We shall see, in Chapters III, IV, V, how great a contrast in this respect is presented by modern law.

CHAPTER II

THE PURPOSE OF CRIMINAL PUNISHMENT

THE inquiry will naturally suggest itself: Under what circumstances does it become wise thus to issue a new criminal prohibition? All modern legislatures are constantly being requested to pass enactments punishing some prevalent practice which the petitioners consider to be injurious to the community and which, whether from selfish or from philanthropic motives, they desire to see repressed. But Bentham[1] has vividly shewn that a lawgiver is not justified in yielding to such appeals merely because it is established that the practice in question does really injure his subjects. Before using threats of criminal penalties to suppress a noxious form of conduct, the legislator should satisfy himself upon no fewer than six points.

1. The objectionable practice should be productive not merely of evils, but of evils so great as to counterbalance the suffering, direct and indirect, which the infliction of criminal punishment necessarily involves. Hence he will not make a crime of mere Lying; unless it has caused a pecuniary loss to the deceived person and thereby become aggravated into Fraud.

2. It should admit of being defined with legal precision. On this ground, such vices as ingratitude, or extravagance, or gluttony (unlike drunkenness), do not admit of being punished criminally.

3. It should admit of being proved by cogent evidence. The untrustworthiness of the only available evidence has been one great cause of the reluctance of experienced legislators to deal criminally with offences that are purely

[1] Bentham's *Principles of Morals and Legislation*, chap. XV; and his *Principles of Penal Law*, II, 1. 4. Cf. *Quarterly Review*, Jan. 1923.

mental, like heresy and conspiracy and the "compassing" of treason; and even with those which consist of merely oral utterances (hard to remember with precision) like slander.

4. Moreover this evidence should be such as can usually be obtained without impairing the privacy and confidence of domestic life. Hence, in England, the criminal law does not punish drunkenness, unless seen in a public place.

5. And even if an offence is found to satisfy all these intrinsic conditions of illegality, the lawgiver should not prohibit it, until he has ascertained to what extent it is reprobated by the current feelings of the community. For, on the one hand, that reprobation may be sufficiently severe to remove all necessity for those more clumsy and costly restraints which legal prohibition would impose; just as in England at the present time, it is really by public sentiment, and not by the unpopular Sunday Observance Act of Charles II, that our habitual abstinence from trade and labour on Sundays is secured. Or, on the other hand—as has sometimes been shewn by prosecutions, under the same statute, of bakers and crossing-sweepers for pursuing their callings on Sundays—public opinion may regard an offence so leniently that the fact of a man's having to undergo legal penalties for it would only serve to secure him such a widespread sympathy as would countervail the deterrent effect of the punishment. Hence whist-drives are prosecuted only fitfully. Criminal legislation must only aim at expressing, as Prof. Ottley says, "the judgment of the *average* conscience as to the *minimum* standard of Right". To elevate the moral standard of the less orderly classes of the community is undoubtedly one of the functions of the criminal law; but it is a function which must be discharged slowly and cautiously. For attempts at a rapid and premature elevation are apt, as in the case of the Puritan legislation of the Cromwellian period, to provoke a reaction which defeats their aim. An admirable illustra-

tion of the caution which a wise legislator exercises in undertaking the tasks that moral reformers commend to him, is afforded by the English law of sexual offences (*post*, p. 166). It does not inflict criminal penalties upon all those acts which the ecclesiastical law prohibits and used to punish, and which the law of contract still visits fitly with the sanction of Nullity. It selects out of them, for criminal prohibition, those alone in which there is also present some further element—whether of abnormality or violence or fraud or widespread combination—that provokes such a general popular disgust as will make it certain that prosecutors and witnesses and jurymen will be content to see the prohibition actually enforced.

6. Whenever any form of objectionable conduct satisfies the five foregoing requisites, it is clear that the legislature should prohibit it. But still the prohibition need not be a criminal one. It would be superfluous cruelty to inflict criminal penalties where adequate protection can be secured to the community by the milder sanctions which civil courts can wield.

Hence breaches of contract have rarely been criminally dealt with. For, even when intentional, they are seldom accompanied by any great degree of wickedness or any great public risk; or by any great temptation which the fear of an action for damages would not be likely to counterbalance; or by any ill effects to the other contracting party which such an action could not repair. It has, however, been made a crime for a workman to break his contract of service whenever the probable consequences will be to endanger life or to expose valuable property to serious injury; (38 and 39 Vict. c. 86).[1] Again, violations of the rights of property, whenever they are merely unintentional, are usually sufficiently restrained by the fear of a mere civil sanction, viz. the payment to the injured person of a sum of money co-extensive with the

[1] p. 344 *post*.

loss that has been inflicted, and of a further sum towards the "costs" which he has incurred by the litigation. But there are other forms of wrong-doing upon which the fear of damages and costs, or even of such mild forms of imprisonment as a civil court can inflict for breach of any injunction which it has laid upon a defendant, do not impose an adequate restraint. Thus the case may be one in which the offender belongs to a class too poor to have the means of paying pecuniary compensation. Or the harm done to the immediate victim of the crime may be such that it cannot be redressed by pecuniary compensation; as in the case of murder. Or, as is far more commonly the case, the gravity of the offence, or the strength of the temptation to it, may be such that every instance of its commission causes a widespread sense of insecurity and alarm. In that case there is, beyond the immediate and direct victim who has been robbed or wounded, an unknown group of "indirect" sufferers; who, if only because they are unascertainable, cannot have pecuniary compensation given them for the suffering that has been caused to them. In such cases the lawgiver must adopt some more stringent remedy. He may, for instance, take precautions for securing some Antecedent interference which will check the wrong-doer at the incipient manifestations of his criminal purpose; interference such as our Saxon ancestors attempted to provide by their system of Frankpledge, which made it the direct interest of a man's neighbours to keep him from crime, and as Sir Robert Peel provided in the nineteenth century when he secured the establishment of the vigilant force of policemen with whom even the current slang of the streets still associates his Christian name. Or he may adopt the easier and more common, but less effective, method of a Retrospective interference; by holding out threats that, whenever a wrong has been actually committed, the wrong-doer shall incur punishment.

To check an offence by thus associating with the idea of it a deterrent sense of Terror, is possible only when both of two conditions are present. For (1) the wrong-doer must know he is doing wrong; for otherwise a terror would not affect him, and so not deter. It is on this ground that immunity from punishment is conceded to a man who has taken another's property by mistake for his own, or has committed a murder in a fit of insanity. Nor does it suffice that he knows that what he is doing is wrong, unless also (2) he can "help" doing wrong: for a man ought not to be punished for acts which he was not, both physically and mentally, capable of avoiding; since the fear of punishment could not have the effect of making him avoid them. (Hence comes the reluctance which lawgivers have often shewn to punish men who have been coerced by threats of death to aid in a rebellion, or who have been hurried into a theft by some kleptomaniacal impulse.) When these two conditions are satisfied, so that the restraint of Terror becomes justifiable, such a restraint is supplied by criminal law very efficiently. For, as we have already seen in our review of the peculiarities which seem to distinguish criminal procedure from civil, the former exposes the offender to more numerous hazards of having litigation instituted against him, as well as to far severer "sanctions" in case of that litigation succeeding; and, at the same time, it diminishes his chances of having these penalties remitted.

According to the most generally accepted writers—as for instance Beccaria, Blackstone, Romilly, Paley, Feuerbach—this hope of preventing the repetition of the offence is not only a main object, but the sole permissible object, of inflicting a criminal punishment.[1] Hence Archbishop Whately vividly says, "Every instance of the infliction

[1] Hence Burnet, J., replied to a protesting prisoner: "Thou art to be hanged, not for having stolen the horse, but in order that other horses may not be stolen."

of a punishment is an instance of the failure of that punishment"; for it is a case in which the threat of it has not proved perfectly deterrent. Whately here embodies an important truth; which had been exaggerated by Whichcote into the over-statement that "The execution of malefactors is no more to the credit of rulers than the death of patients is to the credit of physicians". But, whereas the death of one patient never constitutes any step towards the cure of others, the execution of a man whom the fear of punishment has not deterred from murder, may nevertheless help to deter others. Hence there was sound logic in the often-derided exclamation of the shipwrecked crew who, when they saw a gibbet on the beach where they were washed ashore, cried "Thank God, we've reached a civilised country!"

Criminal punishment may effect the prevention of crimes in at least three different ways.

(*a*) It may act on the body of the offender, so as to deprive him, either temporarily or permanently, of the power to repeat the offence; as by imprisoning him, or by death.

(*b*) It may act on the offender's mind; counteracting his criminal habits by the terror it inspires, or even eradicating them by training him to habits of industry and a sense of duty—"awakening a 'serve me right' feeling" (Lord Haldane). The reforms in prison-management which, mainly under the influence of Howard's initiative, have been carried out during the past century and a half, have been largely directed towards the development of the educational influences that can be thus attempted during imprisonment. There are indeed some criminologists, especially in America, who hold this reformation of the individual punished to be the only legitimate object of punishment (though an object very rarely achieved)—an extreme view which denies to the State so simple and obvious a right as that of self-preservation.

(*c*) Its chief aim is to act on the minds of others, if only in one of the ways in which it may act on his mind; for, though it cannot amend them by education, it may at least deter them by fear.[1] It is in this way that pecuniary penalties help to prevent crime, though incapable of preventing it either in mode (*a*) or as an educative influence.

But beyond this paramount and universally admitted object of punishment, the prevention of crime, it may be questioned whether there are not two further purposes which the legislator may legitimately desire to attain as results, though only minor results, of punishment.

One of these—distasteful as is the suggestion of it to the great majority of modern writers—is the gratification of the feelings of the persons injured. In early law this was undoubtedly an object, often indeed the paramount object, of punishment.[2] Even in Imperial Rome, hanging in chains was regarded as a satisfaction to the kindred of the injured, "ut sit solatio cognatis"; and even in England, so recently as 1741, a royal order was made for a hanging in chains "on petition of the relations of the deceased".[3] The current morality of modern days generally views these feelings of resentment with disapproval. Yet some eminent Utilitarians, like Bentham[4] (and apparently not without support from even so dissimilar a writer as Bishop

[1] That the fear of punishment *can* deter is shewn by the fall in offences against the Education Act when the fine was raised from 5*s*. to 20*s*.; and still more vividly by its efficacy in the training of animals and even of fishes; a pike can by it be taught to swim amongst tench innocuously, or a flea to abstain from jumping. The legislature shewed confidence in that efficacy by the Dangerous Drugs Act, 1923 (as to traffic in cocaine or prepared opium), raising the incarceration imposed by the earlier Act from six months' imprisonment to ten years' penal servitude.

But were Deterrence the *sole* object, it would sometimes impose harsher punishments than public opinion (which usually thinks mainly of ethical Retribution) would tolerate.

[2] Holmes, *Common Law*, p. 34.

[3] Prof. Amos' *Ruins of Time*, p. 23.

[4] *Principles of Penal Code*, II, 16; *Sermons at the Rolls Chapel*, VIII and IX, cf. Henry Sidgwick's *Lectures on Ethics*, p. 357.

Butler), have considered them not unworthy of having formal legal provision made for their gratification. Hence no less recent and no less eminent a jurist than Sir James Stephen maintains that criminal procedure may justly be regarded as being to Resentment what marriage is to Affection—the legal provision for an inevitable impulse of human nature.[1] And a very general, if an unconscious, recognition of this view may be found in the widespread reluctance to punish crimes that are not prosecuted until several years after their commission. The modern community, like those ancient ones which Maine depicts,[2] measures here its own public vengeance by the resentment which the victim of the crime entertains.

There is a second subsidiary purpose of Punishment, which, though not so distasteful as the foregoing one, is almost equally often ignored by modern jurists. This consists in the effects of Punishment in elevating the moral feelings of the community at large. For men's knowledge that a wrong-doer has been detected, and punished, gratifies—and thereby strengthens—their disinterested feelings of moral indignation. They feel, as Hegel has it, that "wrong contradicts right, but punishment contradicts the contradiction". Mediæval law made prominent this effect of punishment. For more than a century past, the tendency of jurists has been to disregard it; but it occupies a large place in the judgment of ordinary men. It had full recognition from practical lawyers so eminent as Sir Edward Fry,[3] Mr Justice Wright,[4] and Lord Justice Kennedy.[5] Prof. Sidgwick testified: "We have long outgrown the stage at which the

[1] The author knew an examinee reproduce this analogy in the startling form that "Stephen maintains that marriage is to love what punishment is to crime".

[2] *Ancient Law*, ch. x.

[3] *Studies by the Way*, pp. 40–71. Cf. *Nineteenth Century*, 1902, p. 848.

[4] *Draft Jamaica Criminal Code*, p. 129.

[5] *Law Magazine*, Nov. 1899.

normal reparation given to the injured consisted in retribution inflicted on the wrong-doer. It was once thought as clearly right to requite injuries as to repay benefits; but Socrates and Plato repudiated this, and said that it could never be right to harm anyone, however he may have harmed us. Yet though we accept this view of Individual resentment, we seem to keep the older view when the resentment is universalised, *i.e.* in Criminal Justice. For the principle that punishment should be merely deterrent and reformatory is, I think, too purely utilitarian for current opinion. That opinion seems still to incline to the view that a man who has done wrong *ought* to suffer pain in return, even if no benefit result to him or to others from the pain; and that justice requires this; although the individual wronged ought not to seek or desire to inflict the pain".[1] It may however be doubted whether any such qualification as that contained in the last fourteen words is really imposed by current opinion.[2]

The view of most people who are not lawyers is thus much the same as that maintained by no less a philosopher than Victor Cousin, in his terse epigram[3] that "punishment is not just because it deters, but it deters because it is felt to be just". They hold with Lord Justice Fry that "the object of punishment is to adjust the suffering to the sin".

And accepted judicial practice, when carefully examined, contains much to corroborate this view, and to shew that Prevention is not the sole object of punishment. For were it so, then (1) an absolutely hardened and incorrigible offender ought to go scot-free, instead of being

[1] *Methods of Ethics*, p. 280.

[2] When, in 1903, the son of Mr Dexter, of New York, was murdered, the bereaved father announced his intention to spend a million dollars, if necessary, to bring the murderer to justice. Yet would current opinion blame this exceptional zeal?

[3] Preface to the *Gorgias* of Plato. Cf. W. S. Lilly, cited p. 39 *post*.

the most severely punished of all.[1] So that in a community utterly defiant of the law such discipline ought to be altogether abandoned as useless. Moreover, if prevention be all, then (2) we should have to consider force of Temptation as being usually reason for increasing the punishment;[2] yet judges have generally made it a ground of extenuation,[3] as when a thief pleads that he stole to satisfy his hunger, or a slayer that he struck under the provocation of a blow. And (3) on the other hand, by a divergence in the opposite direction, the reluctance with which English law admits Duress by any threats to be an excuse for a crime committed by the intimidated agent, and its modern refusal[4] to treat Necessity as an excuse for homicide, even in the extreme case of a starving crew of shipwrecked men, shew again that deterrence cannot be the sole object of punishment; for punishment is thus inflicted where the fear of it could not have sufficed to deter. Indeed the sense of Ethical Retribution seems to play a part even in non-criminal law; for if, in some action of debt or trespass, the judge, in order to save himself trouble by shortening the suit, should offer to pay the plaintiff the damages out of his own pocket, an ordinary plaintiff would feel dissatisfied. Vivid proofs of the influence formerly exercised on criminal law by this idea of Ethical Retribution, may be found in the fact that it sometimes drove the tribunals into the illogical excess of punishing, from mere blind association of ideas, "crimes" committed by non-ethical agents. Instances occur in the mediæval punishments sometimes inflicted on animals for

[1] Thus an able writer (Dr G. V. Poore, *Medical Jurisprudence*, p. 324, ed. 1901) expressly maintains that "In the case of young offenders, one should make an example of them;...but when we deal with a hardened sinner...the sooner we banish from our minds any idea of vengeance the better." To most persons this will appear a precise inversion of the proper contrast.

[2] As in thefts of goods necessarily *exposed*; see p. 251 *post*.

[3] Cf. Prof. Maitland on this paradox; *Mind*, v, 259.

[4] *Reg.* v. *Dudley and Stephens* (1884), 14 Q. B. D. 273. *Post*, p. 86.

homicide;[1] and in the "piacularity" attached in ancient Greece to even inanimate instruments of death, as when, according to Pausanias, the Prytanes at Athens condemned to penal destruction lifeless objects that had accidentally slain a man[2]—a feeling which reappears in the "Deodand" of the old English law of Homicide.[3]

On the other hand, the fact that temptation does not always extenuate, inasmuch as in some classes of offences (especially political and military ones) lawgivers often make it a reason for threatening a graver punishment, shews that the principle of Ethical Retribution is not the only one that guides them, and that they take account also of the necessity of Prevention. A further proof may be found in the comparatively severe punishment inflicted on criminals who through mere negligence (*e.g.* a careless engine-driver), or mere intoxication (*e.g.* a mother overlaying a child in drunken sleep), so that the purely ethical blame is small, have caused some fatal injury. The same lesson is taught, too, on the other hand, by some cases where the divergence from mere Ethics is in the opposite direction; as in the English rules that mere Intention to commit a crime is never punished, and that even the Attempt to commit it is punished but slightly. For in either case the ethical guilt may be just as great as if the guilty scheme had not happened to become frustrated.[4]

It cannot, however, be said that the theories of criminal Punishment current amongst either our judges or our legislators have assumed, even at the present day, either

[1] See Mr G. P. Evans' treatise, *The criminal prosecution of Animals*. In 1595 the city-court of Leyden sentenced a dog that had killed a man "to be hanged, and to remain hanging on the gallows, to the deterring of all other dogs; and his goods, if any, to be forfeited"; *South African Law Journal* for 1907, p. 233.

[2] *Itinerary*, Bk. I, c. 28, s. 11.

[3] *Post*, p. 120.

[4] Hence in French law an attempt to commit any grave crime, which has miscarried "only through circumstances independent of the criminal's own will", is punishable as severely as the consummated offence.

a coherent or even a stable form.[1] To this, in part, is due the fact that—as will be shewn later—our practical methods of applying punishment are themselves still in a stage which can only be regarded as one of experiment and transition.

[1] The student should refer to the discussion of the Purposes of Punishment in Salmond's *Jurisprudence*, 8th ed., ss. 28–31. He may compare with it the views of J. S. Mill (*On Hamilton*, p. 581); Dr Rashdall (*Theory of Good and Evil*, I, 284–312); and of W. S. Lilly (*Idola Fori*, pp. 233–240), who regards Retribution as being "first and beyond all things" the dominant aim of Punishment.

Dr Roscoe Pound, though dissenting from this view, concedes that "Anglo-American lawyers commonly regard the satisfaction of public desires for vengeance as both a legitimate, and a practically necessary, end of penal treatment" (*Criminal Justice in Cleveland*, p. 575, ed. 1922).

CHAPTER III

THE MENTAL ELEMENT IN CRIME[1]

To constitute a crime and subject the offender to a liability to punishment, *i.e.* to produce legal criminal "guilt", a mental as well as a physical element is necessary.[2] To use a maxim, which has been familiar to English lawyers for nearly eight hundred years, "*actus non facit reum nisi mens sit rea*".[3] The physical conduct of the accused may either be active, or may consist of an omission where there is a legal duty to act; and the conduct of the accused must have caused the criminal act which the law seeks to prevent.[4]

In Ethics a guilty mind alone would suffice to constitute guilt. Hence[5] on Garrick's declaring that whenever he acted Richard III he felt like a murderer, Dr Johnson retorted, "Then he ought to be hanged whenever he acts it". But there is no such searching severity in the rules of Law. They, whether civil or even criminal, never inflict penalties upon mere internal feeling, when it has produced no result in external conduct. So a merely mental condition—Shakespeare's "wicked meaning in a lawful

[1] In revising this chapter the editor has drawn freely on three recent articles: "The Mental Element in Crimes at Common Law" by J. W. C. Turner, *Cambridge Law Journal*, VI, No. 1; "Absolute Prohibition in Statutory Offences", by R. M. Jackson, *Cambridge Law Journal*, VI, No. 1; "The Eclipse of Mens Rea", by W. T. S. Stallybrass, 52 L. Q. R. 60.

[2] See Stroud's *Mens Rea*; Austin's *Jurisprudence*, Lectures xviii, xxvi; Clark's *Analysis of Criminal Liability*; Stephen's *General View of the Criminal Law*, 2nd ed., ch. v; Stephen's *History of Criminal Law*, II, 94–123.

[3] Prof. Maitland has traced the use of this aphorism in England back to the *Leges Henrici Primi*, v, 28, and its origin to the echo of some words of St Augustine, who says of Perjury "ream linguam non facit nisi mens rea". *Hist. Eng. Law*, II, 475.

[4] See p. 147 *post*.

[5] Boswell, *anno* 1783.

deed"—is practically never made a crime. If a man takes an umbrella from a stand at his club, meaning to steal it, but finds that it is his own, he commits no crime.[1] It is true that there appears at first sight to be an important exception to this principle, in that form of High Treason called "compassing the King's death".[2] But the exception is only apparent; for the Statute of Treasons goes on to make it essential to a conviction that some "overt act" should have been committed towards accomplishing the end contemplated. In another apparent exception, the misdemeanor of Conspiracy,[3] it is true that the Conspiracy itself is purely a mental state—the mere agreement of two men's minds—and that here, unlike Treason, it is not necessary to a conviction that any act should have been done towards carrying out the agreement; but it would be impossible for two men to come to an agreement without communicating to each other their common intentions by speech or gesture, and thus even in conspiracy a physical act is always present. Hence conspiracies are amongst the commonest instances of the "overt acts" relied upon in charges of Treason.

A still greater divergence from Ethics will be remarked, if we turn from the criminal to the non-criminal branches of Law; for they often inflict their sanctions on mere external conduct, which is not the result of any blameable state of mind. Thus,

(1) In breaches of Contract, the mental and moral condition of the defaulter has no effect upon the question of his liability or non-liability; unless the very language of the contract implies that it can only be broken by some act which is wilful. Thus a wife's covenant in a separation deed "not to molest" her husband, is held not to be broken

[1] But see "Criminal Attempts" by Francis Bowes Sayre in *Harvard Law Review*, XLI, 821. This illustration is discussed by J. W. C. Turner in *Cambridge Law Journal*, V, No. 2, p. 238.

[2] *Post*, p. 307; Stephen, *Digest of Criminal Law*, 7th ed., Arts. 70, 71.

[3] *Post*, ch. XVIII; Stephen, *Digest of Criminal Law*, 7th ed., Art. 66.

by anything but an intentional annoying of him. And, similarly, if the defaulter be liable, the wilfulness or wickedness of his conduct will not affect the amount of the damages to be recovered from him; (except in the case of a breach of promise to marry).

(2) And in Torts the mental condition of the wrong-doer is ignored very largely. But not so nearly universally as in the law of Contract;[1] for there are a few classes of tort (*e.g.* malicious prosecution) in which it is an indispensable element of liability; and in very many (if not, indeed, in all[2]) of the remaining classes, namely the torts in which liability can exist without it, it still may be taken into account in estimating the amount of the damages.

As we have seen there must be a mental as well as a physical element to constitute a crime. The nature of that mental element varies with different offences. It is always essential that the act of the offender should be voluntary. He must be able to help doing what he does. This faculty is absent in persons who are asleep,[3] or are subject to physical compulsion or duress by threats, or whose conduct is due to accident. Where it is absent, an immunity from criminal punishment will consequently arise.

With two exceptions[4] there has always been requisite in Common Law crimes and in many statutory crimes[5] a further mental element—*mens rea* in its true sense.[6] The accused must realise that certain consequences are likely to follow from his conduct, whether that conduct consist of action or of omission to act coupled with a duty to act.[7] He may intend the consequences or be merely reckless or

[1] So in divorce proceedings a wife who has been ravished is not treated as an adulteress (*Long* v. *Long* (1890), 15 P. D. 218); "there cannot be an *innocent* 'adultery'".

[2] Halsbury, *Laws of England* (Hailsham ed.), x, 88.

[3] "If a man walking in his sleep do something, it is not his *act* at all"; Lord Hewart, L.C.J., May 25, 1922.

[4] See p. 46 *post*. [5] See p. 50 *post*.

[6] J .W. C. Turner, *Cambridge Law Journal*, vi, No. 1, p. 34.
J.W. C. Turner, *ibid.* p. 31.

indifferent to them. Mere inadvertence is probably in Common Law crimes (except public nuisance) never sufficient.[1] There must either be desire of the consequences or a reckless risk of their ensuing. Though mere inadvertence is insufficient, it is inevitable that a jury in determining whether or not consequences were foreseen should test proof of foresight by asking themselves whether the consequences must not have been foreseen by a reasonable man, and it is this question which juries are really asked to answer when they are told to consider whether or not an accused has been guilty of "gross" or "criminal" negligence.[2]

The extent to which foresight of the consequences must have extended is of course fixed by law and differs in the case of different crimes. In some crimes emphasis is laid upon a specific intention *e.g.* wounding with intent to cause grievous bodily harm.[3] Sometimes there will be criminal liability where the accused has foreseen not the actual effects of his conduct, but effects of a similar kind.[4] A difference in effect from that foreseen will sometimes reduce criminal liability *e.g.* a man aims at his enemy but hits an animal, and sometimes will increase it *e.g.* a blow is struck intending only to hurt which results in death.[5]

There is less difficulty than might be anticipated in proving the mental element necessary for criminal liability, for, though the burden of proof is upon the prosecution,[6] yet in most cases the law regards the criminal act itself as sufficient *prima facie* proof of the presence of *mens rea.* Every sane adult is presumed to intend the natural consequences of his conduct.[7]

It has been said that the common law only twice[8]

[1] J. W. C. Turner, *Cambridge Law Journal*, VI, No. 1, pp. 39 *et seq.*
[2] See p. 138 *post.*
[3] See p. 167 *post.*
[4] See pp. 159, 170 *post.*
[5] See p. 130 post.
[6] See p. 160 *post.*
[7] Cf. pp. 140, 391 *post*: *Rex* v. *Sheppard* (1810), R. and R. 169 (K. S. C. 463).
[8] See p. 46 *post.*

departed from the rule that to constitute criminal liability there must be *mens rea* in its true sense of foresight of the consequences of conduct. In statutory crimes, however, it is frequently unnecessary to show more than that the accused committed the act forbidden by the statute under which he is charged. Such statutory crimes where *mens rea* is not requisite are steadily increasing both in number and importance. The legislature tends to create such offences where (1) the penalty incurred is not great, but (2) the damage caused to the public by the offence is, in comparison with the penalty, very great; and where (3) the offence is such that there would usually be peculiar difficulty in obtaining adequate evidence of the ordinary *mens rea*, if that degree of guilt was to be required. The absence of *mens rea* may of course always mitigate the sentence imposed, which may sometimes be purely nominal.

The following are instances of this kind of criminal liability:

(*a*) An undischarged bankrupt's obtaining credit for £10 or upwards, without disclosing that he is an undischarged bankrupt; even though he had directed his agent to disclose it, and had reasonable grounds for believing that the agent had done so.[1]

(*b*) Keeping two or more lunatics without a licence; though without knowing the persons to be lunatics.[2]

(*c*) Possessing, for sale, unsound meat; though without knowing it to be unsound.[3]

(*d*) Selling an adulterated article of food; though without knowing it to be adulterated.[4]

[1] *Rex* v. *Duke of Leinster*, [1924] 1 K. B. 311. Cf. 18 Cox 2.
[2] *Reg.* v. *Bishop* (1879), 5 Q. B. D. 259.
[3] *Hobbs* v. *Corporation of Winchester*, [1910] 2 K. B. 471.
[4] *Betts* v. *Armstead* (1888), 20 Q B. D. 771; *Goulder* v. *Rook*, [1901] 2 K. B. 290. *Laird* v. *Dobell*, [1906] 1 K. B. 131, is very strong. Contrast *Derbyshire* v. *Houliston*, [1897] 1 Q. B. 772.

(*e*) Selling intoxicating liquor to a drunken person; though without noticing that he was drunk.[1]

The *actus reus* must of course be committed voluntarily,[2] *e.g.* a butcher who exposes tainted meat in a fit of somnambulism will not be regarded as committing the act of exposing.[3] It must be established that he knew[4] that he was exposing the meat for sale, though it is irrelevant to know whether he knew or could have known that the meat was tainted.[5] What is required is *mens* or *animus* unqualified by *rea*.[6]

In the case too of modern statutory offences a master is sometimes made liable for the act of his servant done without his knowledge and even contrary to his express orders, and that too even where a particular intent has been made necessary for the constitution of the offence.[7] In the case of all ordinary common law offences, the law does not regard a master as having any such connection with acts done by his servant as will involve him in any *criminal* liability for them (whatever may be his liability in a *civil* action of tort or contract), unless he has himself actually authorised them[8] or aided and abetted them.[9] And to render him liable criminally this authorisation must have been given either expressly or else by a general authority couched in terms so wide as to imply permission to execute

[1] *Cundy* v. *Lecocq* (1884), 13 Q. B. D. 207. [2] See p. 42 *ante*.

[3] R. M. Jackson, *Cambridge Law Journal*, VI, No. 1, at p. 91.

[4] The knowledge of a servant may be imputed to a master, see *infra*.

[5] The accused may have intended to do an act which he knew to be forbidden, or it may be that he intended to do a different act, but unintentionally did what was forbidden by statute. In an extreme case it may even be that a statute is so drafted that a man is liable for an involuntary act, *Rex* v. *Larsonneur* (1933), 97 J. P. 206; see R. M. Jackson, *op. cit.* at p. 92.

[6] W. T. S. Stallybrass, 52 L. Q. R. at p. 64.

[7] *Mousell Bros. Ltd.* v. *L. N. W. Ry. Co.*, [1917] 2 K. B. 836.

[8] See *Harvard Law Review*, XLIII, 689.

[9] See p. 98 *post*. In the case of a master mere presence without remonstrance may, it is submitted, amount to aiding and abetting, and acquiescence may sometimes amount to authorisation. Cf. *Moreland* v. *The State* (1927), 139 S. E. 77; *Gough* v. *Rees* (1929), 46 T. L. R. 103; *Newman* v. *Overington* (1929), 93 J. P. 46.

it even criminally.[1] Thus, if a bargeman steers his barge so carelessly that he sinks a skiff and drowns the oarsman, or a chemist's shopman carelessly puts a poison into the medicine he makes up, this negligence of his may involve his master in a civil liability, but not in any criminal one.

So fundamental is this rule that the common law seems to have departed from it in only two instances. At common law the proprietor of a newspaper was liable criminally as well as civilly for libels published by his servants in conducting his newspaper even though he had not authorised their publication;[2] but *now* by the Libel Act, 1843,[3] he may show that the libel was published without his authority and with no lack of care on his part. The other instance is an anomalous offence where the prosecution is criminal merely in form, and in substance and effect is only a civil proceeding:[4] its object usually being not Punishment but simply the cessation of the offence. The offence in question is that of a public nuisance. A public nuisance is an act which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all the King's subjects.[4] In the case of any *private* nuisance, as the remedy is by a civil action, the master is liable, under the ordinary civil rule, for all the acts of his servant done in the course of his employment; even though they may have been done without the master's knowledge and contrary to his general orders.[5] For public nuisances, on the other hand, a civil action can usually[6] not be brought, but only an indictment. There would therefore often be much greater difficulty in

[1] *Rex* v. *Huggins* (1730), 2 Ld. Raymond 1574 (K. S. C. 35); *Hardcastle* v. *Bielby*, [1892] 1 Q. B. 709; *Newman* v. *Jones* (1886), 17 Q. B. D. 132.

[2] *Rex* v. *Walter* (1799), 3 Esp. 21.

[3] 6 and 7 Vict. c. 96, s. 7.

[4] *Reg.* v. *Price* (1884), 12 Q. B. D. 247, 256. Thus see its exceptional position as to Pardon, *ante*, p. 16.

[5] *E.g.* the driver of my traction-engine blocks the street with it; 15 Cox 725.

[6] See Salmond on Torts, 9th ed., p. 293.

obtaining effectual redress for them than for the more trivial class of nuisances, were not the master's liability for his servant's conduct made as general as in the case of mere private nuisance. It accordingly is made so.[1] This rule has the further justification that the master, by the very fact of setting a servant upon work that may result in a nuisance, has brought about a state of things which he ought at his peril to prevent from actually producing that criminal result. Hence, instead of, as in ordinary offences, being liable only if he had authorised the servant's crime, he will, in the case of Nuisance, be liable even although he had actually forbidden it. For here he ought, at his peril, to have seen his prohibition obeyed.

But whilst the common law now recognizes only one instance of this extreme liability, several in recent times have been created by Parliament. Thus, for example, under the Licensing Act, 1910, a publican is held to be liable for the conduct of his servants if they supply refreshments to a constable on duty:[2] or again if they knowingly permit any unlawful game, or any "gaming" to be carried on upon the licensed premises.[3] For as Grove, J., said, "If this were not the rule, a publican would never be convicted. He would take care always to be out of the way." So, too, where servants knowingly harbour prostitutes contrary to the Metropolitan Police Act, 1839, even though contrary to their employer's express instructions, the employer has been convicted of *knowingly* suffering prostitutes to meet on his premises.[4] Again, going still further, a man has even been held responsible for adul-

[1] *Reg.* v. *Stephens* (1866), L. R. 1 Q. B. 702.

[2] 10 Edw. 7, and 1 Geo. 5, c. 24, s. 78. Yet not if the servants did not know him to be on duty; cf. p. 50, n. 3 *post*.

[3] *Ibid.* s. 79. *Redgate* v. *Haynes* (1876), 1 Q. B. D. 89; *Bond* v. *Evans* (1890), 21 Q. B. D. 249. "Gaming" consists in the playing for money or money's worth at any game, even though a lawful one.

[4] *Allen* v. *Whitehead*, [1930] 1 K. B. 211. Cf. *Griffiths* v. *Studebaker Ltd.*, [1924] 1 K. B. 102 (master convicted for using a motor-vehicle without a licence, where his servant used the vehicle contrary to his express orders).

teration effected by a mere stranger, whose acts he had no means of protecting himself against.[1] Where the statute requires guilty knowledge there must be such knowledge at least on the part of the servant. The Pharmacy and Poisons Act, 1933,[2] provides that in proceedings arising out of the unlawful sale of poisons by an employee (*a*) it is no defence that the employee acted without authority and (*b*) knowledge of a material fact by the employee is to be deemed to be the knowledge of the employer. A statute which imposes an absolute prohibition may itself provide a statutory defence.[3] Thus by the Fertilisers and Feeding Stuffs Act, 1926,[4] it is an offence to sell or expose for sale feeding stuffs containing certain deleterious ingredients unless the defendant proves that he did not know and could not with reasonable care have known that the article contained a deleterious ingredient. In such cases the prosecution need only prove the prohibited act, and the defendant must then bring himself within a statutory defence.[5] Another, though quite different, form of vicarious liability is to be found in the provision of the Children and Young Persons Act, 1933,[6] that where a fine, damages or costs are awarded to be paid by a child or young person a court may order that they shall be paid by the parent or guardian unless he satisfies the court that he has not conduced to the commission of the offence by

[1] *Parker* v. *Alder*, [1899] 1 Q. B. 20. Contrast *Brooks* v. *Mason*, [1902] 2 K. B. 743, with *Emary* v. *Nolloth*, [1903] 2 K. B. 264; shewing that the law holds a publican liable for selling liquor in an unsealed vessel to a child under fourteen, although he honestly believed (mistakenly) that it was sealed; yet the law does *not* go so far as to hold him liable for its being similarly sold by his barman who is authorised to sell (unless this barman has the general control of the inn). Either seller's reasonable though mistaken belief that the child is over fourteen *would* excuse him. Cf. *R. C. Hammett* v. *L.C.C.* (1933), 49 T. L. R. 209, where the master was a limited company.

[2] 23 and 24 Geo. 5, c. 25, s. 24 (2).

[3] R. M. Jackson, *op. cit.* at p. 88.

[4] 16 and 17 Geo. 5, c. 45, s. 7 (1).

[5] R. M. Jackson, *op. cit.* at p. 88.

[6] 23 Geo. 5, c. 12, s. 55.

neglecting to exercise due care of the child or young person.

In spite of the frequency of modern statutes creating offences of absolute liability there is still a presumption in construing a statutory definition of a criminal offence that *mens rea* is required.[1] The nature of the liability created depends upon the wording of the statute that creates it, but in general it may be said that the presumption that *mens rea* is required is stronger in old statutes or in statutes embodying a common law offence,[2] or where the punishment for the offence is severe.[3] In acts of Parliament that are recent the courts are less reluctant to dispense with the necessity of *mens rea.* For owing to the greater precision of modern statutes, it is permissible to draw a more emphatic inference from their silence than would be drawn in the case of an older enactment. Hence if the public evil of an offence created by some recent statute be very great, when compared with the smallness of its punishment, then even a mere silence as to guilty knowledge may be sufficient to show that the legislature did not intend ordinary guilty knowledge to be essential to the offence.[4]

In determining whether an Act does create this more stringent prohibition, regard must be paid to "the object of the statute, the words used, the nature of the duty, the person upon whom it is imposed, the person by whom it would in ordinary cases be performed, and the person upon whom the penalty is imposed."[5]

[1] *Re Mahmoud and Ispahani*, [1921] 2 K. B. 716 at pp. 731–2.

[2] Though bigamy (see p. 50 *post*) is not a crime at Common Law.

[3] *Reg.* v. *Tolson* (1889), 23 Q. B. D. 168 at pp. 172–7; though the punishment for the offence for which Prince was convicted (see p. 52 *post*) may be two years hard labour.

[4] *Per* Stephen, J., in *Reg.* v. *Tolson*, *infra*. In contrast with *Tolson's* case, *Rex v. Stocks and Wheat*, [1921] 2 K. B. 119 shews the increasing readiness to give this full effect to mere silence in a penal statute. These two cases can, however, be distinguished, see p. 363 *post*.

[5] *Mousell Bros. Ltd.* v. *L.N.W. Ry. Co.*, [1917] 2 K. B. at p. 845; *Allen* v. *Whitehead*, [1930] 1 K. B. 211. See also "Mens Rea" by Francis Bowes Sayre, *Harvard Law Review*, XLV, 974.

Little reliance can be placed upon the use of such words as "unlawfully" or "wilfully". They seldom add in any way to the degree of *mens rea* requisite. Thus a conviction was upheld for *unlawfully* and *wilfully* killing a house pigeon, though the accused honestly believed it was a wild bird and honestly thought he was exercising his right of protecting his crops.[1] The use of the word "knowingly" may alter the burden of proof; its effect being to throw on the Crown the obligation of proving the ordinary *mens rea* by further evidence than the mere inference from the *actus reus* which, as we have seen,[2] is ordinarily sufficient to prove it.[3] Such evidence may consist, for instance, in expressions of vindictive feeling, or in previous injurious acts nearly identical with the present one; thus negativing the probability of accident or carelessness or ignorance. As we have seen,[4] the guilty knowledge requisite may sometimes be the guilty knowledge of a servant.

Many instances could be given where in spite of silence in a statute *mens rea* has been required. The statute against Bigamy[5] simply specifies the *actus reus*—"being married, marries"—and is silent as to requiring any *mens rea*, yet the great majority of the judges decided in *Reg.* v. *Tolson* (1889),[6] that it will be a good defence to a prosecution for bigamy if the accused contracted the second marriage with an honest and reasonable belief that

[1] *Cotterill* v. *Penn* (1935), 51 T. L. R. 459 (K. S. C. 549); see W. T. S. Stallybrass, 52 L. Q. R. 60. For a discussion of the section under which the charge in *Cotterill* v. *Penn* was brought, see p. 254 *post*. Cf. *Allen* v. *Whitehead*, p. 47 *ante*.

[2] See p. 43 *ante*.

[3] Thus by 10 Edw. 7 and 1 Geo. 5, c. 24 publicans are forbidden to (1) supply refreshments to a constable on duty, or (2) *knowingly* harbour him. Yet guilty knowledge is necessary in both cases; in case (2) the prosecution must prove knowledge, while in (1) the accused must disprove it; see *Sherras* v. *de Rutzen*, [1895] 1 Q. B. 918 (K. S. C. 32).

[4] See *Allen* v. *Whitehead*, p. 47 *ante*.

[5] See p. 358 *post*.

[6] 23 Q. B. D. 168 (K. S. C. 15).

his first wife was dead.[1] Similarly in *Reg.* v. *Sleep* (1861),[2] under a statute which made it an offence simply "to be found in possession of Government stores marked with the broad arrow", and said nothing as to any necessity for guilty knowledge, it was held that the prisoner could not be convicted if the jury found that, though he had possession of such stores, and had reasonable means of knowing of the mark, he neither knew of it nor had wilfully abstained from knowing of it.

As can be seen from *Tolson's* case problems of *mens rea* are closely connected with the defence of mistake of fact. As we shall see[3] a reasonable mistake of fact may be a good defence provided that if the facts had been as the accused supposed them to be he would have been free from *guilt*. It is necessary to determine what is meant by *guilt*. Some mistakes are clearly no defence, *e.g.* the burglar who did not know that nine o'clock had struck (see p. 76 *post*). It would seem that to establish a defence of mistake of fact the accused must shew that on the facts as he supposed them to be he did not have the *mens rea* requisite for the offence in question. Thus in common law crimes, where foresight of similar consequences is required, he must shew that he did not foresee effects similar to those which constitute the *actus reus*.[4] In offences where a specific intent is required it will be sufficient to shew that his mistake prevented him from forming that intent. So where a statute imposes an absolute prohibition the defence of mistake as opposed to that of pure accident can never be successfully raised. Other tests of freedom from *guilt* have been suggested, viz. (*a*) the accused must shew that on the facts as he supposed them to be he committed no sort of criminal offence at all (even one quite different from the offence charged); (*b*) the

[1] Contrast *Rex* v. *Stocks and Wheat*, see p. 49 *ante*.
[2] L. and C. 44. Contrast *Reg.* v. *Woodrow* (1846), 15 M. and W. 404.
[3] See p. 75 *post*.
[4] See p. 43 *ante*.

accused must shew that on the supposed facts he did not even commit an act illegal civilly; (*c*) the accused must shew that on the supposed facts he did not even commit an immoral act. All these tests, however, seem contrary to principle and are based almost wholly on *dicta* of the judges in the famous case of *Reg.* v. *Prince* (1875).[1] Prince had abducted from her father a girl under the age of sixteen; but in the belief on adequate grounds that she was eighteen (in which case the abduction would not have been a crime). It is a criminal offence to take unlawfully any unmarried girl, being under the age of sixteen years, out of the possession and against the will of any person having the lawful charge of her. Prince was convicted.[2] It was held by Brett, J. (afterwards Lord Esher, M.R.), that it was necessary to establish that the accused had knowingly done acts which would constitute a crime. Bramwell, J., appears to have considered that it was sufficient to establish that the accused intended to commit an immoral act. Denman, J., appears to have based liability on the ground that the accused knowingly committed the civil wrong of taking the girl from the custody of her father. It appears, however, that the real reason for the conviction of Prince was simply that he had done the act prohibited by statute.[3] In *Rex* v. *Maughan* (1934),[4] the defence of reasonable belief that a girl was over sixteen was rejected upon a charge of indecent assault upon a girl of under sixteen years of age.[5] The Court of Criminal Appeal stated that, as in *Reg.* v. *Prince*, the act having been absolutely prohibited by statute, the man who did the act took the risk of offending against the

[1] 2 C. C. R. 154 (K. S. C. 21).

[2] For discussions of this case see J. W. C. Turner, *op. cit.* at p. 46, R. M. Jackson, *op. cit.* at p. 86, and W. T. S. Stallybrass in 52 L. Q. R. at p. 64.

[3] See especially the judgment of Blackburn, J., concurred in by nine other judges in 2 C. C. R. at p. 170.

[4] 24 Cr. App. R. 130 (K. S. C. 547).

[5] See p. 182 *post*.

statute.[1] The Court could have based its decision on the ground that Maughan had committed, even on the facts as he supposed them to be, an immoral act, but preferred to take the view that *Reg.* v. *Prince* was decided upon the ground of an absolute prohibition by statute of the act charged. It is submitted that *mens rea* must always be considered in relation to the particular crime charged, and not to criminality, illegality or immorality in general.

NOTE

It may be convenient to the student to add here Prof. Kenny's own discussion of Prince's case.

"We have seen that criminal liability may exist although the offender had no intention to commit the particular crime which he did in fact commit, and that it suffices if he had an intention to commit a crime at all, whatever it were, or even an act that was simply illegal without being criminal. But there remains a further question—whether English law does not even go so far as to permit a still slighter degree of *mens rea* to suffice, viz. an intention to commit some act that is wrong as a breach of the accepted rules of Morality, even though it be not a breach of Law at all. This question was discussed in the elaborately considered case of *Reg.* v. *Prince*, which deserves the most careful attention of the student. Prince had abducted from her father a girl under the age of sixteen; but in the belief, on adequate grounds, that she was eighteen (in

[1] If this be the correct explanation of the decision in *Reg.* v. *Prince*, then *Reg.* v. *Hibbert* (1869), 1 C. C. R. 184 must have been wrongly decided, for in that case an acquittal was directed on a similar charge because the accused did not know and had no reason to know that the girl was under the lawful care of some person having the charge of her. Cf. *Reg.* v. *Green* (1862), 3 F. and F. 274 where Martin, B., directed an acquittal though pronouncing the abductor's conduct "very immoral." *Reg.* v. *Hibbert* could be supported if, where a mistake of fact is raised as a defence, it is necessary to shew that the accused knew that he was acting illegally. Though referred to in argument in both *Reg.* v. *Prince* and *Rex* v. *Maughan*, *Reg.* v. *Hibbert* has never been expressly disapproved.

which case the abduction would not have been a crime). It was held by Brett, J. (afterwards Lord Esher, M.R.), that to constitute criminal *mens rea* there must always be an intent to commit some *criminal* offence. The rest of the court, however (fifteen judges), decided that, upon the construction of the particular statute under which the prisoner Prince was indicted, his conduct was not excused by the fact that he did not know, and had no reasonable grounds for supposing, that he was committing any crime at all. Moreover, independently of the terms of that particular statute, most (or, probably, all) of these fifteen differed from Lord Esher on the general rule of criminal liability; and were agreed in the view that an intention to do anything that is wrong legally, even as a mere civil tort and not as a crime at all, would be a sufficient *mens rea*. Indeed eight of the fifteen, in a judgment delivered by Bramwell, B.[1], expressly went even beyond this; laying down a third view, according to which there is a sufficient *mens rea* wherever there is an intention to do anything that is wrong *morally*, even though legally it be quite innocent, both criminally and civilly. If this opinion be correct, the rule as to *mens rea* will simply be that any man who does any act which he knows to be immoral must take the risk of its turning out, from circumstances not contemplated by him, to be in fact criminal also. This third view has great authority from having been enunciated by so great a number of judges; and it is approved by eminent text-writers. Yet it must be remembered that it was only an *obiter dictum*; being unnecessary for the particular appeal, as there the circumstances actually known to the prisoner made his conduct not merely immoral but also illegal.[2]"

[1] L. R., 2 C. C. R. at p. 176 (K. S. C. at p. 22). Cf. [1899] 1 Q. B. D. at p. 830.

[2] See *per* Denman, J. at p. 178 (K. S. C. at p. 25).

CHAPTER IV

EXEMPTIONS FROM RESPONSIBILITY

We have seen that a mental element, in some shape or other, is a necessary element in every criminal offence. If this element be absent, the commission of an *actus reus* produces no criminal responsibility; any more than when a blow is inflicted by the involuntary jerkings of the limbs of a sufferer from St Vitus's Dance.

Blackstone's classification of the various conditions which in point of law negative the presence of a guilty mind,[1] has become so familiar that it is convenient to adhere to it, in spite of the defects of its psychology. Three of his groups of cases of exemption deserve minute consideration. These are:

I. Where there is no will.

II. Where the will is not directed to the deed.

III. Where the will is overborne by compulsion.

I. *Where there is no will.* (Students of Austin's *Jurisprudence* should be warned that Blackstone's "Will" is not Austin's "Will", *i.e.* a volition, and indeed is not clearly definable at all; but it corresponds roughly with Austin's "Intention".[2]) This absence of will may be due to any one of various causes.

(1) *Infancy.*

The most common cause, one which must place every member of the community beyond the control of the

[1] 4 Bl. Comm. 21.

[2] Austin, Lect. xix; Clark's *Analysis of Criminal Liability*, p. 74.

criminal law for some part of his life, is Infancy. By the law of Crime, infants are divided into three classes:

(i) Those under eight[1] years of age. There is a conclusive presumption that children so young cannot be *doli capax*.[2] Nothing, therefore, that they do can make them liable to be punished by a criminal court; so a child of six, who was arrested for crime, obtained damages from the arrestor.[3] But it is not illegal for parents to administer domestic punishment to such children, if they have in fact become old enough to understand it.[4]

(ii) Between eight[1] and fourteen.[5] Even at this age "infants" are still presumed to be *doli incapax*; but the presumption is no longer conclusive, it may be rebutted by evidence. Yet the mere commission of a criminal act is not, as it would be in the case of an adult, sufficient *primâ facie* proof of a guilty mind. The presumption of innocence is so strong in the case of a child under fourteen that some clearer proof of the mental condition is necessary. This necessity for special proof of a mischievous discretion is impressed upon the jury who try such an infant, by their being asked not only the ordinary question, "Did he do it?" but also the additional one, "Had he a guilty knowledge that he was doing wrong?" A boy under fourteen cannot be guilty of rape or sexual offences.[6] As with adults the guilty mind requisite

[1] The age of immunity was raised from seven (as at Common Law) to eight by the Children and Young Persons Act, 1933 (23 Geo. 5, c. 12), s. 50.

[2] By an uncomplimentary parallel, Prisot, C.J., pronounced them to be "in the same case as an ox or a dog that does harm to a man"; Statham, *tit.* Trespass, pl. 93 (35 Hen. 6).

[3] *Marsh* v. *Loader* (1863), 14 C. B. (N. S.) 535.

[4] *Reg.* v. *Griffin* (1869), 11 Cox 402.

[5] Modern statutory phrases (23 Geo. 5, c. 12, s. 107) are up to fourteen, a "child"; from fourteen to seventeen, a "young person"; from seventeen to twenty-one, "a juvenile adult". In the Education Act, 1921, s. 170, "child" has a slightly different meaning.

[6] *Rex* v. *Tatam* (1921), 15 Cr. App. R. 132.

varies with different crimes, but where the accused is an "infant" it must probably be shewn, even in the case of crimes involving absolute liability (see p. 44 *ante*), that as in the case of insane persons he had knowledge that he was doing wrong.

This guilty knowledge may be shewn by the fact of the offender's having been previously convicted of some earlier crime; or even by the circumstances of the present offence itself, for they may afford distinct proof of a wicked mind.[1] Thus a boy of eight was hanged in 1629 for burning two barns; "it appearing that he had malice, revenge, craft and cunning".[2]

(iii) Between fourteen and twenty-one. A boy knows right from wrong long before he knows how to make a prudent speculation or a wise will. Hence at fourteen an infant comes under full criminal responsibility. But no infant under *eighteen* can be sentenced to death, and no infant under *seventeen* to penal servitude, nor (unless he be "unruly") to imprisonment. And no infant under *fourteen* can ever be sentenced to imprisonment. In all these cases the forbidden punishment is replaced by custody in a remand home or in the case of manslaughter, attempted murder or wounding with intent to do grievous bodily harm by detention for such period as may be ordered by the court and in the case of murder by detention during the King's pleasure in such place as the Home Secretary may direct.[3]

[1] There must be "mischievous discretion", *Rex* v. *Gorrie* (1918), 83 J. P. 136. By the "Lübeck apple proof", if a child was convicted of homicide, he was offered an apple and a penny. If he chose the penny, capacity was held to be established (see W. T. S. Stallybrass in *Journal of Comparative Law* (1932), XIV, p. 51).

[2] 1 Hale P. C. 25. Michael Hamond and his sister, aged *seven* and eleven, were hanged at Lynn for felony, in 1708; Richard's *King's Lynn*, p. 888. A boy of twelve and a half was hanged in New Jersey in 1828; 18 American Decisions 404.

[3] 23 Geo. 5, c. 12, ss. 52, 53 and 54. See also p. 579 *post*.

(2) *Insanity.*[1]

Absence of "Will" may also arise, not from the natural and inevitable immaturity which we just now discussed, but from a morbid condition of mind; whether the temporary delirium of fever or a permanent Insanity.

English law, even in its harshest days,[2] recognised insanity as a possible defence. On the other hand, it has never held (as a popular error imagines it to hold[3]) that the mere existence of any insanity whatever will suffice to exempt the insane person from criminal responsibility.[4] Only insanity of a particular and appropriate kind will produce exemption.[5] For lunatics are usually capable of being influenced by ordinary motives, such as the prospect of punishment;[6] hence they usually plan their crimes with care, and take means to avoid detection.

Careful observation of insane patients, in various countries throughout many years, has now thrown light upon the mental processes of the insane. The world, it is now recognised, is full of "warped" men and women; in whom there exists some taint of insanity, but who nevertheless are readily influenced by the ordinary hopes and fears that control the conduct of ordinary people. To place such persons beyond the reach of all fear of criminal

[1] Stephen, *History of Criminal Law*, II, 124–186; *General View of Criminal Law*, 2nd ed., ch. VI.

[2] Cf. *Kentish Eyre of* 1313 (Selden Society), I, 81; "demens et furiosus, non per feloniam".

[3] But so to hold "would turn the administrators of the criminal law adrift, without a compass, upon a shoreless and starless sea" (Lord Hewart, L.C.J.).

[4] Thus a man who had an insane delusion that his wife had committed adultery with *A* and *B* and *C* was nevertheless sentenced to death for killing *Z*; *The Times*, Oct. 29, 1909.

[5] Similarly in civil matters, the Will of a man who carried on his business intelligently has been held valid although he was so insane as to believe that his "trees were full of crocodiles, and their leaves were birds". Cf. 14 Ch. D. 674.

[6] "Lunatic prisoners, when guilty of assaulting a prison warder, will sometimes say 'You can't touch me; I am a lunatic'". (Dr John Campbell's *Thirty Years' Experiences of a Medical Officer*, p. 92.)

punishment would not only violate the logical consistency of our theory of crime, but would also be a cause of actual danger to the lives and property of all their neighbours. Where insanity takes any such form, it comes clearly within the rule of criminal legislation propounded by Bain:[1] "If it is expedient to place restrictions upon the conduct of sentient beings, and if the threatening of pain operates to arrest such conduct, the case for punishment is made out."

Hence our criminal[2] law divides insane persons into two classes:

(*a*) Those over whom the threats and prohibition of the criminal law would exercise no control, and on whom therefore it would be gratuitous cruelty to inflict its punishments; and

(*b*) Those whose form of insanity is only such that—to use Lord Bramwell's apt test—"they would not have yielded to their insanity if a policeman had been at their elbow".

But the very difficult question as to where the line of demarcation should be drawn between the two classes, is one upon which the law has undergone grave though gradual changes and cannot be said to have developed even now into a complete or even a perfectly stable form. Two centuries ago a view prevailed that no lunatic ought to escape punishment unless he were so totally deprived of understanding and memory as to be as ignorant of what he was doing as a wild beast. But ever since the epoch-making speech of Erskine in defence of Hadfield[3] a more rational view has prevailed; which bases the test upon the presence or absence of the faculty of distinguishing right from wrong in the crime committed.

[1] *Mental and Moral Science*, p. 404.

[2] But English law as a whole is complex with regard to Insanity. "As to crimes, contracts, wills, detention in asylums, and other matters, about eight different tests are applied by it" (McCardie, J.).

[3] (1800), 27 St. Tr. 1281.

This modern view has acquired a degree of authoritative precision unusual for any common law doctrine; through its formulation in an abstract shape, in 1843, by a set of answers delivered by the judges in reply to questions propounded to them by the House of Lords. One Daniel McNaughton[1] had aroused public excitement by the murder of a Mr Drummond, the private secretary of Sir Robert Peel, in mistake for that statesman. The acquittal of McNaughton on the ground of insanity provoked such widespread dissatisfaction that it became the subject of debate in the House of Lords (though the case never came before that House in its judicial capacity). In consequence of the debate, the Lords submitted to the judges certain abstract questions respecting persons afflicted with insane delusions.[2] The replies given by the judges may be summed up thus:

(i) Every man is presumed[3] to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to the satisfaction of a jury.

(ii) To establish a defence on the ground of insanity, it must be "clearly" shewn that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality[4] of the act he was doing, or (if he did know this) not to know[5] that what he was doing was wrong[6] morally.

(iii) As to his knowledge of the wrongfulness of the act,

[1] The name is spelt variously.

[2] *Reg.* v. *McNaughton* (1843), 10 Cl. and F. 200; (K. S. C. 43).

[3] Cf. ch. XXIV *post*.

[4] These two words are mere synonyms (though medical witnesses have often treated their meanings as dissimilar). They refer to the "*physical* nature of the act, as distinguished from moral"; 12 Cr. App. R. 27. *E.g.* the madman cut a woman's throat under the idea that he was cutting a loaf of bread.

[5] Stephen thinks that inability "calmly and rationally" to *consider* its wrongness suffices to disprove this knowledge.

[6] *E.g.* he fancied, like Hadfield, that he had received a Divine command to kill.

the judges say: "If the accused was conscious that *the act* was one which he ought not[1] to do and if that act was at the same time contrary to the law of the land, he is punishable." Thus the test is the power of distinguishing between right and wrong, not, as was once supposed, in the abstract, but in regard to the particular act committed.

(iv) Where a criminal act is committed by a man under some insane delusion as to the surrounding facts, which conceals from him the true nature of the act he is doing, he will be under the same degree of responsibility as if the facts had been as he imagined them to be. He may, for instance, kill under the imagination either that he is an executioner lawfully carrying out a judicial sentence; or, on the other hand, merely that the person killed had once cheated him at cards.

Let us add that, for a defence of insane delusion, the act must be connected with the delusion directly. An instance of such connection (though due not to insanity but to sleep) may be cited from Scotland where a man, dreaming that he was struggling with a wild beast, killed his baby.[2] On the other hand, a man has been convicted of obtaining money by false pretences notwithstanding his

[1] As to the meaning to be given here to "ought not", it was decided in *Rex* v. *Codere* (1916), 12 Cr. App. R. 21, 27, that the meaning is—wrong "according to the ordinary standard adopted by reasonable men". And if he knew (not in mere presumption of law, but actually) that the act was wrong legally, he must—at any rate in serious crimes, though perhaps not always in "minor cases before a court of summary jurisdiction"—be taken to have known that it was wrong by this ordinary moral standard. In *Rex* v. *Pank* (C. C. C., May 21, 1919), the insane prisoner was under the double delusion (1) that his sister-in-law wished to commit adultery, and (2) that it was consequently his duty to kill her in retribution. Darling, J., directed the jury thus: "He knew the nature and quality of his act; for he knew that he was shooting, and that this shooting would kill her. Did he know that it was 'wrong'? If he knew that his act would be wrong in ordinary circumstances, it is no defence that he thought that the special circumstances, present in this particular case, would render it justifiable in him to do that act." He was convicted and sentenced.

[2] *Advocate, H.M.* v. *Fraser* (1878), 4 Couper 70. He was discharged.

insanity, when his delusion was only that he was the lawful son of a well-known prince.

The questions put to the judges had reference, as we have seen, only to the effect of insane delusions and insane ignorance. But insanity affects not only men's beliefs, but also (and indeed more frequently) their emotions and their wills. Hence since 1843 much discussion has taken place as to the effect of these latter forms of insanity in conferring immunity from criminal responsibility. The result has been that though the doctrines laid down after McNaughton's trial remain theoretically unaltered,[1] the practical administration of them affords a wider immunity than their language would at first sight seem to recognise. For many forms of insanity, which do not in themselves constitute those particular defects of reason which the judges recognised as conferring exemption from responsibility, are now habitually treated as being sufficient evidence to shew that one or other of those exemptive defects was also actually present. A man who, after killing his child, goes forthwith to the police station to surrender himself, and gives a lucid account of what he has done, would certainly seem to know the nature and quality of the act committed, and to know that in doing it he did wrong. Yet if he had previously shewn some symptoms of madness, and has killed this child with no discoverable motive and no attempt at concealment, a judge would probably encourage a jury to regard these facts as evidence of his labouring under such insanity as would render him irresponsible.[2] The mere fact that a

[1] Cf. 14 Cr. App. R. at p. 54; 15 Cr. App. R. at p. 12; and especially *Rex* v. *True* (1922), 16 Cr. App. R. 164. The courts are concerned not with insanity as such but with criminal responsibility, see *Essays in Jurisprudence*, A. L. Goodhart, pp. 46–47.

[2] Cf. the case (*The Times*, July 29, 1901) of Hannah Cox, a devoted mother, who, under pressure of poverty, drowned two of her infants, "as it was the best thing she could do for them". Though she had shewn no other symptoms of insanity, either before or after this act, Bigham, J., advised the jury to declare her irresponsibly insane.

crime has been committed without any apparent motive is, of course, not sufficient of itself to establish any similar immunity.[1]

An insane impulse to do an act is merely evidence of exculpative insanity and does not *in itself* affect criminal responsibility. In the United States both the Supreme Court and the courts of some of the States recognise irresistible impulse as being a sufficient defence; even when accompanied by a knowledge that the act was wrong. In England there are judicial dicta[2] supporting the view that an insane impulse should be admitted as a defence if really irresistible (not merely unresisted), because then the act done would not be a "voluntary" act at all, but this defence has been repudiated by the Court of Criminal Appeal.[3] In 1924 ten out of the twelve judges who were consulted as to the propriety of legislation for recognising the defence of Irresistible Impulse, advised against its recognition.[4] There is, however, little doubt that in practice juries more often than not accept the defence of insanity in cases of irresistible impulse.[5] The difficulty is to distinguish on evidence between uncontrolled and uncontrollable impulse.[6]

There is one form of insane impulse, that of kleptomania, which is sometimes put forward, with or without evidence, by well-to-do persons accused of trivial acts of theft. It naturally is chiefly in courts of Petty Sessions that these unimportant charges are preferred; and in such courts a plea of insanity is the safer to raise because they do not possess the power, enjoyed by higher tribunals, of ordering an accused person, who established this plea, "to

[1] *Reg.* v. *Haynes* (1859), 1 F. and F. 666 (K. S. C. 52).
[2] 24 Cox 403 and 83 J. P. 296.
[3] *Rex* v. *Kopsch* (1925), 19 Cr. App. R. 50.
[4] Lord Atkin's Committee in the same year reported in favour of a change in the law. Cmd. 2005, p. 8.
[5] 159 L. T. Jo. 436.
[6] A. L. Goodhart, *Essays in Jurisprudence*, pp. 46–47.

be kept in custody as a criminal lunatic".[1] That an impulse to steal does sometimes arise from actual insanity seems to be established by the fact that it is often limited to special times (*e.g.* that of pregnancy) or to some special class of objects (*e.g.* hats, boots, tablecloths) which are accumulated in numbers not at all needed by the thief.

The defence of insane impulse is now rarer than that of Unconscious Automatism,[2] as in epilepsy or sleep-walking. But our courts, unlike Continental tribunals, have not yet become familiar with the plea that a crime was committed under the influence of post-hypnotic "suggestion", exercised by some designing person who had induced hypnotic sleep in the offender. It remains to be seen what exemptive effect will ever be accorded in England to such "suggestions", or to those affections which (like hysteromania and neurasthenia) have been called the borderland of insanity. Such questions have become of great practical importance, now that modern science has come to recognise so clearly, in addition to the ordinary "Intellectual" insanity which impairs a man's Judgment, a "Conative" form which affects his Will, whether by weakening his natural impulses to action or by inspiring abnormal impulses, and an "Affective" insanity which disturbs his Emotions of love or hatred.[3]

Moreover there are many persons, who, whilst not so insane as to be exempt from criminal responsibility, or perhaps even to require restraint, are nevertheless mentally abnormal. The Commissioners of 1908 classified all

[1] Trial of Lunatics Act, 1883 (46 and 47 Vict. c. 38), s. 2.

[2] Which is covered by the McNaughton rules; 14 Cr. App. R. at p. 55.

[3] The *temporary* disturbance of a sane mind by intense grief was considered in *Rex* v. *Beadon*, where a sane woman was indicted for poisoning her child at a time when she was sane, but was distressed by the death of her husband. Shearman, J., told the jury that, if they thought she was "so distraught that she did not know it was a dangerous thing to administer poison" they might find her guilty of only a manslaughter. But he admitted his ruling to be "an innovation" (*Daily Telegraph*, Sept. 12, 1924).

the mentally afflicted (eight per thousand of the nation, but nineteen per cent. of the persons arrested by the police) pathologically thus:

I. Those who once were normal, but have become abnormal; whether (*a*) through disorder of mind, *i.e.* "lunatics"; or (*b*) through decay of mind (*e.g.* in senility), *i.e.* "the mentally infirm".

II. Those who never had full mental power; viz. (1) Idiots, persons so mentally defective that they are unable to guard themselves against common physical dangers; (2) Imbeciles, persons who, though their own ineffectiveness does not amount to idiocy, are incapable of managing themselves or their affairs, or, in the case of children, of being taught to do so; (3) the Feeble-minded, persons who, though their defectiveness does not amount to imbecility, require care, supervision and control for their own protection or for the protection of others, or, in the case of children, appear to be permanently incapable of receiving benefit from instruction in ordinary schools; (4) Moral defectives, persons in whose case there exists mental defectiveness coupled with strongly vicious or criminal propensities and who require care, supervision or control for the protection of others.

This latter group (II. 1–4) are usually too incapable of self-control to be deterred effectually by the prospect of Punishment. Hence the Mental Deficiency Acts, 1913 and 1927,[1] provide for cases in which a crime, so grave as to be punishable (in an adult) with penal servitude or imprisonment, has been committed by any one who *from before the age of eighteen* has belonged to this group. The court which convicts him[2] may, instead of passing a sentence, place him under guardianship or send him to an Institution for mental defectives. In 1926, 52 were so sent by the courts.

[1] 3 and 4 Geo. 5, c. 28 and 17 and 18 Geo. 5, c. 33.

[2] In cases triable summarily there need not even be a conviction.

No similar provision has as yet been made for similar abnormality that has arisen in later life. Such cases are perhaps fitter for consideration by the Home Office than in the swiftness of a forensic trial. But in the United States and France and Scotland degrees of mental affliction that are too slight to confer complete exemption from responsibility are recognised as a circumstance that may mitigate the offender's punishment.[1] This view is defended on the ground that every form of insanity weakens the power of self-control, so that the offender's moral guilt is proportionately lessened, and therefore, on the Retributive theory, his punishment ought to be the less. (Yet, on the Deterrent theory of punishment, this argument might occasionally be employed for the opposite purpose of aggravating the punishment; for the weaker a man's will, the more sternly does it need to be braced by the fear of penalty.) In English practice the lessened capacity of self-control is often treated as a mitigating circumstance; for instance, when sunstroke or sleepy sickness has left a man with a will-power permanently so weakened that he pursues any passing pleasure with little regard for consequences. Strict logic, however, suggests that a non-exemptive insanity instead of merely lessening the punishment should modify it, by giving it a curative form.

In cases where a defence of insanity has been accepted[2]

[1] Cf. infanticide, p. 142, *post*.

[2] English law (*ante*, p. 60) presumes an accused person to be sane. Hence the prisoner must give "clear" proof (10 Cl. and F. at p. 210) of Insanity. But any seeming harshness in this rule is obviated in the present practice, under which the Crown hands to the Judge and to the accused all its information as to the latter's state of mind, *e.g.* the prison-surgeon's report. Prisoners' counsel sometimes prefer *not* to raise the defence of Insanity. So also may an undefended prisoner: hence, if a prisoner has no counsel, the crown counsel will expressly ask whether the Judge thinks it desirable for him to call the medical witnesses. A medical witness who has not seen the accused before trial must not be asked whether on the evidence he thinks the accused was insane.

by a jury,[1] the form of their verdict used to be "not guilty, on the ground of insanity". But now, under the Trial of Lunatics Act, 1883 (46 and 47 Vict. c. 38), it is to be "guilty of the act (or omission), but so insane as not to be responsible, according to law, for his actions at the time when the act was done (or the omission made)".[2]

The Court then orders the prisoner to be kept in custody as a "criminal lunatic",[3] till His Majesty's pleasure shall be known; and His Majesty may order him to be kept in custody, during his pleasure, in such place and manner as he may think fit. The confinement is usually lifelong;[4] and consequently the defence of insanity is rarely set up in the higher criminal courts except in heinous crimes.[5]

It may be added that insanity is sometimes important in criminal law, even apart from its bearing on criminal responsibility. For if a man become insane[6] after committing a crime, he cannot be tried until his recovery, any more than can a foreigner, or deaf mute, for whom no interpreter is available. Where such a man is certified insane the Secretary of State may order his detention as a criminal lunatic until remittal to prison or discharge,[7] or the court before whom he is brought may upon a jury's verdict that he is unfit to plead order him to be kept in

[1] Justices of the Peace can accept the defence when trying an offender *summarily*; but not when examining for commitment to a higher court.

[2] This 1883 form was devised by Queen Victoria; to emphasise, somewhat illogically, that "guilt" which the law denies. Her life had several times been imperilled by insane assailants.

[3] There are usually nearly a thousand criminal lunatics under detention.

[4] Apart from female prisoners whose insanity was merely a puerperal mania, only about one prisoner in 150 obtains release from Broadmoor. The annual cost of this asylum is about £92,000.

[5] During twenty-two recent years the defence was raised with success in thirty-three per cent. of the trials for murder; but in less than two per cent. of other criminal trials. An unusually minute picture of the practical working of a trial where this defence is raised may be seen in *The Times* of April 20, 1882.

[6] In *any* form of certifiable insanity, even though not such as the McNaughton rules would cover.

[7] Criminal Lunatics Act, 1884, 47 and 48 Vict. c. 64.

custody during the King's pleasure.[1] Again, if after conviction a prisoner become insane,[2] he cannot be hanged until his recovery, for he may have some plea which, if sane, he could urge in stay of execution.[3] The thorough inquiry made by doctors in such cases affords an effective review of a jury's verdict if it be against a prisoner.[4] No prisoner has since 1840 been executed after a certificate of insanity has been given; and the Court of Criminal Appeal is reluctant to allow a long term of imprisonment to follow upon detention in an asylum.[5]

(3) *Intoxication.*

This, whether produced by alcohol or by drugs, is ordinarily no excuse for the commission of a criminal act; even though it have produced for the time great aberration of mind. For, unlike insanity, it has been produced voluntarily; and to produce it was wrong, both morally and also legally.[6] Accordingly the law will not allow one wrong act to be an excuse for another.[7] Hence the gross

[1] Criminal Lunatics Act, 1800, 39 and 40 Geo. 3, c. 94.

[2] In *any* form of certifiable insanity, even though not such as the McNaughton rules would cover.

[3] Less than thirty of the prisoners for trial in any year are found to be so insane as to be incapable of trial, whilst less than forty of those tried are acquitted on the ground of insanity. A person so acquitted cannot appeal to the Court of Criminal Appeal against *either* half of the verdict; *Felstead* v. *Rex*, [1914] A. C. 534.

[4] Troup, *Home Office*, p. 127.

[5] *Rex* v. *Kenneally* (1930), 22 Cr. App. R. 52.

[6] Until 1872 it was a criminal offence, under 4 Jac. 1, c. 5, s. 2; and even now a conspiracy to produce it would be indictable, and a contract for it would be void.

[7] But actual Insanity, even when produced by drunken habits (as in some cases of *delirium tremens*), exempts from criminal responsibility just as effectually as if it had not originated in misconduct. And intoxication itself, in those rare cases where it is innocent—as when produced by necessary medical treatment or by the fraud of malicious companions (*Pearson's Case* (1835), 2 Lew. 144)—has the full exemptive effect of insanity. This exemption has been extended in Ireland and the United States even to the case of a person who, in consequence of fatigue or sleeplessness, becomes intoxicated by taking the small quantity of alcohol which usually he takes with impunity (*Reg.* v. *Mary R.* (1887), an Irish case cited in Kerr, *Inebriety* (2nd ed.), 395).

negligence[1] which has caused a fatal collision is punishable, not only in a sober driver but also in a drunken one.[2] And if a man, when excited by liquor, stabs the old friend whom he never quarrelled with when sober, or steals the picture which never attracted him before, it is no defence to say that "it was the drink that did it". Indeed the older law (4 Coke 125*a*) regarded intoxication as even aggravating[3] the guilt of any crimes whose predisposing cause it was. But modern judges, whilst still holding that it cannot excuse that guilt, admit that it may mitigate the punishment.[4]

Moreover, though drunkenness is thus no excuse for a guilty state of mind, it often affords a defence for an *actus reus* by being evidence that no guilty state of mind existed. For intoxication may cause—even on grounds slighter than could reasonably lead a sober person to the same erroneous conclusion—a Mistake[5] of fact, such as is incompatible[6] with *mens rea*. The drunken man fancies some one else's umbrella to be his own; or supposes an innocent gesture to be an assault, and hits back in supposed self-defence.[7]

An authoritative declaration of the law as to intoxication was given in 1920 by the concurrence of eight law

[1] Cf. *Reg.* v. *Doherty* (1887), 16 Cox 306, 309 (surgeon's negligence).

[2] *E.g. James* v. *British General Insurance Co.*, [1927] 2 K. B. 311, 325 where a man who was drunk by reason of folly and not premeditation was sentenced to twelve months imprisonment for manslaughter, and cf. p. 72 *post*.

[3] Though not on the principle of Lord Cockburn's convivial Scottish judge who argued, "If he remains so bad even when drunk, what must he be when sober?"

[4] 1 Cr. App. R. 181, 255; 25 T. L. R. 76.

[5] At a baby's christening party, its nurse, having got so drunk as to be "quite stupid and senseless", put the infant on the fire by mistake for a log of wood. The magistrates discharged her. (*Gent. Mag.* 1748, p. 570.)

[6] *Post*, p. 75.

[7] *Reg.* v. *Gamlen* (1858), 1 F. and F. 90. Cf. 31 T. L. R. 361; and 12 Cr. App. R. 221. It has been held in America that drunkenness may negative knowledge, *e.g.* in receiving stolen goods, *U.S.* v. *Roudenbosh* (1832), Baldwin 514; *The People* v. *Harris* (1866), 29 Cal. 678.

lords in *Director of Public Prosecutions* v. *Beard*, [1920] A.C. 479. This judgment settles (1) that, as we have already seen, "merely to establish that the man's mind was so affected by drink that he more readily gave way to some violent passion" forms no excuse. But (2) "if actual Insanity in fact supervenes, [even] as the result of alcoholic excess, it furnishes as complete an answer to a criminal charge as Insanity induced by any other cause.... Insanity, even though temporary, is an answer". Yet (3) in cases of mere intoxication the test for exemption is more stringent than in case of Insanity; a judge should not ask the jury "the question 'whether the prisoner knew that he was doing wrong', in a defence of drunkenness where Insanity is not pleaded". Still (4) evidence of such a drunkenness as "renders the accused incapable of forming the specific intent, essential to constitute the crime, should be taken into consideration, with the other facts proved, in order to determine whether or not he had this intent". In such a case the drunkenness, if incompatible with the indispensable mental element of the crime, "negatives the commission of that crime". Thus a drunken man's inability to form an intention to kill, or to do grievous bodily harm[1] at the time of committing a homicide, may reduce his offence from murder[2] to manslaughter (which latter crime requires no specific intent). Provocation may be less in order to reduce murder to manslaughter in the case of a drunken man.[3] The judgment in *Beard's* case adds that

[1] As in *H.M. Advocate* v. *Campbell* (Scotch Justiciary Cases, 1921, p. 1).

[2] *Reg.* v. *Monkhouse* (1849), 4 Cox 55. In *Rex* v. *Meakin* (1836), 7 C. and P. 297, the view was taken that when a dangerous instrument is used drunkenness can have no effect on the consideration of malicious intent, but see *Reg.* v. *Doherty* (1887), 16 Cox 306.

[3] *Rex* v. *Letenock* (1917), 12 Cr. App. R. 221. Until this decision it was not clear whether a less degree of provocation may suffice or whether normal provocation is necessary but apprehension may be more easily aroused if such provocation exist. Contrast *Rex* v. *Marshall* (1830), 1 Lew. 76 with *Reg.* v. *Thomas* (1837), 7 C. and P. 817 and *Rex* v. *Birchall* (1913), 29 T. L. R. 711; 9 Cr. App. R. 91.

this principle is not "an exceptional rule applicable only to cases in which it is necessary to prove a specific intent;... for, speaking generally, a person cannot be convicted of crime unless the *mens* was *rea*". A man's drunkenness may preclude him, not merely from forming one of these specific intentions, but from forming any intent at all.[1]

It was held by the Court of Criminal Appeal in *Rex* v. *Meade*, [1909] 1 K. B. 895, that if a man were so drunk as to be "incapable of knowing that what he was doing was dangerous, *i.e.* likely to inflict serious injury", this would rebut the presumption that he *intended* the natural consequences of his act.[2] So a fatal attack with a razor might thus be reduced from murder to at most a manslaughter. Similarly in *Rex* v. *Griffiths* the same Court (Nov. 17, 1913) unanimously approved a ruling that to be in "such a state of drunkenness that he could not appreciate that his act would cause grievous bodily harm", would be a defence.

Drunkenness thus may shew that an apparent burglar had no intention of stealing;[3] or that an apparent suicide jumped into the water when "so drunk as not to know what he was about".[4] The more complex the intent required by the definition of the particular crime, the more likely is drunkenness to be useful in disproving the presence of some element requisite to it; as by shewing that wounds were inflicted with no "intent to do grievous bodily harm",[5] or that a false pretence was made with no "intent to defraud". A man may be so drunk as to be unable to form an intention to kill or to do grievous bodily

[1] For a criticism of this dictum see "Defence of Drunkenness in Criminal Law", by R. U. Singh, 49 L. Q. R. 528.

[2] The general doctrine of *Rex* v. *Meade* seems to be recognised by *Rex* v. *Beard*; though the latter case engrafts upon the former one an exception, viz. where the crime is one of "Constructive Murder" in attempting some other felony (see p. 158 *post*).

[3] *The State* v. *Bell* (1870), 29 Stiles 316 (K. S. C. 55).

[4] *Reg.* v. *Moore* (1852), 3 C. and K. 319.

[5] *Rex* v. *Meakin* (1836), 7 C. and P. 297.

harm, and yet may be guilty enough to be convicted of manslaughter, or of an unlawful wounding.

Let us finally note that the question "Was he drunk?" is often[1] answered too definitely, as if there existed some single standard of sobriety. Intoxication, it should always be remembered, is a question of degree, ranging from mere exhilaration down to unconsciousness.[2] The man may be too drunk to do this act properly, yet sober enough to do some other. Our earliest legal standard of sobriety was over-lenient; regarding a man as not intoxicated unless "the same legs which carry him into the house cannot bring him out again" (Dalton's *Country Justice*, p. 27, A.D. 1635).[3]

Under the Road Traffic Act, 1930,[4] it is an indictable offence punishable with six months imprisonment and/or a fine to drive or attempt to drive or to be in charge of a motor-vehicle on a road or other public place when under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle.[5] On summary conviction[6] this offence is punishable with not more than four months imprisonment or a fine not exceeding £50 and in the case of a second subsequent conviction with not more than four months imprisonment and/or a fine not exceeding £100. The offender is, unless

[1] Especially often when it is (not the Excuse but) part of the Crime. It is such, for instance, in the various petty offences of being drunk (1) "in a public place", (2) "on licensed premises", (3) "and incapable", (4) "and disorderly", (5) "in charge of loaded firearms", (6) "in charge of a child under seven".

[2] Hence the familiar division into four successive stages—jocose, bellicose, lachrymose, comatose.

[3] We may add that an accused man may sometimes be helped towards acquittal by the fact of his having been drunk even on some occasion *subsequent* to the date of the crime in question. For it may afford an innocent explanation of conduct that otherwise would suggest a consciousness of guilt; as where, on being arrested, he has made untrue statements or has refused to make any statement at all.

[4] 20 and 21 Geo. 5, c. 43, s. 15.

[5] *Rex* v. *Hawkes* (1931), 22 Cr. App. R. 172.

[6] See pp. 508 *et seq.*, *post*.

the Court otherwise orders, disqualified from holding a licence for twelve months, and a longer period of disqualification may be imposed.[1]

(4) *Corporations.*

Corporations formerly lay quite outside the criminal law. If a crime were committed by a corporation's orders, criminal proceedings, for having thus instigated the offence, could only be taken against the separate members, in their personal capacities, and not against the corporation as itself a guilty person.[2] This was a consequence of the technical rule that criminal courts expected prisoners to stand at their bar, and did not permit "appearance by attorney".[3] But it was further supported also by more scientific considerations, which the Roman law had anticipated and accepted.[4] It was urged that a corporation, as it had no actual existence, could have no will; and therefore could have no guilty will.[5] And it was further urged that, even if the legal fiction which gives to a corporation an imaginary existence may be stretched so far as to give it also an imaginary will, yet the only activities that could consistently be ascribed to the fictitious will thus created, must be such as are connected with the purposes which it was created to accomplish. If so, it could not compass a crime; for any crime would be necessarily *ultra vires*. Moreover a corporation is devoid not only of mind, but also of body; and therefore incapable of the usual criminal punishments. "Can you hang its common

[1] 20 and 21 Geo. 5, c. 43, ss. 5 and 15.

[2] Cf. Pollock and Maitland, I, 473, 661.

[3] A corporation may now appear by a representative, see Summary Jurisdiction Act, 1879, s. 49 and Criminal Justice Act, 1925, s. 33.

[4] Yet the theory of Germanic law inclined the other way; as our English institution of Frankpledge (Stubbs' *Const. Hist.* I, 618) may serve to remind us. Cf. Maitland's *Political Theories*, p. 39.

[5] Hence, even in civil actions, doubts were long entertained as to the possibility of holding a corporation liable for those Torts in which "express malice" is necessary. Contrast *Abrath* v. *N.E. Ry. Co.* (1886), 11 App. Cas. 247 with *Chuter* v. *Freeth* (1911), 27 T. L. R. 467.

seal?" asked an advocate in James II's days (8 St. Tr. 1138).

But under the commercial development which the last two generations have witnessed, corporations have become so numerous that there would have been grave public danger in continuing to permit them to enjoy this immunity. The various theoretical difficulties have therefore been brushed aside; and it is now settled law that corporations may, in an appropriate court, be indicted by the corporate name, and that fines may be consequently inflicted upon the corporate property. The innovation was introduced at first by drawing a distinction between offences of non-feasance and those of mis-feasance; on the ground that whilst, in the case of a criminal mis-feasance, the servant or agent who actually did the criminal act could always be himself indicted, no such indictment would be available in the case of a non-feasance; for the omission would not be imputable to any individual agent but solely to the corporation itself. Hence, in 1840, an indictment for non-feasance, in omitting to repair a highway, was allowed against a corporation, in *Reg.* v. *Birmingham and Gloucester Ry. Co.* (1840).[1] Soon afterwards, in the case of *Reg.* v. *The Great North of England Ry. Co.* (1846),[2] an indictment was similarly allowed even for a mis-feasance, that of actually obstructing a highway. And the principle has received legislative approval. For the Interpretation Act, 1889,[3] provides that in the construction of every statutory enactment relating to an offence, whether punishable on indictment or on summary conviction, the expression "person" shall, *unless a contrary intention appears*, include a body corporate. The gravity, or the nature, of an offence may be sufficient to shew that the framers of the enactment against it could not have

[1] 3 Q. B. 223.
[2] 9 Q. B. 315 (K. S. C. 69).
[3] 52 and 53 Vict. c. 63, s. 2. *Pearks* v. *Ward*, [1902] 2 K. B. 1.

had any intention of regarding bodies corporate as capable of committing it.

Thus the fact that a corporation cannot be hanged or imprisoned[1] sets a limit to the range of its criminal liability. A corporation can only be prosecuted, as such, for offences which can be punished by a fine. Though manslaughter is finable, a corporation cannot be indicted for it, nor for any other crime that involves personal violence (*e.g.* assault or riot) or that is a felony, *Rex* v. *Cory Bros.*, [1927] 1 K. B. 810. Thus, whilst it can be indicted and fined for a libel published by its order, it cannot be indicted for a burglary, or any other offence which is too grave to admit of being visited by a merely pecuniary penalty. If any such crime be committed by the orders of a corporation, the various persons by whom it was ordered must be indicted individually in their own names, and punished in their own persons. It must be remembered that they are also liable to be thus individually indicted, even in the case of those less heinous offences for which their corporation might itself be indicted; for *it* becomes indictable only through the fact that a wrong has been instigated by *them*.

II. *Where the will is not directed to the deed.*

This state of mind arises from mistake or some other form of ignorance.

Our criminal law often allows it to afford a good defence; as shewing, even though there has been an *actus reus*, that no sufficient *mens rea* preceded it.[2] Mistake of fact will not therefore be a defence in these cases where *mens rea* is not requisite (p. 44 *ante*). But such a defence can only arise when three conditions are fulfilled.

[1] Or "committed" for trial, *Daily Mirror Newspapers Ltd.* v. *Glover* (1922), 16 Cr. App. R. 131; so the Criminal Justice Act, 1925, s. 33 (1), substituted an order empowering the prosecutor to prefer a bill of indictment.

[2] Yet, in civil law, ignorance that a girl is a ward of Court is no defence for the contempt of court committed by marrying her; [1909] 2 Ch. 260.

(1) The first condition is that the mistake must be of such a character that, had the supposed circumstances been real, they would have prevented *mens rea*[1] from attaching to the person in doing what he did. Therefore it is no defence for a burglar, who breaks into No. 5, to shew that he mistook that house for No. 6; or did not know that nine o'clock (see p. 201) had struck. Similarly, on an indictment for assaulting a constable "in the discharge of his duty", the fact that the assailants did not know of his official character will not excuse them. On the other hand, it will be no offence[2] to lay violent hands upon a person, whom you reasonably, though mistakenly, suppose to be committing a burglary.[3] The case of *Reg.* v. *Tolson*, which we have already discussed (*ante*, p. 50), affords an important illustration of mistake of fact.[4]

(2) A further condition is that the mistake must be a reasonable one. This will be mainly a question of fact; but the jury may be assisted by the judge's directions as to mistakes that are clearly reasonable or are clearly unreasonable. One of the former class is mentioned by Sir Michael Foster.[5] A man, before going to church, fired off his gun, and left it empty. But during his absence some person went out shooting with the gun; and, on returning, left it loaded. The owner, late in the same day, took up the gun again; and in doing this, touched the trigger. The gun went off, and killed his wife, who was in the room. Foster held that the man had reasonable grounds to believe that the weapon was not loaded. The case might well have been otherwise if weeks, instead of hours, had

[1] As to the meaning of *mens rea* in this connection, see p. 51 *ante*.

[2] As to the killing of a supposed dead man by one who imagines himself to have *already* murdered him, see two Indian cases where it was held not to be murder; 36 L. Q. R., 6–8.

[3] *Rex* v. *Levett* (1638), Cro. Car. 538 (K. S. C. 26).

[4] A mistake of fact may provide a lawful justification for an apparently illegal act, *e.g.* a boxer strikes a referee mistaking him for his opponent.

[5] Foster 265 (K. S. C. 27).

elapsed between his firing off the gun and his subsequently handling it without taking any pains to see whether it had meanwhile been loaded again.[1] Similarly in an American case,[2] where a constable was charged with arresting a man unlawfully, it appeared that the man had fallen down in the street in a fit,[3] and his friends had first tried to revive him by administering whisky, and then had gone away to seek help. The constable was acquitted; for the fact that the man smelt of whisky afforded reasonable ground for supposing his insensibility to be due to intoxication (a lawful ground for arrest).

But no belief which has now come to be currently regarded as an obsolete superstition can be treated as a mistake sufficiently reasonable to excuse a crime. Thus in 1880, at Clonmel, a woman who had placed a child naked on a hot shovel, in the honest belief that it was a deformed fairy sent as a substitute for the real child (who would be restored if the changeling were thus imperilled), was convicted and sentenced. So, in 1895, again at Clonmel, were men who had caused the death of the wife of one of them by holding her over a fire and scaring her with a red hot poker, in the honest expectation of thereby exorcising a demon that was supposed to possess her.[4] And even people who break the law in consequence of a belief that they are obeying a Divine command, are legally regarded as actuated by a mistake which is "unreasonable". Illustrations are afforded in America by the prosecutions of Mormons for polygamy;[5] and in England

[1] Thus see *Reg.* v. *Jones* (1874), 12 Cox 628 (K. S. C. 28) and *The State* v. *Hardie* (1878), 10 Runnells 647 (K. S. C. 123); cases where a mistaken belief that the firearms were unloaded was *not* reasonable. Contrast *Reg.* v. *Finney* (1874), 12 Cox 625 (K. S. C. 120).

[2] *Commonwealth* v. *Presby* (1859), 14 Gray 65.

[3] To distinguish epilepsy from intoxication is a difficult task; the police are often censured most unjustly for failing to achieve it.

[4] In 1894 an Indian sentinel was convicted in Canada who had killed a man under the belief of his being an evil spirit that would attack human beings, *Reg.* v. *Machekequonabe* (1894), 28 Ontario 309.

[5] *Reynolds* v. *United States* (1878), 98 U.S. 145 (K. S. C. 31).

by the prosecutions of the "Peculiar People" for withholding medical aid from their sick children. At the same time it must be remembered that some religious delusions may be of so extreme a character as to be evidence of insanity, and to afford a good defence upon that ground.[1]

(3) The final condition is, that the mistake, however reasonable, must not relate to matters of law but to matters of "fact". For a mistake of law, even though inevitable, is not allowed in England to afford any excuse for crime. *Ignorantia juris neminem excusat.*[2] The utmost effect it can ever have is that it may occasionally, like drunkenness, rebut the existence of the peculiar form of *mens rea* which some particular kind of crime may require. Thus larceny can only be committed when a thing is stolen without even the appearance of right to take it; and, accordingly, a *bonâ fide* and reasonable mistake, even though it be of law—like that of a woman who gleans corn in a village where it is the practice to do so (p. 233 *post*) —will afford a sufficient defence. Similarly a mortgagor who, under an invalid but *bonâ fide* claim of right, damages the fixtures in the house which he has mortgaged, will not be guilty of "malicious" damage.[3] Apart, however, from such exceptional offences, the rule which ignores mistakes of law is applied with rigour. A sailor has been convicted of an offence that had been forbidden

[1] *Rex* v. *Hadfield* (1800), 27 St. Tr. 1281. Compare C. C. C. Sess. Pap. CLIV. 357.

[2] For a discussion of the justifications that may be offered for this severe rule, see Austin's *Jurisprudence*, Lect. xxv, Markby's *Elements of Law*, secs. 269, 270, and C. K. Allen's *Legal Duties*, pp. 195 and 196. Perhaps after considering them all, the student may still feel compelled, with the late Prof. Henry Sidgwick, to regard the rule as "not a realisation of ideal justice, but an exercise of Society's right of self-preservation". For the milder principles adopted in Roman law see Justinian's *Digest*, XXII, 6, and Lindley's *Jurisprudence*, p. 24 and App. xix.

[3] *Reg.* v. *Croft* (1889), C. C. C. Sess. Pap. CXI. 202. Cf. *Reg.* v. *Twose* (1879), 14 Cox 327.

only by an Act of Parliament of which he could not possibly know, since it was enacted when he was far away at sea, and the offence was committed before the news of its enactment could reach him.[1] Frenchmen, who had acted as seconds in a fatal duel here, have similarly been committed for trial on a charge of murder, although their own land practised duelling and they did not know that English law forbade it.[2] A husband may be guilty of wilfully neglecting to maintain his wife, even though he *bonâ fide*, though mistakenly, believes that he is not legally liable to maintain her.[3] Italians have been punished in London for keeping lotteries, in spite of their urging that in Italy every little village possessed a lottery sanctioned by the State, and that they had no idea that the English law could be different. It is therefore easy to see that a veterinary surgeon's mistaken belief that an operation, which he knows to be painful and purposeless, is nevertheless unpunishable legally, will afford him no defence for performing it.

These mistakes are reasonable enough; yet they afford no excuse. Nor would they do so, even if the prisoner could shew that he had taken pains to obtain a lawyer's advice and had been misled by it. Still less, therefore, can any excuse be conferred by legal errors that are unreasonable. Such are apt to occur in connection with the crime of Bigamy. In a trial for it, which the author witnessed at the Central Criminal Court in 1883, not only the prisoner himself, but also his first wife and all her family, had believed his marriage with her to be void, because the wedding-ring was only of brass and not of gold.[4]

[1] *Rex* v. *Bailey* (1810), R. and R. 1 (K. S. C. 29). Cf. 86 J. P. 77.

[2] *Re Barronet* (1853), 1 E. and B. 1.

[3] *Biggs* v. *Burridge* (1925), 89 J. P. 75.

[4] One female bigamist tried in 1920 had been assured, by the authorities of the asylum in which her incurably insane husband had been con

But although mistakes of law, unreasonable or even reasonable, thus leave the offender punishable for the crime which he has blundered into, they may of course afford good grounds for inflicting on him a milder punishment.[1]

III. *Where the will is overborne by compulsion.*

(1) *Obedience to Orders.* This rarely affords any defence in English law, though there are, of course, acts which are legal when done lawfully for the advancement of justice which would otherwise be illegal,[2] *e.g.* the execution of the lawful sentence of a court,[3] acts done for the prevention of forcible crimes and breaches of the peace,[4] or to secure the arrest of criminals.[5] Though the King can do no wrong, either civilly or even criminally—or, rather, *because* the King can do no wrong—his subordinates must be held strictly accountable for any wrongs they may commit on his behalf. Hence, if a soldier or sailor or constable unlawfully does violence to any one, he cannot plead as a defence merely that he was acting under orders from his superior officer, or even from the King himself.[6]

Of course such orders, when not *obviously* unlawful, may be relevant to his defence under some more general rule of law. They may give him such a "claim of right"[7] as renders it no larceny for him to appropriate another man's goods; or such grounds for supposing the surrounding

fined for eleven years past, that his incurableness had set her legally free to marry again; a man, tried also in 1920, had honestly believed that his wife's elopement with an adulterer had *ipso facto* dissolved the marriage. A frequent error is that a mere decree *nisi* effects an immediate dissolution; cf. p. 363 *post*.

[1] Cf. 7 C. and P. 456; and [1921] 2 K. B. at p. 125.

[2] See in particular in relation to homicide, p. 117 *post*.

[3] p. 116 *post*. [4] p. 117 *post*. [5] p. 528 *post*.

[6] *Post*, p. 89; cf. Pollock's *Law of Torts*, 13th ed., ch. 4, s. 3; and Kenny's *Select Cases on Tort*, pp. 122–6. See Hallam's *Constitutional History*, ch. I, p. 3, and ch. VII, p. 526, as to this peculiarly English check upon royal authority.

[7] *Post*, p. 232.

circumstances to justify his conduct as will render this Mistake of Fact[1] a valid defence, or negative a particular intent[2] or excuse apparent gross negligence.[3]

And, more than this, by a special rule as to Public Subjection, a mistake even of Law may afford a defence to a public servant who has obeyed unlawful orders under a reasonable (though mistaken) belief that they were lawful. Thus when violence is exercised by a gaoler or hangman in carrying out an invalid sentence, then, though the violence was criminal, yet if the Court which passed the sentence had jurisdiction over the offence, and the sentence had all reasonable appearance of validity, the man's public official subjection affords him immunity.[4]

There is not yet, however, any conclusive English authority for extending to the military and naval forces the degree of immunity which the common law thus concedes to gaolers and other civil functionaries. A marine who, to obey orders, shoots a boatman who insists on rowing up to the ship, will probably be held[5] not guilty of murder if he knew that the orders were given lest the boatman should promote a mutiny on board; for such orders he might reasonably suppose to be lawful. Yet he clearly would be guilty if he knew them to be given from a mere desire to keep the ship agreeably isolated. The official British Manual of Military Law admits it to be still

[1] *Ante*, p. 75.

[2] *Reg.* v. *James* (1837), 8 C. and P. 131.

[3] *Reg.* v. *Trainer* (1864), 4 F. and F. 104.

[4] 9 Coke 68; 1 Hale 496; 1 Hawkins, ch. XXVIII; 1 East P. C. 331. See the authorities cited in *Marks* v. *Frogley*, [1898] 1 Q. B. 396, 404. Cf. 3 C. and K. 199. No less a judge than Willes, J., on the trial of a fireman for manslaughter by a railway accident, laid it down, *Reg.* v. *Trainer* (1864), 4 F. and F. 105, 111, that "in a criminal case an inferior officer must be held justified in obeying the directions of a superior, not obviously improper or contrary to law". Cf. *Reg.* v. *Hutchinson* (1864), 9 Cox 555. And he held this to extend even to a fireman's private obligation to obey his engine-driver. Cf. 4 F. and F. at p. 805.

[5] *Rex* v. *Thomas* (1816) (Russell on Crimes, 8th ed., p. 774); *Reg.* v. *Smith* (1899), 17 Cape of Good Hope 561, K.S.C. 60; and Stephen's *History of Criminal Law*, I, 205.

"somewhat doubtful" (ch. VIII, par. 95) how far a superior officer's specific command, even one not obviously improper, will excuse a soldier for acting illegally. But the courts of the United States have repeatedly refused to recognise any such excuse at all; and insist that a soldier or sailor cannot plead his commander's orders as a defence unless they not merely seemed to be legal but actually were so.[1] See *United States* v. *Jones* (1813), 3 Washington 218; and *United States* v. *Carr* (1872), 1 Woods 480. This extreme American doctrine is ridiculed by French jurists as "la théorie des baïonettes intelligentes".

Private civil subjection has been of more frequent importance than Public, as a defence. It never afforded exemption to servants or children who committed crimes at the instigation of a master or a parent. Only in the case of conjugal subjection did it ever amount to a defence. For if a wife[2] committed an ordinary felony in her husband's actual presence, the common law raised a *primâ facie* presumption that she had committed it under such a compulsion as to entitle her to be acquitted; even though there were no proof of any actual intimidation by him. (Yet for any crime committed by her when he was not actually present, his previous orders or threats would afford her no more excuse than those of any other instigator[3] would do.) This presumption of coercion never applied in mere non-indictable offences. But it extended (so the majority of writers[4] assert) to all misdemeanors, except those that are connected with the management of the house (for in that matter the wife is assumed to be the person chiefly active). And it extended to most felonies,[5]

[1] For the different views of English, Scottish, American and South African courts see the cases in K. S. C. pp. 59–62.

[2] Not a mere concubine, *Rex* v. *Court* (1912), 7 Cr. App. R. 127.

[3] Cf. p. 84 *post*.

[4] And so Lord Birkenhead's committee of 1922 reported. Cf. *Reg.* v. *Torpey* (1871), 12 Cox 45; *Rex* v. *Smith* (1916), 12 Cr. App. R. 42.

[5] Kelyng 31 (K. S. C. 66). In 1891 Cave, J., allowed it in arson.

e.g. to burglary, larceny, forgery; but not to felonies of extreme gravity, such as treason and murder. Still, as we have said, this presumption of subjection was only a *primâ facie* one; rebuttable by proof that the wife took so active a part in the crime as to shew that her will acted independently of her husband's.[1]

The singular privilege thus accorded to the wife, yet denied to the child, admits of a curious historical explanation. "Benefit of clergy"—the right[2] of any man, who could read, to escape capital punishment—was denied to women until 1692.[3] Hence, whenever a man and his wife were charged with jointly committing any felony, the man, if he could make a semblance of reading, would get off, whilst the woman, though probably the less guilty of the two, would be sentenced to death. This injustice was evaded by the establishment of this artificial presumption of conjugal subjection.

The Criminal Justice Act, 1925, abolished this anomalous defence, as from June 1st, 1926. It provides (s. 47) that "Any presumption of law that an offence committed by a wife in the presence of her husband is committed under the coercion of the husband is hereby abolished, but on a charge against a wife, for any offence other than treason or murder it shall be a good defence to prove that the offence was committed in the presence of, and under the coercion of, the husband".[4]

It may perhaps be convenient, though not strictly relevant, to mention here that there are a few cases in which even an act itself, otherwise criminal, that has been

[1] *Reg.* v. *Cruse* (1838), 2 Moody 53 (K. S. C. 66).

[2] *Post*, p. 573.

[3] Hence under Charles II and James II, though (just as now) few women were tried, they formed about two-sevenths—sometimes even a majority—of those sentenced to *death* at each Old Bailey sessions.

[4] In certain cases of treason (see p. 84 *post*) duress *per minas* is a defence open to any person, and presumably in such cases this defence is still open to a wife. (This difficulty is pointed out by W. T. S. Stallybrass in *Journal of Comparative Law* (1933), XIV, 61.)

done by a wife, will cease to be *reus* because of its connection with the relations between her and her husband. Thus, if a husband who has committed a crime is received and sheltered by his wife, she (see p. 102 *post*) is not regarded by the law as becoming by such "bare reception" an accessory after the fact (or a participator in his treason); for she is bound to receive him. Again, in consequence of the conjugal unity by which the married pair are—for some purposes—regarded in law as constituting only a single person, no criminal agreement to which they are the only parties can amount to the crime of conspiracy (p. 336 *post*); for a conspiracy needs two conspirators. And, similarly, a libel published against a husband by his wife, or one against a wife published by her husband, constitutes no offence.[1] Nor (see p. 211 *post*) can a husband or wife normally be guilty of stealing each other's property.

(2) *Duress per minas* is a very rare defence; so rare that Sir James Stephen, in his long forensic experience, never saw a case in which it was raised. Consequently the law respecting it remains to this day both meagre and vague. It is, however, clear that threats of the immediate infliction of death, or even of grievous bodily harm, will excuse *some* crimes that have been committed under the influence of such threats. It is impossible to say with precision for what crimes the defence will be allowed to avail. It certainly will not excuse murder. Yet it may excuse the still graver offence of treason, though only in its minor forms: as where a prisoner shews that under pain of death, or of some physical injury falling little short of death, he was forced into giving some subordinate assistance in a rebellion. But he must shew that the compulsion continued throughout the whole time that he was assisting; and that he did no more than he was obliged to do; and that he desisted at the earliest possible

[1] *Reg.* v. *Lord Mayor of London* (1866), 16 Q. B. D. 772.

opportunity.[1] Moreover, according to Sir James Stephen, this defence is admissible, only where the prisoner has been threatened by a plurality of persons. Yet it would seem, on principle, that two persons may differ so much in strength, or in weapons, that a degree of compulsion sufficient to exempt may have been exercised by one of them over the other, although there was but this single threatener.

Fears of some lesser degree of violence, insufficient to excuse a crime, may nevertheless mitigate its punishment. Wherever there are two criminals, one of them is always to some extent in terror of the other. In such a case the timid rogue will usually deserve a less severe punishment than his masterful associate.

(3) *Necessity.* The fact that a man who has inflicted harm upon another's person or property, did so for the purpose of saving the community from a much greater harm, has from early times been recognised as a defence in civil actions, brought to recover compensation for the harm thus inflicted.[2] It is admittedly no tort to pull down houses to prevent a fire from spreading,[3] or to enter a person's house to put out a fire. It would therefore seem natural that such necessity should be still more readily admissible as a defence to criminal proceedings. For in them the object is not to compensate mere loss but only to punish actual guilt (which here seems almost or altogether absent); and punishment itself must fail to attain its great object, that of Deterrence, in those cases of necessity where the evil it threatens is less than the evil which would have been suffered if the crime had not warded it off. So a person who commits some trivial offence, for the purpose of saving life—who goes at night,

[1] *Rex* v. *McGrowther* (1746), Foster 13 (K. S. C. 56).

[2] For necessity as a civil defence, see Pollock's *Law of Torts*, 13th ed., p. 174. For self-defence in cases of offences against the person see pp. 117 to 118 and 178 to 180 *post*.

[3] 1 Dyer 36*b*. See Kenny's *Select Cases on Torts*, pp. 161–170.

shall we say, on a lampless bicycle to fetch the fire-engine —might seem to have a valid legal excuse. Yet though theoretical writers have been willing to accept this ground of defence, there is no English case in which the defence has been actually raised with success. Yet Lord Mansfield gave an *obiter dictum* that even an act of treason, like the deposition of a colonial governor by his Council, might, in some circumstances of public danger, be justified by its necessity.[1] It has always been thought that if provisions run short during a voyage, the captain of the ship commits no larceny by breaking into the cargo to feed his crew. In *Gregson* v. *Gilbert* (1783),[2] which was an action on a policy of marine insurance to recover the value of a hundred and fifty slaves, who had been thrown overboard during a voyage because the casks of water were running short and a hundred slaves had already died of thirst, no doubt was suggested, either by the Court or even at the bar, as to extreme necessity being capable of excusing even so awful an act as this. But there the question of criminal liability did not directly arise; and now, since *Reg.* v. *Dudley and Stephens* (1884),[3] it seems that the criminal law would concede no exemption, on the ground of necessity, for such an act of homicide.

Clearly no such defence can be accepted in any case (1) where the evil averted was a less evil than the offence committed to avert it, or (2) where the evil could have been averted by anything short of the commission of that offence, or (3) where more harm was done than was necessary for averting the evil. Hence it is scarcely safe to lay down any more definite rule than that suggested by Sir James Stephen, viz. that "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

[1] *Rex* v. *Stratton* (1779), 21 St. Tr. 1222. The correctness of this dictum was conceded by Lord Coleridge in *Reg.* v. *Dudley* (see p. 87 *post*).

[2] 3 Douglas 232.

[3] 14 Q. B. D. 273 (K. S. C. 62).

breaking it; but these cases cannot be defined beforehand".[1]

In the only English case where this defence has been expressly raised, it failed.[2] Three men and a boy escaped in an open boat from the shipwreck of the yacht *Mignonette*. After having passed eight days without food, the men killed the boy in order to eat his body. Four days later, they were rescued by a passing ship. On their arrival in England, two of the men were tried for the murder of the boy. Lord Bacon had suggested (*Maxims*, v) that if two shipwrecked men were clinging to a plank which was only sufficient to support one, and one of them pushed the other off, he would be exempt from any criminal liability, because his conduct was necessary to save his life.[3] But the Court of Queen's Bench declared emphatically that there is no general principle of law which entitles a man to take the life of an innocent person in order to preserve his own. The court appears to have been willing, if necessary, even to overrule Lord Bacon's dictum about the plank; but Sir James Stephen considers that their actual decision does not go so far as to overrule it. For, as he points out, the accused man does no direct bodily harm to the other, but leaves him still the chance of getting another plank; whereas in the *Mignonette* case the boy was actually killed, and moreover by men who did it for the sake of avoiding a starvation which the jury only found to have been otherwise "*probable*", not otherwise "*inevitable*".[4]

[1] *History of Criminal Law*, II, 109.

[2] *Reg.* v. *Dudley and Stephens* (1884), 14 Q. B. D. 273 (K. S. C. 62).

[3] Hale's *Pleas of the Crown*, 54. Much legal controversy was aroused in France in 1898 by a judgment at Amiens which adopted Bacon's lenient principle; for Hale's view is more generally adopted by French judges.

[4] Stephen, *Digest of Criminal Law*, 7th ed., Art. 43. He also maintains that the circumstances of *Reg.* v. *Dudley* distinguish it from many cases in which there is a choice of evils; for instance, where an accoucheur finds it necessary to destroy a child at the approach of birth in order to save the mother (an act that is never made the subject of a prosecution). Still

The defence of necessity, however, can only be important where, as in capital offences, there is a prescribed minimum of punishment. For in all others every English judge would take the extremity of the offender's situation into account, by reducing the sentence to a nominal penalty.[1]

Yet where immediate death is the inevitable consequence of abstaining from committing a prohibited act, it seems futile for the law to continue the prohibition, if the object of punishment be only to deter. For it must be useless to threaten any punishment the threat of which cannot have the effect of deterring.[2] Hence, perhaps, it is that in the United States the defence of Necessity seems to be viewed with favour.[3]

To these three primary groups of cases (see *ante*, p. 55) where unquestionably a criminal act goes unpunished for lack of the necessary mental element, Blackstone (IV, 32) adds a supposed fourth one: "Where the will is too perfect to do wrong." For, by a totally unnecessary legal fiction, he ascribes the King's unquestionable immunity from criminal liability to an imaginary "perfection" in his will, which Blackstone supposes to render him incapable of

more is it distinguishable from those in which the question is not which one shall live, but whether any shall live; as where three mountaineers are roped together, but two of them slip, and the third cuts the rope to save himself from being dragged to death with them. See Plowden 13 for a prisoner's escaping from a burning gaol, *to save his life*.

[1] But in continental countries (where a minimum is frequently set to punishments) the necessity of averting grave bodily harm is often raised as a defence.

[2] At a court-martial held (*The Times*, July 28, 1893) in consequence of a collision, it was shewn that naval discipline regards even disobedience to an Admiral's orders as being excusable by necessity, *e.g.* the paramount necessity of not endangering the safety of a ship.

[3] *Commonwealth* v. *Brooks* (1868), 99 Mass. 434; *The State* v. *Wray* (1875), 72 N. C. 253. In *Rice* v. *Georgia* (1899), 34 S. E. R. 202, a man prosecuted for breach of a statute that forbade taking alcoholic liquor to church, pleaded that it was necessary for his wife's life that she should always have alcohol at hand. But the defence was disallowed, as it was not necessary for the wife to go to church.

mens rea. But it is clear that our law does not really regard the King as incapable of committing crime; inasmuch as, though it will never punish him, it would readily punish, as an accessory before the fact, any evil counsellor who might prompt him to a crime. The King has indeed himself an exemption from liability; but it is sufficiently explained by the absence, in our Constitution, of any tribunal possessed of jurisdiction to try him. It is thus a mere matter of adjective law; and not the result of any fiction in our substantive law.

But, whichever be the proper branch of law to class it under, the exemption itself is dictated by a wise policy. Almost every nation has considered it necessary to clothe its Chief Magistrate with this immunity. (It is true that in the United States the personal responsibility of the President for any crimes he may commit is fully recognised;[1] but the particular circumstances under which the States framed their constitution sufficiently account for this unusual liability.) At the trial of Charles I, even the Parliament's counsel admitted[2] the correctness of a judicial dictum, of Henry VII's time, that "If the King should, in passion, kill a man, this would be no felony for which to take away the King's life".

The like immunity conceded by the comity of nations to every foreign sovereign[3] and ambassadors and their suites, whilst resident in this country, must be remembered.[4] In some recent cases of the unlawful driving of motor-cars, it has had practical results.

[1] Constitution of U.S.A., art. II. s. 4. Cf. *The Federalist*, No. 69.

[2] 4 State Trials, 1034. Cf. Wade and Phillips, *Constitutional Law*, 2nd ed., p. 76.

[3] Unless they are deposed, exiled or fugitive in England, when the immunity ceases (*Reg.* v. *Mary Queen of Scots* (1586) 1 St. Tr. 1161).

[4] They must not even be subpœnaed as witnesses. In 1913 a secretary of the Danish embassy was drowned in the Thames; and the embassy claimed (with success) that no inquest could be held on his body.

See Oppenheim, *International Law*, 4th ed., I, 632, n. 2, as to the kidnapping in 1896 of Sun Yat Sen (afterwards twice President of the

Further, an Act of State[1] cannot be examined into by the Courts of the State which does the act.[2]

Republic of China) in the London residence of the Chinese Imperial Legation.

See *Engelke* v. *Musmann*, [1928] A. C. 433 for the *conclusiveness* of a certificate from our Foreign Office as to a person's possessing diplomatic privilege.

As to semi-sovereign rulers, like the protected Indian princes, see *Statham* v. *Statham*, [1912] P. 92.

[1] See Wade and Phillips, *Constitutional Law*, 2nd ed., pp. 87 to 91.

[2] Stephen's *History of Criminal Law*, II, 61.

CHAPTER V

INCHOATE CRIMES

WE have seen that where there is merely *mens rea*, there is no crime at all. But though an *actus reus* is thus necessary, there may be a crime even where the whole of the particular *actus reus* that was intended has not been consummated. If an assassin misses the man he shoots at, there is clearly no murder; but nevertheless a crime has been committed. For the law will punish acts that constitute even a very early stage in the preparations for an *indictable* crime.

But, just as the mere *mens rea* is not punished, so neither are the earliest conceivable stages of the *actus reus*. There is thus, as a general rule (leaving out of view, at present, the anomalous case of Treason, see p. 309 *post*), no criminal liability where a *mens rea* has only been followed by some act that does no more than manifest the *mens rea*. Liability will not begin until the offender has done some act which not only manifests his *mens rea*, but also goes some way towards carrying it out. Three classes of merely incipient or inchoate crimes proceed far enough to become punishable: Incitements, Conspiracies, Attempts.

(1) In *Incitement*, the act takes the form of soliciting some other person to commit a crime.[1] This is a misdemeanor,[2] even though that person never does commit

[1] *Rex* v. *Higgins* (1801), 2 East 5 (K. S. C. 83). But this desired crime must (except in a few statutory cases) be an *indictable* one. To "counsel or procure" the commission of a *non*-indictable crime will, however, itself become a petty offence if the offence counselled come to be actually committed.

[2] Punishable with fine and imprisonment.

the ultimate crime thus suggested to him.[1] If he do commit it, the inciter becomes still more guilty; being liable as an "accessory before the fact",[2] if the suggested crime be a felony, and liable as a principal offender, if it be a misdemeanor.

(2) In *Conspiracy*,[3] the mere agreement of two or more persons to commit a crime is regarded by the law as an act sufficiently proximate to the contemplated offence to render these persons guilty at once of a crime. Even a conspiracy to do no more than incite some one else to commit a crime would be criminal.

(3) *Attempts* constitute the most common form of inchoate crime. They consist in some physical act which helps, and helps in a sufficiently "proximate" degree, towards carrying out an *indictable* crime that is contemplated. But no abstract test can be given for determining whether an act is sufficiently proximate to be an "attempt". It is clear that mere Preparations for the intended crime, antecedent to the actual commencement of the crime itself, do not amount to an indictable attempt.[4] Thus if a man, who contemplates murder, buys a pistol and takes a railway ticket to the place where he expects to find his intended victim, these are mere acts of preparation, too remote from the actual Perpetration to constitute an attempt. But if, on meeting the victim, he points the pistol at him and puts his finger on the trigger, he does acts which are a part of the offence of

[1] *Reg.* v. *Gregory* (1866), 1 C. C. R. 77. Or even *could not* commit it, provided that the inciter supposed that he could, *Reg.* v. *Brown* (1809), 63 J. P. 790.

[2] *Post*, p. 101.

[3] *Post*, p. 335. In a Conspiracy (*unlike* Incitement and Attempt) the crime aimed at need not be an indictable one, *Reg.* v. *Whitchurch* (1890), 24 Q. B. D. 420; and, *as* in Incitement and Attempt, it probably need not be a possible one, *Rex* v. *Bishop* (1917), 34 T. L. R. 139.

[4] *Rex* v. *Robinson*, [1915] 2 K. B. 342; *Rex* v. *Woods* (1930), 22 Cr. App. R. 41; 46 T. L. R. 401. Yet they will often afford evidence of Conspiracy. For a preparatory act made an offence by statute see p. 325 *post*.

murder—and, similarly, of that of shooting with intent to wound—and certainly will amount to an "attempt" to commit either of those two crimes. And if a death by only a *slow* poisoning be intended, yet the administration of even the first dose (weak and non-fatal) is a sufficient attempt.[1]

So again, the buying a box of matches would not be an act sufficiently proximate to the offence of arson to constitute an attempt to commit it; for it is an ambiguous act, not necessarily referable to that crime, or to any crime at all. But, on the other hand, actually striking one of the matches at a haystack, for the purpose of setting fire to the stack, would be a sufficient "attempt" to commit this arson.[2] And it will remain so, even if the match goes out—or is snatched away from the prisoner, or is thrown away by him on finding himself detected—before any hay has caught fire at all. Another illustration of this dividing line may be found in cases relating to the publication of seditious or defamatory books. Merely to preserve such a book, even with a view to publish it, is not an attempt at publication, nor is a journey with the aim of procuring such a book.[3] But actually procuring it, with intent to publish it, would be.[4]

It has been suggested[5] by a learned writer that an attempt is constituted when the accused does an act which is a step towards the commission of a specific crime, and the doing of such act can have no other purpose than the commission of that specific crime, but the test of "proximate step" though less certain is more in accord with authority. The test suggested can only be reconciled with *Rex* v. *Robinson*, [1915] 2 K. B. 342 by the

[1] *Rex* v. *White* (1910), 4 Cr. App. R. 257.

[2] *Reg.* v. *Taylor* (1859), 1 F. and F. 511. Cf. Holmes, *Common Law*, ch. II.

[3] Dearsly, 551.

[4] Contrast, similarly, 11 Cr. App. R. 111 with 11 Cr. App. R. 124.

[5] "Attempts to Commit Crime", J. W. C. Turner, *Cambridge Law Journal*, v, No. 2.

exclusion of subsequent conduct, *e.g.* a confession, as evidence of the quality of an ambiguous act, an exclusion which seems contrary to principle.[1]

It was for a time thought that a person could not be convicted of an attempt unless the attempted act were possible. Thus for a thief to put his hand into a person's pocket which happened to be empty, was not regarded as amounting to an attempt to commit larceny.[2] This doctrine has, however, been definitely overruled.[3] Nevertheless there must be an act which is proximate to the offence and thus, though shooting at a distant man with a pistol that will not carry far enough would be an indictable attempt, shooting at a post which you mistake for a man would not be. "It is not a question of impossibility, the man is never on the thing at all."[4]

The offence attempted may itself be only an inchoate form of crime. Thus a conviction may be obtained for an attempt to incite, or an attempt to conspire.[5] But, as it is of the essence of an attempt to be itself merely inchoate, it will be a good defence to an indictment for an attempt if the prisoner can shew that he actually completed the intended crime. For, thereupon, the attempt became merged in the greater offence;[6] and he must be reindicted if he is to be punished. If, however, on the other hand, a

[1] See p. 424 *post*.

[2] *Reg.* v. *Collins* (1864), L. and C. 471. Nevertheless it was punishable as an "assault with intent to commit a felony" (*post*, p. 184).

[3] *Reg.* v. *Brown* (1890), 24 Q. B. D. 357; *Reg.* v. *Ring* (1892), 61 L. J. (M. C.) 116 (K. S. C. 88).

[4] *Rex* v. *Osborn* (1910), 84 J. P. 63, with which contrast *Reg.* v. *Brown* (1899), 63 J. P. 790. See also *Harvard Law Review*, XLI, 821. Mr J. W. C. Turner (p. 93 *ante*) criticises *Rex* v. *Osborn*. He considers that in certain circumstances, viz. where the act previously shewed the intention, a man who aimed at a pillow thinking his enemy to be sleeping on the bed might be guilty of a criminal attempt, even if the enemy was miles away, but see the text *supra* for criticism of Mr Turner's test.

[5] Or an attempt to incite to conspire.

[6] *Rex* v. *Higgins* (1801), 2 East, at p. 20, *per* Grose, J.; *Reg.* v. *Meredith* (1838), 8 C. and P. 589. Similarly an Incitement will merge in the completed crime. But a Conspiracy will not; see p. 336 *post*.

man indicted for some crime turns out to have done no more than attempt it, it is now provided by statute[1] that he may, even on the original indictment, be convicted of the mere attempt; thus avoiding the trouble of a new indictment and a new trial.

At common law, every attempt to commit any indictable crime, whether that ulterior crime be felony or misdemeanor, is itself a misdemeanor;[2] and is punishable with fine and imprisonment with hard labour. But by statutes some particular attempts have themselves been made felonies; thus, every attempt to murder is now a felony, and punishable with penal servitude for life.[3]

[1] 14 and 15 Vict. c. 100, s. 9.

[2] *Reg.* v. *Hensler* (1870), 11 Cox 570.

[3] 24 and 25 Vict. c. 100, s. 15. This does not include attempts to commit *suicide*; see p. 129 *post*.

CHAPTER VI

THE POSSIBLE PARTIES TO A CRIME

CRIMES are often grouped by English lawyers into three classes—Treasons, Felonies and Misdemeanors. In the gravest, and also in the least grave, of these three, no legal distinction, either of substance or even of form, is drawn between the various recognised modes of taking part in the commission of them. For the guilt of even the slightest share in any Treason is regarded as being so heinous that it is needless to distinguish it from still deeper shades of guilt. And, on the other hand, no activity in a mere Misdemeanor is considered heinous enough to make it worth while to draw a formal distinction between it and any less prominent mode of taking part in the offence.[1] Hence if a crime belongs to either of these two opposite extremes, all persons who are concerned in it in any way —whether by actually committing it, or only by keeping near in order to assist whilst it is being committed, or merely by suggesting its commission—are indiscriminately classed together by the law as being alike "principals" in the offence.

But the intermediate group of crimes, viz. Felonies, appeared to be neither so grave nor so trivial as to make[2] it useless to take some formal notice of the gradations of guilt that arise from the variety of ways in which men may be concerned in them. And in the case of Felonies these distinctions still continue to be drawn, though their practical importance has now almost entirely disappeared. An accurate comprehension of them is, however, still of great value to the student as enabling him, not merely in

[1] *Gould and Co. Ltd.* v. *Houghton*, [1921] 1 K. B. 509.

[2] See Stephen, *History of Criminal Law*, II, 221–241; *Digest of Criminal Law*, 7th ed., Arts. 50–61; Pollock and Maitland, II, 507–509.

Felonies but also in Treasons and Misdemeanors, to trace with precision the lines at which the law ceases to take notice of participation in a crime—the stages, in other words, where Complicity ends and Immunity begins. Four several ways of taking part in a felony are recognised: (1) a principal in the first degree, (2) a principal in the second degree, (3) an accessory before the fact, (4) an accessory after the fact.

(1) By a *principal in the first degree*, we mean the actual offender—the man in whose guilty mind lay the latest blameable mental cause of the criminal act. Almost always, of course, he will be the man by whom this act itself was done. But occasionally this will not be so; for the felony may have been committed by the hand of an innocent agent who, having no blameable intentions in what he did, incurred no criminal liability by doing it. In such a case the man who instigates this agent is the real offender; his was the last *mens rea* that preceded the crime, though it did not cause it immediately but mediately. Thus, if a physician provides a poisonous draught and tells a nurse that it is the medicine to be administered to her patient, and then by her administration of it the patient is killed, the murderous physician—and not the innocent nurse—is the "principal in the first degree".[1] Similarly, if a man sends a six-year-old child[2] into a shop to steal something out of it for him, the man himself will be principal in the first degree in this theft. Thus if you hand in to your master's book-keeper a lying statement of money matters, and he believes it and makes entry of it, you are yourself indictable for the offence of "falsifying" the master's account-books in which the untrue statement was so entered.[3] Even an animal may be employed as an "innocent agent". For, just as anyone who sets a

[1] Kelyng 52 (K. S. C. 79); *Rex* v. *Saunders and Archer* (1578), Foster 371 (K. S. C. 81).

[2] *Reg.* v. *Manley* (1844), 1 Cox 104 (K. S. C. 78).

[3] *Reg.* v. *Butt* (1884), 15 Cox 564.

dog upon people is himself guilty of assaulting them, so any one who should send his trained retriever to purloin meat from a butcher's stall, might be convicted of the larceny of the meat, as a principal in the first degree; and this, even though he were out of sight when the dog took it.

There may, of course, be more than one principal in the first degree. Thus all the members of a gang of poachers may have fired simultaneously at the keeper who has surprised them. Or both the father and the mother of a little child may have together concurred in starving it. And persons may be thus joint principals in the first degree, even though one of them commits his share of the crime in one town whilst his colleague commits his in quite a different one.

(2) A *principal in the second degree* is one by whom the actual perpetrator of the felony is aided and abetted at the very time when it is committed. For instance, a car-owner sitting beside the chauffeur who kills some one by over-fast driving, or a passenger on a clandestine joy-riding expedition which results in manslaughter;[1] or a bigamist's second "wife", if she *knows* he is committing bigamy. (In early law he was not ranked as a principal at all, but only as a third kind of accessory—the accessory *at* the fact.) This subordinate principal may or may not be actually present at the scene of the crime. Instances of persons who aid and abet a felony at the place itself[2] are afforded by the seconds in a prize-fight which ends fatally; or even by mere spectators if they actively encourage such a contest even by mere applause. But a spectator's presence at a prize-fight does not of itself constitute sufficient encouragement to amount to an aiding

[1] *Rex* v. *Baldessare* (1930), 22 Cr. App. R. 70; 144 L. T. 185.

[2] *Reg.* v. *Swindall and Osborne* (1846), 2 C. and K. 230 (K. S. C. 74); contrast *Rex* v. *Mastin* (1834), 6 C. and P. 396 (K. S. C. 77). "The surgeon who attends a duel, to *save* the lives imperilled, attends it as a criminal"; 8 Q. B. D. at p. 536.

and abetting,[1] and therefore does not necessarily make him punishable as a party to it. On the other hand, a man may effectively aid and abet a crime, and at the very moment of its perpetration, without being present at the place where it is perpetrated. Thus, when *A* is inside a house, committing a burglary, *B* and *C* may be waiting outside it, ready to help him in carrying off the plunder or to protect him by giving warning of the approach of the police.[2] A prize-fight will usually have sentinels thus on the alert. In a case in Ohio, a man who invited a shopkeeper to accompany him to a convivial gathering, and took care to keep him agreeably occupied at it while some accomplices broke into his shop, was held to have been giving, even at the moment of the burglary, a sufficiently effective assistance in it to render him a principal in the second degree.[3]

An aider and abettor is liable for such crimes committed by the principal in the first degree as were done in execution of their common purpose.[4] Thus if two men have a common design to commit robbery with violence and one causes death while another is present aiding and abetting the felony, as a principal in the second degree, both are guilty of murder although the latter had not specifically consented to such a degree of violence as was in fact used, *Rex* v. *Betts and Ridley* (1930);[5] but the act done must relate to the common design and not totally or substantially vary from it, see p. 162 *post.*

(3) An *accessory before the fact* is a person who procures

[1] *Reg.* v. *Coney* (1882), 8 Q. B. D. 534. Cf. *Rex* v. *Gray* (1917), 12 Cr. App. R. at p. 246.

[2] Foster 350. Cf. *Reg.* v. *Griffith* (1553), Plowden 97 (K. S. C. 73); *Rex* v. *Betts and Ridley* (1930), 144 L. T. 526; 22 Cr. App. R. 148.

[3] *Breese* v. *The State* (1861), 12 Ohio 146.

[4] Usually there *is* a purpose agreed on between the two. But a man who does something, which he knows will assist an intended crime, is liable as aider and abettor, even though the main offender is unaware of this support. See 13 Cr. App. R. 166.

[5] 144 L. T. 526; 22 Cr. App. R. 148 (K. S. C. 554).

or advises[1] one or more of the principals to commit the felony.[2] This definition requires from him an instigation so active that a person who is merely shewn to have acted as the stake-holder for a prize-fight, which ended fatally, would not be punishable as an accessory. The fact that a crime has been committed in a manner different from the mode which the accessory had advised, will not excuse him from liability for it. Accordingly if *A* hires *B* to poison *C*, but *B* instead kills *C* by shooting him, *A* is none the less liable as accessory before the fact to *C*'s murder. But a man who has counselled a crime does not become liable as accessory if, instead of any form of the crime suggested, an entirely different offence is committed. An exception, however, arises where the crime counselled was one which was itself likely to cause this other crime that actually was committed; so if, when *A* has hired *B* to murder *C*, *B* by mistake kills *C*'s twin brother *D* instead, *A* may be convicted as an accessory to *D*'s murder. Yet in *Saunders' and Archer's Case*[3] (1578), where one man had instigated another to give a woman a poisoned apple, but she innocently handed on this apple to her child, who died from eating it, there was held to be no such likelihood as would render the original instigator an accessory to the murder of the child.

The student should notice that in criminal law the word "principal" thus suggests the very converse of the idea which it represents in mercantile law. In the former, as we have seen, an accessory proposes an act, and the "principal" carries it out. But in the law of Contract, and in that of Tort, the "principal" only authorises an

[1] Even to know that burglary in general is intended, and to supply the means that might be used in it, is not enough; there must be in mind some specific crime, *i.e.* a particular burglary, *Rex* v. *Lomas* (1913), 9 Cr. App. R. 220. Cf. L. and C. 161.

[2] Therefore there can be no accessory before the fact in "voluntary" (*i.e.* unpremeditated) manslaughter. See p. 130 *post*.

[3] Plowden 475; Foster 371 (K. S. C. 81). For a discussion of this case see *Harvard Law Review*, XLIII, 689.

act, and the "agent" carries it out.[1] Where the same transaction is both a tort and a crime, this double use of the word may cause confusion. For example, if, by an innkeeper's directions, his chamber-maid steals jewels out of a guest's portmanteau, the maid is the "principal" in a *crime*, wherein her master is an accessory before the fact; whilst she is also the agent in a *tort*, wherein her master is the "principal".

As we have already seen, to participate in a treason or a misdemeanor in either the second or the third of the modes now enumerated would constitute, not only an act of crime, but an act which the law does not distinguish (as it does in the case of felonies) from that of the "principal in the first degree". It is wholly immaterial, for all technical purposes, whether a misdemeanant was principal at the fact or before the fact.

(4) But the *accessory after the fact* stands in a fourth and remoter degree of complicity, which in the case of misdemeanors[2] involves no criminal responsibility at all. An accessory of this species is a person who, knowing that a felony has been committed, subsequently shelters or relieves one of the felons (even one who was a mere accessory) in such a way as to enable him to elude justice. He may do this, for instance, by concealing a fugitive murderer in his house or supplying him with the means of escape,[3] or by helping a convicted murderer to get out of prison. Active assistance to the felon is thus necessary.[4] Hence merely abstaining (however wilfully) from arresting a known felon, and so leaving him to make his escape, is not enough[5] to make the sympathiser guilty, as an accessory, of the felony itself. (But it does make him

[1] South African lawyers use the terms thus, even as to Crimes.

[2] Or of the petty offences punishable summarily.

[3] Or destroying dangerous evidence, *Rex* v. *Levy* (1912), 7 Cr. App. R. 61.

[4] *Reg.* v. *Chapple* (1840), 9 C. and P. 355 (K. S. C. 82). But it need not be to him *personally*; as *Rex* v. *Levy* shews.

[5] Hale, *History of Pleas of the Crown*, pp. 618–619.

guilty of the specific misdemeanor of a Misprision of Felony.[1] Similar merely passive connivance in a treason would, in like manner, be a Misprision of Treason. For crimes so grave as felonies or treasons ought to be disclosed to a magistrate by every one who knows of them. But in the case of mere misdemeanors there is no such duty.) It should be noted that, since it is a wife's duty to aid her husband and to keep his secrets, she incurs no[2] liability if, after he has committed a felony, she hides him from justice. But a husband enjoys no similar exemption when he assists a felonious wife; he becomes accessory to her felony.

Even in felonies but little practical importance now attaches to the distinctions between the first *three* of these four classes of "accomplices"—(a term which the law applies to all the *participes criminis*, whatever their degree of "complicity" in the offence, though popular use generally limits it to those who take only a minor part). For the maximum punishment prescribed for any given crime is the same in the case of all three classes. And similarly the mischievous rule of the old common law, that the accessories to a crime could not be convicted until their principal was convicted (though he perhaps might be acquitted utterly unjustly or might die before he could be arrested), has long ago been abolished by statute; so that now all accessories whether before or after the fact may be indicted even though the principal felon has not yet been convicted, or even is not amenable to justice.[3] Moreover, by a bold application of the principle that *qui facit per alium facit per se*, it has also been enacted that an accessory before the fact may even be indicted and convicted as himself a principal.[4] For the man who despatches the assassin is as truly a murderer of the victim

[1] *Post*, p. 320. [2] *Ante*, p. 84.

[3] 24 and 25 Vict. c. 94, ss. 1, 3.

[4] 24 and 25 Vict. c. 94, s. 2. See *Reg.* v. *James* (1890), 24 Q. B. D. 439 (K. S. C. 81).

as if he had himself fired the fatal bullet. But the converse does not hold good; if a principal is indicted as an accessory, he cannot be convicted.

In modern times, the only important surviving difference between the various grades of accomplices consists in the fact that a much more lenient punishment is awarded to the man who is only an accessory *after* the fact. Instead of being, like accessories before the fact, liable to the same heavy maximum of sentence as the principal, he is punishable with nothing more than two years' imprisonment, with or without hard labour (except in the case of murder, where the maximum punishment for an accessory after the fact is penal servitude for life).

It is scarcely necessary to say that a man may be an accomplice in more than one way to the same act of crime; and thus he may be convicted on one count as an accessory before the fact, and on another count as an accessory after the fact.[1] For that famous and still mysterious crime, the murder of Sir Edmondbury Godfrey in 1678, Atkins (the secretary of Pepys the diarist) was indicted both as an accessory before the fact and also as a principal.[2]

[1] 8 C. and P. 43. But evidence that he is merely an accessory after the fact does not support a charge that he is an accessory before the fact, or a principal, *Rex* v. *Fitzpatrick* (1926), 19 Cr. App. R. 91.

[2] 6 St. Tr. 1491.

CHAPTER VII

THE CLASSIFICATION OF CRIMES

PUBLIC wrongs, Pleas of the Crown, or—to use a phrase more familiar but more ambiguous—Crimes, may be arranged, according to their technical degrees of importance, in the following series of groups.

I. Indictable offences; *i.e.* those which admit of trial by jury.

(1) Treasons,
(2) (Other[1]) Felonies,
(3) Misdemeanors.

II. Petty offences; *i.e.* those which can only be tried summarily, by justices of the peace sitting without a jury.[2]

The word "Crime" is properly applicable to all these; and thus, for instance, in the Judicature Acts[3] the expression "criminal cause or matter" includes them all. But sometimes more restricted senses have been adopted: as when Serjeant Stephen, in re-writing Blackstone's *Commentaries*, limits "crime" to offences that are indictable; or when Blackstone himself goes still further, and limits it to indictable offences that are graver than misdemeanors.[4]

The two groups, Indictable and Non-indictable, were originally quite exclusive of each other; but now they overlap to some extent. For, under the Summary Juris-

[1] For (*post*, p. 105) "Felony" *properly* includes Treasons.

[2] Sometimes absurdly, though officially, styled "Summary offences"! "Misdemeanor" in a wide and better sense includes these as "petty misdemeanors", and means any offence below felony ([1928] 2 K. B. 459); whilst Blackstone (IV. 1. 5) recognises it as having also a third sense, synonymous with "Crime", and so including even Felonies.

[3] 36 and 37 Vict. c. 66, s. 47. Now 15 and 16 Geo. 5, c. 49, s. 31.

[4] 4 Bl. Comm. 1.

diction Act, 1879, and the Criminal Justice Act, 1925,[1] some frequent indictable offences *may* under certain circumstances be tried summarily instead; whilst all such of the petty offences as are heinous enough to admit of a sentence of imprisonment for over three months *may* instead be tried on indictment.[2]

The discussion of the distinction between indictable and non-indictable offences may conveniently be postponed until we reach the subject of Procedure. But the mode in which indictable offences themselves are subdivided springs from so noteworthy a historical origin,[3] and produces so many important consequences, as to deserve immediate consideration.

Amongst indictable crimes, the common law singled out some as being so conspicuously heinous that a man adjudged guilty of any of them must incur—not as any express part of his sentence but as a consequence that necessarily ensued upon it—a forfeiture of property, whether of his lands or of his goods or of both. Such crimes were called "Felonies". The other, and lesser, crimes were known as "Transgressions" or "Trespasses"; and did not obtain their present name of misdemeanors until a much later date. A felony is, therefore, a crime which either involved by common law such a forfeiture, or else has been placed by statute on the footing of those crimes which did involve it. (This definition, it will be seen, includes treason; and, accordingly, the Statute of Treasons[4] speaks of "treason or other felony". But the differences of procedure between cases of treason and those of other felonies are so numerous and important that treasons have usually to be discussed apart; and hence,

[1] 15 and 16 Geo. 5, c. 86, s. 24. See also as to children, 23 Geo. 5, c. 12, sch. III. *Post*, ch. XXIX. Six-sevenths of all the indictable offences prosecuted *are* so tried.

[2] 42 and 43 Vict. c. 49, s. 17.

[3] See Pollock and Maitland, I, 284–286, II, 463–468, 509.

[4] 25 Edw. 3, st. 5, c. 2. Cf. Maitland's *Collected Papers*, I, 316.

for brevity's sake, the term "felony" is commonly employed as exclusive of them.)

The very word "felony" has been said[1] to contain a reference to the forfeiture which the crime entailed, and to be derived from the words *fee*, *i.e.* feudal holding, and *lon*, *i.e.* price; felony thus being such a crime as "costs you your property". But according to the Dictionary of Prof. Skeat the word is derived from a Celtic root, meaning "evil" (or, according to that of Dr Murray, from the Latin *fel*, "venom"); and at any rate it is akin to our English adjective "fell", as in Shakespeare's "fell and cruel hounds".[2]

Familiar instances of felonies are—murder, manslaughter, burglary, housebreaking, larceny, bigamy, rape; whilst the most conspicuous instances of misdemeanors are less heinous crimes, like perjury, conspiracy, fraud, false pretences, libel, riot, assault. The differences between felonies and misdemeanors are no longer so numerous as they once were. Amongst those, however, that have now disappeared there are some whose historical importance requires notice.

(1) Originally, as we have seen, every felony tacitly produced a forfeiture; whilst no misdemeanor did, and in extremely few misdemeanors could forfeiture be imposed even as an express part of the sentence. But all forfeitures for felony and treason were abolished by the Forfeiture Act, 1870 (33 and 34 Vict. c. 23, s. 1).

(2) Originally all felonies (except petty larceny) were punished with death; whilst no misdemeanor was.[3] Hence the idea of capital punishment became so closely connected with that of felony that any statute making a

[1] 4 Bl. Comm. 95. It occurs in French before 1066; but only as the name of one specific offence—the breach of a vassal's fealty to his lord, naturally involving the loss of his feudal land.

[2] Pollock and Maitland, II, 465.

[3] Heresy (though never a felony) was of course punishable with death; but it was an ecclesiastical offence not triable in temporal courts.

crime a felony made it capital by mere silent implication; whilst in an enactment which created a mere misdemeanor even the widest general words could not suffice to make it capital,[1] and nothing but the most express language would suffice.

(3) Originally, a felon could not, at his trial, call any witnesses in his defence,[2] or have any counsel to defend him[3] (except for the argument of mere points of law); whereas a misdemeanant, like a defendant in a civil case, could have both. These disabilities were removed in 1702 and in 1836 respectively.

But the majority of the ancient differences between felonies and misdemeanors still exist in the law of the present day. The discussion of most of these may be postponed until we reach the general subject of Procedure; when we can more appropriately discuss[4] those which relate to such matters as the mode of accusation, the procedure at the trial,[5] and the disqualifications produced by a conviction. But there are some differences which can more conveniently be considered now.

(1) It is, as we have already seen,[6] only in felonies that the distinction between the four classes of *participes criminis* is technically drawn, or the fourth class made criminal.

(2) When the Act of 1870[7] put an end, as we have seen, to the forfeitures which were formerly created by a conviction for treason or any other felony, it did not restore

[1] Hence the Statute of Anne (7 Anne, c. 12) which, in consequence of the unfortunate arrest of the Russian Ambassador, subjects those who violate an ambassador's privileges to "such pains, penalties, and corporal punishment *as the court shall think fit*" did not make it possible to punish this offence with death: though its framers may have hoped that "his Czarish Majesty", whom they avowedly were attempting to appease, would be unaware that its language would be construed thus restrictively. 1 Bl. Comm. 255.

[2] 1 St. Tr. 885, 1281, 1304.

[3] Y. B. 30 and 31 Edw. 1. App. II, p. 529.

[4] *Post*, chs. xxx and xxxi.

[5] *Ibid.*

[6] *Ante*, p. 96.

[7] 33 and 34 Vict. c. 23.

the offender's property free of all liabilities, but justly saddled him with certain burdens which the crime itself had brought about. Thus, sec. 4 of the Forfeiture Act enables the court before which any person is convicted of felony—but not of treason—to order that he shall pay damages, not exceeding £100, for any "loss of property" which the felony has occasioned (as where cash has been given for a forged cheque). But for this enactment, the person who had suffered the loss would have had to incur the trouble and expense of bringing an action in some civil court to obtain compensation. French procedure has long permitted the intervention, in criminal proceedings, of a *partie civile*; so as to save expense and trouble by enabling one litigation to do the work of two. But the principle is so unfamiliar in England that it has not yet been extended to misdemeanors.[1]

(3) As felonies were always heinous offences, the law regarded it as of great moment that the offender should be brought to justice. Hence whenever a felony has been committed, any one who, on reasonable grounds, suspects any person of being the offender, is permitted to arrest him forthwith. And any one who actually sees a felony

[1] But in those light cases where any crime—whether felony or misdemeanor or even a mere petty non-indictable offence—has been committed under such extenuating circumstances (whether arising from the triviality of the act itself, or from the youth, good character, mental condition, etc. of the offender) that, although the charge is proved, the court thinks it inexpedient to inflict actual punishment, it may instead order him to pay "such damages for injury or compensation for loss" as it thinks reasonable. If the court is only one of summary jurisdiction, the sum ordered must not exceed £25; but if it be a court of assizes or quarter-sessions there is no limit (not even that of the £100 prescribed in the Forfeiture Act). See 16 and 17 Geo. 5, c. 13, s. 1.

The Forfeiture Act also empowered the court which convicted a person of felony or of treason to charge him with the *costs* of the prosecution. But by the Costs in Criminal Cases Act, 1908 (8 Edw. 7, c. 15), s. 6 that power is now given on conviction for *any* indictable offence; and for all non-indictable offences it already existed, under 11 and 12 Vict. c. 43, s. 18. In 1909, such an order was made on a misdemeanant in a case where the taxed costs of the prosecution exceeded £2000; 2 Cr. App. R. 228.

committed is not only permitted, but required, to do his best forthwith to arrest the felon; and may use any degree of violence that may be necessary to attain that object. But in the case of misdemeanors the common law never permitted (and it is only in particular cases that modern statutes[1] now permit) even the eye-witnesses of the offence to arrest the offender without first obtaining a magistrate's warrant to enable them to do so. Hence a man who steals a penny may be seized on the spot, since he is a felon. But a man who has obtained a herd of cattle by false pretences is only a misdemeanant, so the farmer had, at the common law, to let him go. On the same principle, the justices of the peace who committed a felon for trial, have always had authority to insist, if they thought fit, on his remaining in prison until the trial took place; though a person committed for trial for misdemeanor could, at common law, insist on being released on bail if he found sufficient sureties. By modern legislation, however, the discretion which justices possess in felonies has been extended—first to many—now to all misdemeanors.[2] The anxiety of the law to secure the punishment of felons led to the further rule that no person injured by a felony could bring a civil action against the felon, to recover compensation for his loss, until *after* a criminal prosecution had either taken place or (as by the death or the pardon of the offender) been rendered impossible. In misdemeanors, on the other hand, either the civil or the criminal remedy may be taken first; or indeed, in theory, both may be pursued simultaneously,[3] though in practice such a course would never be prudent.[4] But it should be added that, even in the case of felonies, it is not altogether easy for a defendant to defeat a civil

[1] *Post*, ch. xxx.

[2] 8 Edw. 7, c. 15; *post*, p. 537.

[3] *Jones* v. *Clay* (1798), 1 B. and P. 191; *Ex parte Edgar* (1913), 29 T. L. R. 278.

[4] Cf. *Rex* v. *Mahon* (1826), 4 A. and E. 575.

action by raising this defence that he has not yet been prosecuted for the wrong which is complained of. So audacious an attempt to "take advantage of his wrong" is not allowed by the courts to be raised in the form of an ordinary defence. But the defence does certainly exist; see *Smith* v. *Selwyn*, [1914] 3 K. B. 98.[1] A defendant can set it up by a summons at chambers to stay the action; or the court itself may spontaneously refuse to hold the trial. The objection, however, was never regarded as applying to actions, even though connected with the felony, in which the defendant was not the felon himself, or in which the plaintiff was not the injured party himself.[2]

(4) The heinousness of felonies is vividly shewn by the legal disqualifications which arise from the infamy of being convicted of one. The convicted felon[3] loses any office or pension;[4] and he cannot vote for or sit in Parliament, or hold military or civil or ecclesiastical office, until after he either has been pardoned or has worked out his sentence.[5] These disqualifications are not entailed by any misdemeanor, but conviction and imprisonment for more than three months without the option of a fine either within five years before election or after election entails disqualification for local government office,[6] and a member of Parliament who commits a misdemeanor may be expelled.[7]

The existence of so many differences, some of them still so important, between felonies and misdemeanors naturally suggests to the student that the former class of crimes are marked by some special gravity. Yet

[1] Felonies of *homicide* are made an exception by 9 and 10 Vict. c. 93.

[2] *Appleby* v. *Franklin* (1885), 17 Q. B. D. 93.

[3] Unless sentenced merely to imprisonment for twelve months or less, and without hard labour; or (23 Geo. 5, c. 12, s. 51) unless convicted when younger than seventeen.

[4] But in practice the pensioning authorities now deal with each case on its merits; and note any favourable report from the judge.

[5] 33 and 34 Vict. c. 23, s. 2.

[6] Local Government Act, 1933 (23 and 24 Geo. 5, c. 51), s. 59.

[7] Wade and Phillips, *Constitutional Law*, 2nd ed., p. 120.

it is not easy for him at first sight to discover on what principle the separation has been made between the crimes which are allotted to the one class or to the other. It cannot depend—like the French classification into *crimes*, *délits*, and *contraventions*—upon the degree of dignity of the tribunal before which the offender is to be tried. For a man may be tried for larceny, which is a felony, before a police magistrate, and yet for mere misdemeanors he may be impeached before the House of Lords. Nor, again, can it depend upon the amount of evil actually caused by the offence. For perjury, though it may cause the death of an innocent person, is only a misdemeanor, whilst keeping a horse-slaughterer's yard without licence is a felony.[1] Nor, thirdly, can it depend upon the gravity of the punishment. For larceny, which is a felony, and false pretences, which is a misdemeanor, are punishable alike. And the misdemeanor of conspiracy to murder is punishable with ten years' penal servitude;[2] yet the felony of stealing mineral ores is only punishable with two years' imprisonment (Larceny Act, 1916, s. 11). An arrangement which produces such anomalies as these, can only be explained by considerations purely historical. It probably may be traced back to ancient times when particular offences were first found to be of such frequency and gravity as to render it no longer safe to leave them to the chance of a prosecution by the injured, in the forms of ordinary litigation. The public safety demanded a periodical public investigation by the Crown, through a jury of accusation provided for the purpose, into the question whether any offences of this deep dye had been committed. Hence arose[3] "Grand Juries". To facilitate

[1] 26 Geo. 3, c. 71. The object is to prevent stolen horses from being easily disposed of.

[2] In the period when rape was only a misdemeanor it nevertheless was punished by the loss of the offender's eyes and testicles; Hawkins, Bk. I, ch. IV, s. 7.

[3] See *post*, p. 545.

their operations it became necessary to frame a precise legal definition of each of the offences which they were to report about.[1] To such offences the name of "felonies" probably soon became[2] limited; and the procedure concerning them gradually acquired its peculiar characteristics. But offences less grave, or less common, were for a long time left very loosely defined (as some of them still are, *e.g.* conspiracy); and were never prosecuted in this "inquisitorial" mode, but were left as before to the "litigious" action of private persons (though in later days that action would usually be nominally taken on behalf of the Crown). These latter offences (except where statutory enactment has since erected any of them into felonies) constitute our modern misdemeanors. They, said Bracton six hundred years ago, are tried like civil actions ("civiliter intentantur"); and even now, as Sir James Stephen says, a prosecution for misdemeanor is akin to an action for tort in which the King is plaintiff and which aims at punishment and not at damages. Thus, in a trial for misdemeanor, the juryman's oath is to "truly try the *issue* joined between our sovereign Lord the King and the *defendant*". But in a felony it is to "true *deliverance*[3] make between our sovereign Lord the King and the *prisoner* at the bar". Hence it is easy to understand why, in so many respects, the older law assimilated the idea of misdemeanors rather to that of mere civil wrongs than to that of felony; as in the conspicuous instance of its requiring a Peer to be tried by the House of Lords if the charge is one of felony, but by a jury of mere commoners if it is one of misdemeanor. In the course of time,

[1] Cf. *Eyre of Kent*, 1313 (Selden Society), I, 52, 57.

[2] For an earlier and wider meaning (*i.e.* an "appealable" crime) see 2 P. and M. 466.

[3] It is uncertain whether this refers to (1) the deliverance of the verdict, or (2) the deliverance of the prisoner (who is said to "stand on his deliverance") from custody, or (3) the jury's *deliberation* on the evidence.

the analogies of civil procedure have gradually caused the litigious type of procedure to supersede the inquisitorial, even in the case of felonies.[1] The influence of the old inquisitorial theory, however, still survives in the conduct of all public prosecutions. Thus, in cases of homicide, every person present at the killing is usually called by the Crown as a witness, if he seem honest, even though he be manifestly hostile to the Crown. In a case of poisoning, all the chemists who have made analyses for the Crown, alike those who thought they found poison and those who did not, will be called. It is the view of English law that the Crown counsel are not "litigants" battling with the prisoner, but a royal commission of "inquirers" dispassionately investigating the truth.[2]

We may add that long before the abolition, in 1870, of forfeitures for felony, they had ceased to be of any financial importance. The annual amounts received between 1848 and 1870 ranged only from £253 to £1317. Most felons were poor; and the rich ones disposed of their wealth between arrest and conviction. The time had come for this change.

It is quite possible that, in a perfect Criminal Code, crimes would continue to be broken into two great divisions according to their greater or lesser heinousness; and that particular incidents both of procedure and punishment would attach to the graver class. But, in English law, great objection may be taken both, as we have seen, to the illogical manner in which particular crimes have been placed in the one class or the other, and

[1] But coroners still proceed inquisitorially; they obtain all the evidence they can get, whichever way it may tell. See p. 504 *post*.

[2] See 1 C. and K. 650. Similarly the judge in all criminal trials can, if necessary, call a witness whom neither party wishes to be called; (though the "litigious" nature of civil trials forbids him thus to interpose in them). And the prosecuting counsel is only a "minister of justice"; *post*, p. 568.

In trials for felony, the curious proclamation, inviting other charges against the prisoner, is a survival from "inquisitorial" procedure.

also to some of the incidents attached to one or other of the classes. Hence the Criminal Code Bill of half a century ago, in its earlier form, abolished altogether the distinction between felonies and misdemeanors; and though the last draft, that of 1880, retained the distinction, yet it removed nearly all its importance. For it proposed that some incidents now attached to felonies should be attached only to such crimes as are punishable with death or penal servitude; whilst a few of the other incidents were to be extended to all crimes; and other incidents, again, were to be wholly abolished. There can be little doubt that, of all parts of our criminal law, none is in greater need of a thorough reconstruction than that which concerns the classification into Felonies and Misdemeanors.

BOOK II
DEFINITIONS OF PARTICULAR CRIMES

CHAPTER VIII

HOMICIDE

WE have already shewn ample ground for not adopting, as the arrangement of our successive explanations of the various crimes known to English law, the technical classification into Felonies and Misdemeanors. All writers have found it necessary to classify crimes upon a very different and more scientific principle—viz. by reference to the various kinds of interests which the respective offences violate. Thus Blackstone arranged them into those that are committed against (1) religion; (2) the law of nations; (3) the sovereign executive power; (4) the rights of the public; and (5) the rights of private individuals, whether these rights relate to (*a*) the persons, or (*b*) the habitations, or (*c*) the ordinary property, of those individuals. And, very similarly, the proposed Criminal Code of 1880 classified crimes into (1) those against public order (*e.g.* treason); (2) those affecting the administration of law and justice (*e.g.* perjury); (3) those against religion, morals, or public convenience (*e.g.* blasphemy, nuisance); (4) those against the person or reputation of individuals (*e.g.* murder, libel); and (5) those against the rights of property of individuals (*e.g.* theft). But the clearest arrangement is that of Blackstone's modern editor, Serjeant Stephen, who divides them simply into (1) offences against the persons of individuals, (2) offences against the property of individuals, (3) offences against public rights.

Following this last arrangement, our list of crimes must

begin with those which affect the security of men's persons—employing here that much abused word, not in its ancient technical legal sense of "a subject of rights and duties",[1] but in the modern meaning of "the living body of a human being".[2] Of all such offences, that of homicide[3] is necessarily the most important. And, to every student of criminal law, homicide is a crime peculiarly instructive; inasmuch as in it, from the gravity of the fact that a life has been taken, a minuter inquiry than is usual in other criminal cases is made into all the circumstances, and especially into the wrongdoer's state of mind. Hence the analysis of the *mens rea* has been worked out in homicide with great detail; whilst in regard to many other offences it still remains uncertain what precise condition of mind the accepted definitions of them are to be interpreted as requiring.

It is not, however, every homicide that is criminal. And at one time those forms of homicide which were not criminal were subdivided into two species (though the importance of the distinction has now disappeared). For the older lawyers distinguished between the homicides that were Justifiable, and those that were only Excusable. In the former the act was enjoined or permitted by the law (the slayer thus really acting on behalf of the State); in the latter, the act was thought to carry with it some taint, however slight, of blameworthiness.

(A) The homicides classed as strictly *Justifiable* have never involved any legal penalty whatever.

(1) The execution of public justice. The hangman who carries out[4] the sentence of a competent court incurs no

[1] See Holland's *Jurisprudence*, ch. VIII.

[2] This sense perhaps was brought into English law by Sir Matthew Hale; who has the grotesque phrase, "the interest which a *person* has in the safety of his own *person*". (*Analysis of the Law*, s. 1.)

[3] See Stephen's *History of Criminal Law*, III, 1; *Digest*, 7th ed., chs. XXIII, XXIV.

[4] If with precision; *e.g.* no change of day or of form of death.

criminal liability. The sheriff who burnt the martyrs Latimer and Ridley at the stake was accordingly in no danger, either under Mary or even under Elizabeth, of being himself convicted of murder for having so done. His immunity was due—not, as Blackstone (IV. 28) ascribes it, to the mere absence of *mens rea* (because his act was extorted by a compulsion of official duty which overbore his own reluctance to commit it)—but to the entire absence of even an *actus reus*. It was not a crime for him to carry out the sentence; nay, it would have been a crime (though it might have been an act of moral heroism) for him to refuse to carry it out. For technical "murders", by deviating mercifully from a sentence, see p. 319 *post*.

(2) The advancement of public justice. Thus life may be innocently taken, if it be necessary for arresting a felon,[1] or suppressing a riot, or preventing some crime of a violent[2] character. On the other hand, when, in 1804, the "Hammersmith Ghost" (or a person mistaken for it) was shot on its nocturnal round, the slayer was held guilty of murder; for the masquerade thus prevented was not a violent crime but a mere misdemeanor of "Nuisance".

(3) The defence of oneself against a wrong-doer. A man is justified in using against an assailant a proportionate amount of force in defence of himself[3] or of his immediate kindred[4] (and in the case of a *felonious* assault,[5] and probably even in lesser ones,[6] the defence of anyone else who actually needs his protection).[7] Hence if he has a

[1] Cf. pp. 332, 528, *post*; and K. S. C. 143. As to officers' indemnification for firing on air-craft that fly illegally, see 2 and 3 Geo. 5, c. 22.

[2] Preventing a *non*-violent crime, even a felony, would not thus justify homicide; 1 C. and P. 319.

[3] *Howel's Case* (1221), Maitland's *Select Pleas* 94 (K. S. C. 139). In 1811 Mr Purcell, of co. Cork, a septuagenarian, was knighted for killing four burglars with a carving knife.

[4] *Reg.* v. *Rose* (1884), 15 Cox 540 (K. S. C. 140).

[5] See 2 B. and P. 260. [6] See p. 179 *post*.

[7] Foster 274; Russell on Crimes (8th ed.), pp. 773, 775; 135 U. S. A. 80, "any bystander".

reasonable apprehension of danger, and adopts none but proportionate means of warding it off, he will be innocent even though the wrong-doer be killed by the means thus adopted. But proportionate these means must be.[1] I must not stab a child because he is pricking me with a pin. Thus a person assaulted is not justified in using firearms against his assailant, unless the assault is so violent as to make him consider his life to be actually in danger. On the other hand, where a man, after hurling a bottle at the head of one Mr Cope, had immediately proceeded to draw a sword, and Cope thereupon had thrown back the bottle with violence, Chief Justice Holt held that Cope's action was justifiable;[2] "for he that hath manifested that he hath malice against another is not fit to be trusted with a dangerous weapon in his hand". Again, self-defence may sometimes lawfully take the form of attack. If a revolver be pointed at you, a blow from your umbrella may be the only possible method of self-defence. But though a blow struck merely to prevent further attacks is a justifiable self-defence, it must not be repeated for aggression; "a fair fight" is not self-defence.

But where the wrong-doer is not going so far as to assault a human being, but is only interfering unlawfully with property, whether real or personal, the possessor of that property (though he is permitted by the law to use a moderate degree of force in defence of his possession), will

[1] See also pp. 178–180 *post*.

[2] *Reg.* v. *Mawgridge* (1706), Kelyng 120, 129. If he be blameless *from the first* it is a disputed question whether a man, defending himself against immediate danger of grievous bodily harm, is bound (as he certainly is in Chance-medley, p. 122 *post*) to retreat, if possible, before killing; especially if assailed within his own house. Recent *obiter dicta* in England seem (cf. 18 Cr. App. R. 160) against his having the right to stand his ground. *For* the right, see Foster, and East's P. C. 271. The right has twice been recognised by the Supreme Court of the United States; 158 U. S. 550, 256 U. S. 335; "detached reflection cannot be demanded in the presence of an uplifted knife". Cf. *Harvard Law Review*, XVI, 567.

usually not be justified in carrying this force to the point of killing the trespasser.[1] For such a justification will not arise unless the trespasser's interference, or his resistance, amounts to a felony; and moreover to a felony that is violent, such, for example, as robbery, arson, or burglary. And even these extremely violent felonies should not be resisted by extreme violence unless it is actually necessary; thus firearms should not be used until there seems to be no other mode available for defeating the intruder and securing his arrest. Hence, *à fortiori*, the actual killing of a person who is engaged in committing any mere misdemeanor, or any felony that is not one of force, cannot be legally justified; anyone so killing him will be guilty of a criminal homicide.

(4) There was some old authority for maintaining that under some circumstances a man might, for the preservation of his own life, be justified in taking away the life even of a person who was in no way a wrong-doer. Thus Lord Bacon,[2] reviving the ancient problem which Cicero had cited from the Rhodian moralist Hecato, suggested that where two men, swimming in the sea after a shipwreck, get hold of a plank not large enough to support both, and one pushes off the other, who consequently is drowned, the survivor will not be guilty of any crime. But, as we have seen, in *Reg.* v. *Dudley and Stephens* (1884),[3] the five senior judges of the King's Bench Division threw doubt upon Bacon's doctrine; and refused to recognise as justifiable the act of some shipwrecked sailors, who had killed a boy, in order to feed on his body, when scarcely any other hope of rescue remained.

[1] But Hale held that since "a man's *house* is his castle", a violent attempt to take from him the possession of it may be resisted with as great force as would be permissible in defence of his person. This view was confirmed in 1924 by the Court of Criminal Appeal in *Rex* v. *Hussey*, 18 Cr. App. R. 160. There a tenant had inflicted shot-wounds in resistance to his landlord's illegal attempt to eject him from his room prematurely.

[2] Bacon's *Maxims*, v; Cicero, *De Officiis*, III, 23; Puffendorf, 2. 6. 4.

[3] 14 Q. B. D. 273 (K. S. C. 62). *Ante*, p. 87.

The peaceful orderliness of modern times has of course greatly diminished the number of cases of justifiable homicide. Some three hundred felonious homicides take place in England every year; but less than a score of executions, and less than half-a-dozen other homicides that are justifiable.

(B) Beyond the strictly justifiable cases of homicide there were other cases[1] which the law regarded as merely *Excusable, i.e.* similarly not deserving to be made felonies and punished with death, but as nevertheless being in some degree blameable. These accordingly were punished by the forfeiture of the offender's moveable property (though ultimately it became usual for the Crown to restore all these goods except the "deodand", the instrument by which the killing had been effected).[2] We have here a relic of the rough Anglo-Saxon times in which the law treated almost all homicides, heinous or innocent, as matters to be expiated by the payment of a pecuniary *wer*. Thus, so late as 1118, the compiler of the so-called *Leges Henrici I* gives it as still the Wessex rule, that for every homicide, whether intentional or even accidental, the *wergild* must be paid[3] to the family of the slain man. Even after a more discriminating legislation had recognised, under ecclesiastical influence,[4] that the more heinous forms must be punished with death, some time had still to elapse before it was clearly settled what forms were on the other hand so innocent as not to deserve even a pecuniary penalty. Thus, in the thirteenth century, even the man who slew some one by mere accident still needed a royal pardon, though he received this pardon as a matter

[1] Bracton, f. 121; 1 Hale P. C. 419–424; Stephen, *History of Criminal Law*, III, 77; Pollock and Maitland, *History of English Law*, II, 471.

[2] Pollock and Maitland, II, 473.

[3] Cap. 70, s. 12. "Sive *autem* sponte aut non sponte fiant hec, nichilominus tamen emendetur. *Que enim per insciencium peccamus, per industriam corrigamus.*" Pollock and Maitland, II, 469 and (Alfred's quaint 36th Law, as to various accidents caused by carrying a spear), I, 53.

[4] Glasson, *Histoire du droit de l'Angleterre*, II, 537.

of course.[1] And subsequently it came to be settled that, even when pardoned, he would still have to forfeit not merely the deodand but all the rest of his chattels (which, however, at that period were seldom of great value). Even if it were not to him that the deodand belonged, it nevertheless would still be confiscated, in order that it might be purged from the stain of blood by being "given to God" in pious uses. Hence it was exacted not only where a human agent was thus responsible for the death, as in the case of a man on horseback accidentally riding over a man who was asleep on the highway, but even where death was due to some mere natural accident, as in the case of a man's falling from a boat and being drowned. The rule was

> "Whatever moved to do the deed
> Is deodand and forfeited."

But, in practice, the forfeiture of the deodand was not confined to things that had moved. A small boy fell into a pan full of milk and was thereby drowned; whereupon the pan was forfeited.[2] The deodand was usually sold by the King; the purchase money, or commutation money, received for it being devoted to pious uses for the soul that had died unabsolved. After the Reformation, the money was usually handed to the poor, or to the relations of the deceased. Thus when in 1716 the coroner's jury of Yarmouth declared a stack of timber which had fallen on a child to be forfeited as a deodand, it was ransomed for 30*s*., which was paid over to the child's father. Deodands were not abolished until 1846.[3] But the general forfeiture of goods caused by excusable homicide had been abolished in 1828;[4] so the homicides which down to that time had been classed as Excusable ceased, thenceforward, to

[1] Pollock and Maitland, II, 478.

[2] *Select Coroner's Rolls*, p. 50.

[3] 9 and 10 Vict. c. 62. The abolition was hastened by the fear of entire railway-trains being forfeited.

[4] 9 Geo. 4, c. 31, s. 10.

differ at all in their legal consequences from such as were fully Justifiable. The merely Excusable cases of homicide had been the two following.

(1) Where in any *chance-medley* (*i.e.* "sudden combat") one of the combatants desisted from fighting, but the other continued his assault, and then the former one, having no other probable means of escape open to him,[1] killed his assailant, the necessity of self-defence prevented the homicide from being a felony. But, as at first he was to blame for his share in the affray, the case was distinguished from the strictly "justifiable" homicide in which a person, who had been assaulted when entirely passive, slew his assailant in self-defence. On the other hand, if the chance-medley had been continued by *both* the combatants down to the time when the fatal blow was struck, the homicide would have nothing to "excuse" it, and would be felonious[2]—a manslaughter or possibly even a murder.

(2) Where one man killed another by *misadventure*—*i.e.* in doing a lawful act, and with no intention of causing harm, and with no culpable negligence in the mode of doing it[3]—his act was held excusable. Thus where a man spun round with a boy in a frolic, and, on the boy disengaging himself, reeled against a woman and thereby caused her death, the case was held to be only one of misadventure.[4] So again, where a child of four, on being asked if he would like a drop of gin, twisted the glass out of the prisoner's hand and swallowed nearly all its contents, and died in consequence, it was held that the drinking this extraordinary additional quantity of the gin was the act of the child himself; and that the prisoner therefore had committed no felony.[5] A very important

[1] For he should *retreat*, if he can. Cf. p. 118, n. 2. [2] *Post*, p. 134.

[3] Contrast *Reg.* v. *Jones* (1874), 12 Cox 628 (K. S. C. 28) with K. S. C. 27 and with *Reg.* v. *Finney* (1874), 12 Cox 625 (K. S. C. 120).

[4] *Reg.* v. *Bruce* (1847), 2 Cox 262 (K. S. C. 136).

[5] *Rex* v. *Martin* (1827), 3 C. and P. 211 (K. S. C. 137).

class of cases of mere misadventure is that in which death is accidentally caused by a parent or master, when engaged in the lawful act of giving a child, or scholar, or apprentice, reasonable chastisement with a reasonable instrument.[1]

The right of the parent or teacher to punish a child is recognised by the Children and Young Persons Act, 1933.[2] By the older common law this right of correction was recognised even as against adult servants. Similarly, every husband was formerly intrusted with the power of correcting his wife by personal chastisement; but, as Blackstone (I, 444) tells us, in the politer days of Charles the Second this power of correction began to be doubted; though, he adds in a vein of humour, "the lower rank of people, *who were always fond of the Common Law*, still claim and exert their antient privilege".

The right to punish a child exists of course only in the case of one who is old enough to be capable of appreciating correction; not, for instance, in that of an infant of the age of two and a half.[3] And, in all cases, the character and amount of the punishment that can be recognised as lawful will vary with the age and the sex and the apparent physical condition of the child. But where the punishment has clearly a lawful occasion, and is not unreasonable in the manner of its infliction or even in its amount, the fact that the child has died in consequence of it will not render the parent or master who inflicted it guilty of a felonious homicide. Thus a death may ensue where the child has some hidden peculiarity of structure that was unknown[4] to the parent or master. Such a defect, for

[1] *Rex* v. *Woods* (1921), 85 J. P. 272; *Cleary* v. *Booth*, [1893] 1 Q. B. 465. Cf. p. 178 *post*. An elder brother may not chastise a younger brother merely because he is cheeky, *Rex* v. *Woods*, *supra*.

[2] 23 Geo. 5, c. 12, s. 1. [3] *Reg.* v. *Griffin* (1869), 11 Cox 402.

[4] *Status lymphaticus* (the debility produced by enlargement of the thymus gland) can rarely be detected during life; yet the most trifling cause may prove sufficient to kill anyone who has this malady; see 85 J. P. 272.

instance, as a fatty heart or the familiar "egg-shell skull" may render a slight blow fatal; or a hæmophilic boy may have such a tendency to bleeding that he dies from a flogging which might have been administered with impunity to ordinary pupils. Similarly, quite apart from any chastisement, the peculiar physical formation of a person may easily lead to his death by misadventure. A slight push, which was only such as is usual in social intercourse, has, for instance, been known to cause the death of an old man with the brittle arteries of senility.

Another class of cases of misadventure, of still greater practical importance, is seen where death is accidentally caused in the course of some lawful game or sport; as, for instance, when a batsman's head is fatally injured by a short-pitched ball rising sharply from the ground. Thus, though an armed tournament was unlawful even in mediæval times, and a knight who killed another in such an exercise would usually be guilty of criminal homicide, yet it was otherwise if the King had commanded the particular tournament in question. In a struggle thus legalised by the royal order, the death of any of the combatants was regarded as a case of mere innocent misadventure. At the present day, all such exercises with naked swords would be illegal however licensed. But ordinary fencing, and, similarly, boxing,[1] wrestling, football,[2] and the like, are lawful games if carried on with due care. Everyone who takes part in them gives, by so doing, his implied consent to the infliction upon himself of a certain (though a limited) amount of bodily harm. But no one has the right to consent to the infliction upon himself of an excessive degree of bodily harm, *e.g.* such harm as amounts to "maiming"[3] him; and thus his agreement to play a game under dangerously illegal rules

[1] *Reg.* v. *Coney* (1882), 8 Q. B. D. 534.
[2] *Reg.* v. *Bradshaw* (1878), 14 Cox 83 (K. S. C. 131).
[3] *Post*, p. 168; see also p. 183 *post*.

will, if he be killed in the course of the game, afford no legal excuse to the killer.[1] (Nor has he even any right to consent to the production of such a state of affairs as will constitute a breach of the peace. For both these reasons, prize-fighting[2] is held to be illegal; in spite of the two competitors having consented to take its risk.) Moreover as a general rule it is an illegal act to strike another person so that bodily harm (including any injury or hurt calculated to interfere with health or comfort) is likely to result. Unless the case comes within one of the recognised exceptions, *e.g.* sport, lawful chastisement, etc., consent is no defence and therefore irrelevant.[3]

Thus not only is a *combat* illegal, produced by an actual desire to hurt, but so also is even a *contest* for mere exhibition of strength and skill, if they are exhibited in a manner that is perilous.[4] To wear boxing-gloves will not necessarily reduce the peril of boxing to within the legal limit, for they may be too slight for their purpose.[5] And the question has further been debated whether an illegal degree of peril is not created by the Ten Seconds Rule; which, in order to protect an over-exhausted man from resuming the fight, makes his non-resumption of the contest equivalent to a defeat, but thereby tempts each boxer to try to secure victory by reducing his opponent to a dangerously extreme degree of exhaustion. The Home

[1] Cf. p. 98 *ante* as to guilt of the spectators.

[2] The fact that the boxers are contesting for a wager does not necessarily constitute a Prize-fight. That term involves the further idea of a Battery (p. 175) with a *dangerous* weapon, viz. the fist of a trained boxer; and usually, moreover, the idea of Publicity, so that there also is an Affray (p. 175 n.), and an Unlawful Assembly (p. 328).

[3] *Rex* v. *Donovan*, [1934] 2 K. B. 498 (K. S. C. 558). (A case of indecent physical violence.)

[4] As by the blow on the kidneys, now forbidden by the National Sporting Club. Doubts exist as to the legality of that knock-out blow on the jaw ('Tom Sayers' "auctioneer"), which drives it upwards and so causes concussion of the brain.

[5] Or the fight may be unduly prolonged; C. C. C. Sess. Pap. LXIV, 73.

Secretary stated in 1925 that an average of five persons are annually killed in boxing.

Of course even the most lawful game will cease to be lawful as soon as anger is imported into it; and the immunity from criminal liability will consequently at once disappear.[1]

[1] *Reg.* v. *Canniff* (1840), 9 C. and P. 359. The fact that the prisoner was playing in strict accordance with the well-accustomed rules of the game will help towards shewing that he was not actuated by anger; and, again, towards shewing that the way in which he was playing was not so obviously perilous as to be illegal. Hence, for either of these purposes, these rules may be admissible evidence on behalf of the prisoner. But, on the other hand, if the prisoner was playing in violation of the rules, they are not thereby rendered admissible evidence against him. For it is not criminal, and not necessarily either dangerous or malicious, to break them. On this point the case of *Reg.* v. *Bradshaw* (1878) (*ante*, p. 124) may be compared with that of *Reg.* v. *Moore* (1898), 14 T. L. R. 229, where, in a game of Association football, the prisoner had killed a man by charging him from behind, in defiance of the rules.

CHAPTER IX

FELONIOUS HOMICIDES

If a homicide be committed under such circumstances as to be neither justifiable nor excusable, but a crime, it is not, and never was, a mere misdemeanor, but always a felony. The felony may, however, take any one of five forms:

(I) *Felonia de se*; *i.e.* a suicide that takes place under such conditions as to be criminal. It is generally said that no one can be—and in actual practice no one ever is—adjudged a *felo*[1] *de se* unless he brought about his own death with the same full "malice aforethought" (*post*, p. 152) that would render his killing of someone else a Murder; *e.g.* where a duellist was killed by the bursting of his own pistol.[2]

The common law endeavoured to deter men from this crime by the threat of degradations to be inflicted upon the suicide's corpse, which, by a natural if unreasoning association of ideas, were often a potent deterrent; and also by threatening the forfeiture of his goods, a vicarious punishment which, though falling wholly upon his surviving family, was likely often to appeal strongly to his sense of affection. Thus the man who feloniously took his own life was at one time buried in the highway, with a stake through his body; and his goods were forfeited. The burial of suicides lost its gruesome aspect in 1824, when the original mode was replaced by the practice of burial between the hours of nine and twelve at night, without

[1] *Felo de se* does *not* mean the felony, but the felon himself.

[2] But, more logically, Jervis (*Coroners*, 7th ed., p. 186) holds it sufficient that the suicide has committed "any unlawful act the consequence of which is his own death", as in Manslaughter. And the form of verdict prescribed in the Coroners Act (50 and 51 Vict. c. 71, s. 2) requires only a killing "feloniously", not any malice aforethought.

any service. In 1870, the confiscation of the goods of suicides was put an end to in the general abolition of forfeitures for felony.[1] And in 1882, the statute 45 and 46 Vict. c. 19 removed every penalty, except the purely ecclesiastical one that the interment must not be solemnised by a burial service in the full ordinary Anglican form. Even before the common law penalties of *felonia de se* were legally abolished, the popular disapprobation of them, which ultimately secured their abolition, had gone very far in reducing the number of cases in which they were actually inflicted. For it rendered coroners' juries eager to avail themselves of the slightest grounds for pronouncing an act of suicide to have been committed during a fit of insanity, and consequently to have involved no felonious guilt. So if the evidence disclosed any source of anxiety which might have given the deceased a motive for his fatal act, anxiety was declared to have unsettled his mind; if, on the other hand, no motive could be found, then the very causelessness of his act was declared to be itself proof of his insanity. It is to be regretted that this practice of "pious perjury"—to borrow an indulgent phrase of Blackstone's—became so inveterate that it has survived the abolition of those penalties which were its cause and its excuse. In every thousand cases of suicide upon which coroners' inquests are held, there are usually less than forty in which a verdict of *felo de se* is returned.[2] Juries who, in cases of suicide, pronounce on utterly inadequate grounds a verdict of Insanity, forget that such a verdict, whilst it no longer removes any appreciable penalty, may, on the other hand, throw upon the family of the deceased an undeserved stigma, gravely

[1] 33 and 34 Vict. c. 23.

[2] In the seventeenth century, on the other hand, it was returned in over ninety per cent. of the cases. In France only sixteen per cent. of suicides are pronounced insane, unlike our more than ninety-six. A London coroner (*The Times*, Dec. 18, 1908) calculated that only thirty per cent. of suicides were really insane.

affecting their social or matrimonial or commercial prospects. A Departmental Committee on Coroners (1936)[1] has recommended that the verdict of *felo de se* be abolished, and that there should be no reference in the verdict to the deceased's state of mind. The verdict should simply be that the deceased died by his own hand.

In spite of the abolition of the old penalties, the intentional suicide of a sane person is still regarded by the law as an act of crime. Accordingly, every attempt to commit suicide is an indictable misdemeanor.[2] Another consequence of the criminality of suicide is that if two persons agree to die together, but only one succeeds in putting an end to his life, the survivor is guilty of murder,[3] as a principal if present, or, if absent, as an accessory before the fact.[4] Putting it more generally, anyone who successfully instigates another to commit suicide is guilty of murder. For the same reason, if a person, in making an attempt to commit suicide, should accidentally kill any of the bystanders, he will be guilty at least of manslaughter, and, in most cases, of murder.[5]

Statistics shew that during the fifty years preceding the War the proportion of suicides to population went on increasing; but during the War it fell steadily. It is, however, higher now, by a fifteenth, than before the War.[6]

We now pass to those cases of felonious killing in which the person slain is not the slayer himself but someone else.

(II) Manslaughter. This felony consists in killing

[1] Cmd. 5070. This recommendation does not imply that suicide may not be self-murder in law. It affects only the duties of a coroner.

[2] *Reg.* v. *Burgess* (1862), L. and C. 258.

[3] *Commonwealth* v. *Bowen* (1816), 13 Mass. 356 (K. S. C. 91).

[4] Yet, in these "death-pacts", the sentence is always commuted now.

[5] *Commonwealth* v. *Mink* (1877), 9 Lathrop 422 (K. S. C. 110); *Rex* v. *Hopwood* (1913), 8 Cr. App. R. 143.

[6] In France it is very much higher than in Great Britain. In both England and France, summer and not winter is the period of the maximum of suicides; and in both countries they are about thrice as common among men as among women.

another person unlawfully, yet under conditions not so heinous as to render the act a murder.[1] It is spoken of by Hale and Blackstone as being committed "without malice, either express or implied". We shall better avoid confusion of language if we say, instead, "without any of those[2] more guilty forms of malice which amount to Murderous Malice".

Manslaughter is sometimes divided into two forms: the so-called "voluntary" and the so-called "involuntary". (*a*) Voluntary manslaughter is that which is committed with the "voluntas", the intention, of causing to another person some unjustifiable harm likely to result in death, but where owing to the existence of provocation the crime is reduced from murder to manslaughter.[3] We have already seen (p. 123 *ante*) that homicide caused accidentally by a lawful blow, *e.g.* correction of a scholar, is not criminal at all. Homicide caused by an act likely to hurt is manslaughter, unless the act be likely to cause grievous harm with the risk of death when in the absence of provocation it is murder. Homicide caused by an act likely to hurt is manslaughter, even if the accused did not desire to inflict physical harm but merely took the risk of inflicting it.[4] In manslaughter there need be no "foresight" of the likelihood of death, but merely "foresight" of the likelihood of physical harm.[5]

Where death is produced by a blow which was not a mere trivial one, but was likely to cause serious

[1] But originally, and even so late as 1581, "manslaughter" was a generic name that included *all* forms of felonious homicide. See Holdsworth's *History of English Law*, III, 314.

[2] *Post*, p. 152.

[3] For Prof. Kenny's own definition of "voluntary" manslaughter, see 14th ed., p. 116; for a criticism of it see J. W. C. Turner, *Cambridge Law Journal*, V at p. 67 and VI at p. 52.

[4] *Rex* v. *Sullivan* (1836), 7 C. and P. 641 (K. S. C. 116).

[5] See p. 43 *ante*. "Foresight" does not imply intention. A man may recklessly take the risk of consequences which he hopes will not occur.

bodily harm, the crime may be either a manslaughter or a murder, according to the circumstances. For though, if the assailant had received only a slight provocation, or none at all, his crime will amount to murder; yet if he had received gross[1] provocation, and had been *in fact* provoked by it, it may amount to no more than a manslaughter. The provocation must be such as to deprive a reasonable man of his self-control.[2] This may be the case even though the fatal injury were inflicted by a deadly weapon and with the full intention of killing. For the provocation which the slayer had received may have been so sudden and so extreme as actually to deprive him (for the time being) of the ordinary powers of self-control;[3] and consequently to render his violent feelings of hostility less blameable—blameable enough, still, to merit punishment, but not to merit the punishment of death. The suddenness of the homicidal act is thus an essential condition of this mitigation of his guilt. A settled habitual feeling of irritation cannot reduce a murder to a manslaughter. The fact that the weapon used was one which the slayer already had in his hand at the time of receiving the provocation, may be important as evidence that the blow was not premeditated. Still more favourable will it be for the prisoner if he can shew that he used no weapon but that with which nature had provided him—his own clenched fist. If *A*, firing at *B* under such provocation as would reduce to manslaughter his killing of *B*, miss his aim and instead kill *C*, this unintended crime will also be only a manslaughter.

[1] *Reg.* v. *Wild* (1837), 2 Lew. 214 (K. S. C. 116). The "grossness' must be measured by an ordinary person's feelings, not by this prisoner's exceptional sensitiveness (*Rex* v. *Alexander* (1913), 9 Cr. App. R. 139; cf. *ibid.* p. 93). Were it measured by the latter, mere spoken words or even silent gestures might sometimes be adequate provocation.

[2] *Rex v. Lesbini*, [1914] 3 K. B. 1116.

[3] *Rex* v. *Lynch* (1832), 5 C. and P. 324. Cf. the mental condition in the offence of Infanticide, p. 142 *post*.

In manslaughter of the "voluntary" kind, as there can have been no premeditation, there can never be an accessory before the fact (a remark which has sometimes been extended, too hastily, to manslaughters in general). There will usually, too, be no appreciable interval of time between the one man's act of provocation and the other man's act of killing. If, however, some time does intervene, it is possible that the slayer's conduct during it may be such as to shew that the ungovernable passion, aroused by the provocation, still continued throughout that time and was truly the cause of the fatal blow. On the other hand, it is of course also possible that his conduct during the interval—even one of a few minutes—may have been so calm as to shew that his resentment had cooled down; and consequently that the provocation originally received will not have the legal effect of reducing the killing to something less than murder.

The provocation upon which any such sudden intent to kill is formed must, as we have said, be a gross one, if it is to have the result of reducing the killing to a manslaughter. Mere words, however insulting and irritating, are never regarded by the law as gross enough to produce this result.[1] Indeed very few forms of provocation that do not involve some physical assault are regarded as sufficiently gross to produce it. One of those few may be found in the case of a husband who detects a man in the very act of adultery with his wife,[2] and kills him[3] on the spot. (But

[1] *Rex* v. *Mason* (1912), 8 Cr. App. R. 121 (though words and spitting may be), but see note 3 *infra*. Any provocation may of course be an element in determining punishment.

[2] Not with a mere fiancée, *Rex* v. *Palmer*, [1913] 2 K. B. 29; nor a concubine, *Rex* v. *Greening*, [1913] 3 K. B. 846.

[3] Or kills *her*. And so with a confession of *past* adultery, if the words used would cause in an ordinary man the same hostility as if he had witnessed his wife's *act* of adultery, *Rex* v. *Palmer*, *supra*, *Rex* v. *Jones* (1908), 72 J. P. 215. But no less convincing proof of adultery suffices; *Rex* v. *Birchall* (1913), 29 T. L. R. 711; 9 Cr. App. R. 91. Nor does a wife's confession of intention to commit adultery, *Rex* v. *Ellor* (1921), 15 Cr. App. R. 41; 36 T. L. R. 480.

had the man been committing not mere adultery but rape —*i.e.* had the wife not been a consenting party—the husband's act in killing him might not have had even the guilt of manslaughter and might have been a Justifiable Homicide.) On the other hand, if he kill him, not on the spot but subsequently, "after cooling-time", it will be Murder.

Even an actual assault is not provocation enough unless it be of a very violent or very insulting[1] character. Thus if a man receives from a *woman* a slap in the face, the provocation is not gross enough for this purpose; though if she had struck him violently on the face with a heavy clog, so as to draw blood, that would have been sufficiently gross.[2] And a blow which was given lawfully, *e.g.* for the purpose of preventing a violent assault on some third person, can never be an adequate provocation. An assault by a husband upon his wife was held sufficient provocation to reduce to manslaughter the immediate killing of the husband by his father-in-law.[3] Although, as we have seen, mere words, however insulting, are never regarded as amounting of themselves to a sufficiently gross provocation, yet, where they accompany a blow, they may be taken into account in estimating the degree of provocation given by the blow. They may thus have the effect of rendering an assault, which, if committed silently, would have been trivial, a provocation gross enough to reduce a homicide to a manslaughter.[4] An unlawful imprisonment, or an unlawful arrest, may clearly be a sufficient provocation to reduce to manslaughter an act of killing inflicted by the actual person imprisoned or arrested.[5] But it will never have this effect as regards a

[1] As to spitting on a person, cf. 4 F. and F. 1066 with 8 Cr. App. R. 121.
[2] Foster 292.
[3] *Reg.* v. *Harrington* (1866), 10 Cox 370.
[4] *Rex* v. *Mason* (1912), 8 Cr. App. R. 121.
[5] See p. 529 *post*. But the communication of venereal disease by a concubine is *not* sufficient. *Per* Avory, J. (*The Times*, March 6, 1918).

homicide committed by other persons in their sympathy with him. Hence if bystanders try to rescue him, and kill someone in the attempt to do so, they will be guilty of murder.[1] Again, there must be a reasonable proportion between the provocation and the violence provoked by it. A kick that would extenuate the return of a fatal blow might not extenuate the fatal use of a pistol.

One of the common cases of manslaughter under provocation is that of its being committed in the anger provoked by a sudden combat. Thus if, upon a quarrel which was not premeditated on the part of the prisoner, persons fall to fighting, and then, in the heat of the moment, either of them (for the combat affords matter of provocation to each) inflicts some fatal injury on the other, the slayer will not be guilty of more than a manslaughter. So where a soldier, who was defending himself against an insulting mob by brandishing his sword and by striking some of them with the side of it, finally struck one of them a blow on the head which killed him, the judges held it only manslaughter.[2] Similarly where, in a quarrel, one man threw another to the ground, and then stamped on his stomach and so killed him, it was held to be only manslaughter; as there had been no interval of time between the blow which threw the deceased person down and the stamping on his body.[3] If, however, the quarrel subside for a time, and then be resumed by one of the combatants, it usually will not afford him any palliation for a fatal blow struck after this resumption of the conflict.[4] It certainly will not do so if he employed the interval in arming himself for the renewal of the combat. Hence if, when two persons quarrel, they proceed to fight then and there, and one of them is killed, the offence is only man-

[1] *Reg.* v. *Allen* (1867), Stephen's *Dig. Cr. Law*, 7th ed., note VIII and 17 L. T. [N. S.] 223.
[2] *Rex* v. *Brown* (1776), 1 Leach 167 (K. S. C. 112).
[3] *Rex* v. *Ayes* (1810), R. and R. 166 (K. S. C. 113).
[4] *Rex* v. *Hayward* (1833), 6 C. and P. 157.

slaughter; but if, instead of thus fighting at the moment of the quarrel, they agree to hold a duel on the following day, and one of them is killed in that duel, the slayer will be guilty of murder.[1] Where there is any evidence on which a jury might bring in a verdict of manslaughter instead of murder, the judge should direct them on this possibility even when the defence of manslaughter is not raised.[2]

The various effects of provocation in cases of homicide may be summed up thus. A grave provocation reduces to manslaughter the act of killing, even though it be committed with some dangerous instrument, such as was likely to kill (*e.g.* a pestle). But a slight provocation (α) leaves the act of killing with a dangerous instrument still a murder; though it (β) reduces the act of killing with a slight instrument, such as was likely only to wound (*e.g.* a cudgel), to manslaughter. Provocation never reduces a homicide to misadventure, if the fatal blow were unlawful (*e.g.* resentful); though it may if that blow were only a lawful act of self-defence.

(*b*) *Involuntary* manslaughter is that which is committed by a person who brings about the death of another by acting in some unlawful manner, but without any intention of killing or doing an act likely to kill. This may happen in three ways:

(1) He may be doing some act which is intrinsically unlawful[3] (it must not be a felony of violence for then the

[1] *Reg.* v. *Cuddy* (1843), 1 C. and K. 210. *Rex* v. *Hall* (1928), 21 Cr. App. R. 48; 140 L. T. 142.

[2] *Rex* v. *Thorpe* (1925), 89 J. P. 143; 18 Cr. App. R. 189.

[3] Even though a fatal result were so improbable that it could not be anticipated. In *Rex* v. *Sasun* (*The Times*, May 18, 1920), a man was convicted of manslaughter who, in commencing an illegal operation upon a woman, had caused her death, through nervous shock, by an act so slight that three experienced accoucheurs stated that they had never known it produce death. But Shearman, J., ruled that "*However improbable* a fatal result might be, if the illegal act did cause death there is a manslaughter." Cf. 21 Cox 693.

homicide would be murder[1]). It has been said that the causing of death by any unlawful act is manslaughter.[2] And this rule has been regarded as holding good whenever the unlawful act which accidentally produced the death amounted to even a mere civil tort. But good authority confines the doctrine to such torts as are likely to cause bodily hurt. In *Reg.* v. *Franklin* (1883)[3], this more lenient view was expressed by Field, J., and Mathew, J. But the late Mr Justice Stephen[4] adhered to the older doctrine that any tort will suffice, even though it did not seem fraught with any danger.

The rule that homicide is manslaughter if caused by an illegal act must probably be confined to illegal acts (even if criminal) involving an obvious risk of bodily harm. The authorities cited in support of the rule are all cases where a risk of bodily harm was involved, and the proposition that homicide caused by any misdemeanor is necessarily manslaughter cannot be reconciled with the law as laid down by judges in motoring manslaughter cases where "criminal negligence" (see p. 139 *post*) must always be shewn.[5]

(2) He may be culpably[6] leaving unperformed some act which it is his legal duty to perform and the non-performance of which involves a risk of physical harm. Thus if a railway passenger is killed because the pointsman fell asleep and forgot to move the points, this pointsman will be guilty of manslaughter (if, on the other hand, he had purposely left the points unmoved, it would have been murder). Where the engine-man at a colliery left his steam-engine in the charge of an ignorant boy, and this lad's inexperience brought about

[1] See p. 159 *post*. [2] Stephen, *Digest of Criminal Law*, 7th ed., Art. 314.
[3] 15 Cox 163 (K. S. C. 118). Cf. 22 Cr. App. R. 70.
[4] *Digest of Criminal Law*, 7th ed., Arts. 294 and 314.
[5] "*Mens Rea* and Motorists", J. W. C. Turner, *Cambridge Law Journal*, v, 61. See also p. 139 *post*.
[6] See note 4, page 138 *post*.

the death of a miner, the engine-man was held guilty of manslaughter.[1] But the connection between the omission and the fatal result must not be too remote.[2]

In these two instances, the legal duty of acting arises from special circumstances whereby the particular person concerned had taken it upon himself.[3] It will usually arise thus; for the community at large are seldom under any legal duties but negative ones, duties to abstain from the commission of certain acts. I am under no legal obligation to protect a stranger. "If I saw a man, who was not under my charge, taking up a tumbler of poison, I should not become guilty of any crime by not stopping him."[4] Nor by not warning a blind man whom I see heading for the edge of a cliff. (Cf. p. 9 *ante*.) But the law itself does in some cases impose upon a special class of persons some duty of a positive character, a duty of acting. Thus parents are responsible for the care of their children;[5] and consequently, if a child's death is caused, or even accelerated, by a parent's gross neglect in not providing sufficient food or clothing for his child, the parent will be guilty of manslaughter.

The mere fact that there was some degree of negligence on the parent's part will not suffice. There must be a reckless disregard of the likelihood of injury. Of course, if the wickedness went so far that the parent *intended*

[1] *Reg.* v. *Lowe* (1850), 3 C. and K. 123 (K. S. C. 132).

[2] See *Reg.* v. *Hilton* (1838), 2 Lew. 214 (K. S. C. 133); *Reg.* v. *Rees* (1886), C. C. C. Sessions Papers, CIV (K. S. C. 133).

[3] Even a duty created only by a contract (*e.g.* signalman's hiring) to which the person killed was not a party, may suffice; at any rate if it contemplated the safety of life. See 11 Cox 210, 16 Cox 710, 19 T. L. R. 37. Yet see Beven on Negligence, p. 8. The common law bound the captain of a British ship to try to rescue any of *his own* sailors or passengers who fell overboard. But the Maritime Conventions Act, 1911, s. 6, extends his duty to the rescue of *any* person at sea in danger of being lost, even an alien enemy.

[4] *Per* Hawkins, J., in *Reg.* v. *Paine* (*The Times*, Feb. 25, 1880).

[5] From the birth, but not before, *Rex* v. *Izod* (1904), 20 Cox 690; but see p. 143 *post*.

the child to starve to death, or even to suffer grievous bodily harm, he would be guilty not of manslaughter but of murder, *Rex* v. *Gibbins and Proctor* (1918).[1] At common law, it was a good defence that the parent was not sufficiently well off to provide for the child. But now, under the Children and Young Persons Act, 1933 (23 Geo. 5, c. 12), s. 1, neglect to provide food, clothing, medical aid, or lodging for a child is not excused by the being unable to do so without resorting to the Poor Law authorities. Hence if his wilful omission to provide medical aid for his child occasions or accelerates the death of the child, the parent will be guilty of manslaughter. (And this will be the case even when the omission is due to a conscientious or religious objection to the use of medicine.[2]) This liability for neglect is not confined to parents. Any adult who undertakes, lawfully or unlawfully, the care of a person who is helpless, whether it be through infancy or even through mere infirmity,[3] will similarly be guilty of manslaughter if this person should die through his *wicked*[4] neglect; or even of murder, if he knew that the neglect was likely to prove fatal. And, on the same principle, if a doctor, after having (not merely been summoned to, but) actually undertaken the treatment of a patient, wickedly neglects him, and he dies in consequence of this neglect, the doctor will be guilty of manslaughter.[5]

But the degree of negligence must be not merely a culpable but a criminal one. It is not enough to shew that there was an error of judgment, or even such carelessness

[1] 13 Cr. App. R. 134.

[2] *Reg.* v. *Senior*, [1899] 1 Q. B. 283.

[3] *Reg.* v. *Instan*, [1893] 1 Q. B. 450. *Rex* v. *Chattaway* (1922), 17 Cr. App. R. 7.

[4] The use of the terms "wicked", "gross", etc., is criticised by J. W. C. Turner, *Cambridge Law Journal*, v, No. 1 at p. 72; see too p. 139 *post*; for explanation of their meaning see p. 43 *ante*.

[5] See generally as to a doctor's criminal liability *Rex* v. *Bateman* (1925), 41 T. L. R. 557; 19 Cr. App. R. 8.

as would support a civil action for damages for negligence.[1] Hence it has been noticed that when motorists are sued in civil actions for negligence, the verdict is usually against them, but is rarely so in prosecutions of them for manslaughter. There must be a "wicked" negligence[2]— "such disregard for the life and safety of others as to deserve Punishment". Yet the delicate line between these degrees has to be drawn by the jury,[3] not by the judge (unless he hold that there is *no* evidence at all to shew the criminal degree). "Criminal negligence", as has been well pointed out,[4] is an unhelpful term. To direct a jury that negligence must be criminal if they are to convict, is to tell them that negligence is criminal if they are of the opinion that it amounted to a crime.[5]

However extreme a man's negligence may have been,

[1] French law drew until 1912 the like distinction; but now identifies criminal negligence with civil.

[2] *Reg.* v. *Finney* (1874), 12 Cox 625 (K. S. C. 120). *Rex* v. *Bateman*, *ante* p. 138. With *Reg.* v. *Finney* contrast *Reg.* v. *Jones* (1874), 12 Cox 628 (K. S. C. 120).

[3] Yet it cannot be drawn in abstract terms. But it may be illustrated by contrasts. Motorists have been allowed to be convicted for homicides caused by coming round a dangerous corner on the wrong side and without sounding the horn; or by driving at a rate of sixteen miles an hour down Oxford Street at ten a.m. (C. C. C. Sess. Pap. CXLVII, 677), or at twenty-five miles an hour on a country road that was slippery with ice (CLII, 340); or by steering out on the wrong side, to pass a tramcar that stood lengthways across the motorist's course (CLVIII, 33). And so has a drunken van-driver who took his horses "galloping like a fire-engine" along the wrong side of the road (CLIV, 386). But it was held by Ridley, J., to be no manslaughter where the negligence by which a motorist caused a death was only that of getting out of the line of traffic and proceeding on the wrong side (CXLIX, 314); or that of an error of judgment in continuing his journey after finding that his steering-gear had got out of order (CXLIX, 232). Mere speed of a motor-car is not necessarily evidence of criminal negligence, *Rex* v. *Rose* (1928), 20 Cr. App. R. 164.

[4] J. W. C. Turner, *Cambridge Law Journal*, v, 73.

[5] Mr Turner (*op. cit.* p. 71) suggests that in all cases of manslaughter the test should be: Must the prisoner by his conduct be deemed to have intended to cause bodily harm to someone or to have been indifferent or reckless as to the obvious risk of bodily harm to which his conduct was exposing someone. This test would cover all cases of manslaughter by neglect to act, and probably also all cases of manslaughter caused by doing an illegal act (p. 136 *ante*).

he still will not be answerable for a death which even full diligence on his part would not have averted or delayed.[1] On the other hand, "contributory negligence" (see p. 150 *post*) is not a defence in criminal trials, whilst in civil ones it is accepted; as where a flurried pedestrian stops short in front of a taxicab. The negligence of the accused must of course be shewn to be the cause of the death.[2] The death too must as in murder occur within a year and a day.[3]

(3) He may be doing some act which is in its nature lawful, but nevertheless may be doing it recklessly[4] and therefore unlawfully.[5] For instance, a sportsman indulges in rifle practice in the immediate vicinity of houses; a school-girl reads her favourite poet whilst cycling; or some one swings a chair to and fro wantonly, though in mere play. If death be caused in chastising a child who is under your authority, and whom you have no intention to kill, the case will be (*a*) one of *Manslaughter*, if the extent of the punishment or the instrument used was unreasonable. On the other hand, it will be (*b*) one of

[1] *Reg.* v. *Dalloway* (1847), 2 Cox 273 (K. S. C. 134).

[2] Cf. pp. 149–150 *post*.

[3] See p. 162 *post*.

[4] *I.e.* with a *wicked* negligence. As to the Evidence necessary, it has been held in Ireland (*Reg.* v. *Cavendish* (1873), 8 Ir. C. L. 178) and approved by the High Court of Australia (27 C. L. R. 160) that, on an indictment for manslaughter by negligent driving, the proof of the mere fact of killing raises a presumption of unlawful killing, and thus throws on the accused the burden of disproving negligence. (Cf. the rule in Murder, *post*, p. 160) But this Irish ruling has not escaped criticism and is only applicable to cases of direct violence (*Reg.* v. *Elliott*, (1889) 16 Cox 710). Moreover (see p. 160 *post*) the burden of proof of guilt is always on the prosecution, and if there is any reasonable doubt created by the evidence given by either the prosecution or the prisoner, there must be an acquittal. That a motor-car was on the foot-path would be evidence of criminal negligence. But it would be rebutted by shewing that it went there by the machinery being out of order; or by the need of avoiding an imminent collision on the roadway; or even merely by (in the Admiralty phrase) "a wrong manœuvring in the agony of the moment" of impending collision.

[5] If the test previously suggested (p. 139 *ante*, note 5) was adopted, it would cover these cases also. They would be regarded not as manslaughter by negligence but as manslaughter by acts which the accused must be deemed to have realised to be likely to cause bodily harm.

Misadventure, if both the extent and the instrument were reasonable; but (*c*) of *Murder*, if the instrument used or the extent of the punishment was utterly unreasonable. And similarly if death be caused by a workman throwing down rubbish from a roof, though without his having any idea of doing hurt to anyone, there are the same three alternatives. For (*a*) it will be *Misadventure*, if the matter occurs in a village, and the workman has called out to give warning before throwing the materials down. But (*b*) it will be *Manslaughter*, (1) if, though it were only in a village, the workman did not even call out; or (2) if it were in a town and he only called out, but did not take the further precaution of looking over. Finally, (*c*) it will be *Murder*, if it were in a town, and he were so recklessly negligent as not even to call out.[1] In like manner, if a person die from being plied with liquor by his boon-companions, the degree of their legal responsibility will depend upon the motives with which they acted. If from mere unreflecting conviviality, the homicide would only be one of misadventure; if from a deliberate "practical joke", it would be[2] at least a manslaughter; and, in case that an extremely excessive amount of liquor was administered, or that there was a desire to produce death,[3] it would be murder.[4] A person may be criminally negligent although taking all the care that *he* can. For if he undertake the work of an expert—*e.g.* if a ploughman act as a boatman or as a surgeon—he must exercise an expert's skill (cf. 12 Cr. App. R. 153).

Manslaughter is often spoken of as "the most elastic of crimes"; for the degrees of guilt which may accompany it extend from the verge of murder to the verge of excusable homicide. The punishment[5] is penal servitude for

[1] Archbold, 28th ed., p. 909.

[2] *Rex* v. *Martin* (1827), 3 C. and P. 211 (K. S. C. 137).

[3] *Reg.* v. *Paine*, C. C. C. Sess. Pap. xci, 537–592; *The Times*, Feb. 25, 1880.

[4] *Reg.* v. *Packard* (1842), C. and M. 236 (K. S. C. 137).

[5] 24 and 25 Vict. c. 100, s. 5. The normal sentence for Involuntary manslaughter is reputed to be six months' imprisonment.

life or not less than three years, or imprisonment for not more than two, or a fine.[1] Coroners' inquests suggest an annual average for cases of manslaughter of a little under seventy, and for murders a little over one hundred and fifty; as against five justifiable homicides (other than executions) and nearly four thousand (sane and insane) suicides.

(III) Infanticide. This modern felony is the creation of the Infanticide Act, 1922 (12 and 13 Geo. 5, c. 18).

During the seventeen years 1905–21, sixty women were sentenced to death for infanticide; but in fifty-nine of the cases the sentence was commuted. To remove this divergence between theory and practice, the Act of 1922 enacts that: "Where a woman by any wilful act or omission causes the death of her newly-born child, but at the time ... had not fully recovered from the effect of giving birth to such child, and by reason thereof the balance of her mind was then disturbed, she shall... be guilty of Infanticide"; and may be punished as if guilty of Manslaughter (see p. 141 *ante*) although but for this enactment she would have been guilty of Murder. If she be tried for the child's murder, the jury may instead convict her of Infanticide; and if tried for Infanticide, they may instead convict her either of Concealment of Birth (see p. 145), or (if she be over sixteen) of an offence of Cruelty under s. 1 of the Children and Young Persons Act, 1933.

Thus she is treated as having been in *some* degree responsible when she did the act, although the balance of her mind was then so far disturbed that—like a person who kills under gross provocation—she was not completely mistress of her faculties. In a bad case, where she did intend to kill, a sentence of nine months' imprisonment was passed by Avory, J.

The Act unfortunately contains no definition of the vague phrase "*newly*-born". Accoucheurs limit it to

[1] For manslaughter in a combat, Patteson, J., once inflicted merely a fine of a shilling (*The Times*, Aug. 9, 1845).

infants less than sixteen days old (Glaister's *Legal Medicine*, p. 133), and in *Rex* v. *O'Donoghue* (1927),[1] the Court of Criminal Appeal held that it was not an error in law to hold that there was no evidence on which a jury could find that a child of one month old was newly-born.

(IV) Child Destruction. The killing of one not "in being", *i.e.* a mere unborn child, was until 1929 punishable neither as murder nor as infanticide when committed by a mother. There can be no murder[2] of a child which dies before being born or even whilst being born, only of one that has been born, and, moreover, been born alive. For purposes of criminal law—and also for those of property law, *e.g.* to become a holder of property and so transmit it again to new heirs, or to enable the father to obtain curtesy of his wife's lands—mere *birth* consists in extrusion from the mother's body, *i.e.* in having "come into the world". If but a foot be unextricated, there can be no murder, the extrusion must be complete, the whole body of the infant must have been brought into the world.[3] But it is not necessary that the umbilical cord should have been severed.[4] And to be born alive the child must have been still in a living state after having wholly quitted the body of the mother. Hence that life still existed must be actually proved, and this may be done by giving evidence of any cry, or breathing, or pulsation, or movement, after extrusion. But it is not necessary that the child should have continued to live until it was severed from the mother; or even until it could

[1] 44 T. L. R. 51.

[2] By statute (24 and 25 Vict. c. 100, s. 58) to use means to procure abortion is a felony punishable with penal servitude for life.

[3] *Rex v. Poulton* (1832), 5 C. and P. 330.

[4] *Reg.* v. *Reeves* (1839), 9 C. and P. 25. The ambiguous phrases, "separate existence" and "independent circulation", differently understood by different doctors, should be avoided, as more easily uttered than explained (20 L. Q. R. 142–5).

breathe,[1] for a child may perhaps not breathe until some time after full extrusion (though, on the other hand, infants sometimes breathe, and even cry, before they are fully extricated). A Parliamentary Committee of 1893 recorded the sapient verdict of a coroner's jury upon "a child found dead, *aged about three months*: but no evidence as to whether or not it had been born alive". Thus to constitute murder the birth must precede the death; but it need not also precede the injury. Thus an act which causes a child to be born much earlier than in the natural course, so that the child is rendered much less capable of living when born and accordingly soon dies, may itself amount to murder.

A great encouragement to infanticide was afforded by the rule that, for a charge of it, *partial* extrusion was not sufficient. There was therefore passed in 1929 the Infant Life (Preservation) Act (19 and 20 Geo. 5, c. 34). By this Act any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother, shall be guilty of the felony of Child Destruction, and shall be liable to penal servitude for life. Evidence that a woman has been pregnant for twenty-eight weeks or more is *primâ facie* proof that she was at that time pregnant of a child capable of being born alive. Before anyone can be convicted of this felony it must be proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother. Upon a trial for the murder or manslaughter of any child, or for infanticide, or for using means to procure an abortion, the jury may acquit of the crime charged and,

[1] Nor is it necessary that it should be capable of *continued* life. In 1812, at York summer assizes, a midwife was convicted of murder for drowning a new-born child which, from the absence of part of the skull, could not have lived many hours. Bayley, J., however, recommended commutation of her sentence, because she had sincerely believed her act to be lawful. *Annual Register* for 1812, p. 96.

if they find that the facts prove the felony of Child Destruction, may convict of that felony without the necessity of a fresh trial or indictment. Similarly upon a trial of Child Destruction the jury may convict of using means to procure an abortion.

It is convenient here to mention another offence—Concealment of Birth. On the indictment of any person for the murder of a new-born infant, or for infanticide, or for the felony of Child Destruction, the jury may find no sufficient proof of the crime charged, and yet may convict without a fresh trial of the statutory misdemeanor of "endeavouring by *secret disposition*[1] of its dead[2] body, to conceal its birth" (24 and 25 Vict. c. 100, s. 60). This offence[3] (which, of course, may itself form the subject-matter of an express indictment) is punishable by two years imprisonment with hard labour. Concealment from the world in general must be intended; it is no crime to conceal a birth merely from some particular individual alone; "there would be a hardship in punishing a girl for concealment from her master, if there had been no concealment from her mother".[4] But there may be sufficient concealment although the birth is already made known to some persons pledged to secrecy. Where evidence of concealment is slight a prosecution is sometimes brought for the Common Law misdemeanor of preventing a coroner from holding an inquest when he ought to hold one,[5] but there must be shewn both a duty

[1] *E.g.* throwing into a pond, or burning. Thus mere *denial* is not a sufficient concealment.

[2] There thus is no offence under this statute in concealing the birth of a child that is still alive.

[3] "An imaginary crime, consistent with perfect [moral] innocence"; Pollock, B. (*Life of Lord Bramwell*, p. 37). "I always regarded its moral guilt as altogether unworthy of punishment"; Lord Brampton (*Reminiscences*, ch. XXXII).

[4] Mr Justice Wright, *Draft Criminal Code for Jamaica*, p. 108.

[5] *Reg.* v. *Price* (1884), 12 Q. B. D. 247; *Reg.* v. *Stephenson* (1884), 13 Q. B. D. 331.

to hold an inquest and an intention to prevent its being held.[1]

(V) Murder. The word "murder", from the Germanic *morth*, originally denoted (1) a secret killing. Hence the name was applied to the fines imposed by William the Conqueror upon any hundred where a Norman was found secretly killed. The dead man was presumed to be a Norman unless there was "express presentment of Englishry". After these fines (then already nearly obsolete) were abolished by Edward III in 1340, the word "murder" necessarily lost its earlier meaning, and came to be used as a name for (2) the worst kinds of homicide. (Those kinds of homicide which, as they were neither justifiable nor even cases of misfortune or self-defence, were capital felonies, but yet were not of so bad a kind as to be called "murders", remained undistinguished by any particular name.) Finally, when by 23 Hen. 8, c. 1 the benefit of clergy was largely taken away from "murder of malice aforethought", the term "murder" soon became (3) limited, as it still is, to the form of homicide dealt with by this statute. This phrase "malice aforethought" was not new. It had been in use since the thirteenth century (even before the abolition of Englishry); for "malitia praecogitata" was familiar under Henry III as one of the tests of unpardonable (*i.e.* capital) homicide. But at the time when the phrase began to be used the word "malitia" meant rather the wrongful act intended, than the intention itself; still less had it any particular reference to that special form of evil intention, viz. hatred, which "malice" now popularly denotes.[2]

Murder, in this third and final sense, may be defined, in antique phraseology which has been classical ever since the time of Lord Coke, as (α) unlawfully (β) killing (γ) a reasonable creature, who is (δ) in being and

[1] *Rex* v. *Purcy* (1933), 24 Cr. App. R. 70; 149 L. T. 432.

[2] Pollock and Maitland, II, 467; Maitland's *Collected Papers*, I, 304.

(ε) under the King's peace, (ζ) with malice aforethought either express or implied; (η) the death following within a year and a day.[1] Of these seven constituents, the first, viz. "unlawfulness", distinguishes murder from all non-felonious homicides, whether ranked as justifiable or only as excusable; and the sixth, "malice aforethought", distinguishes it from those unlawful homicides which rank only as manslaughter. The second, third, fourth, fifth and seventh are as necessary in manslaughter as in murder. But, as it is in cases of murder that they have received the fullest judicial consideration, it has seemed more appropriate to postpone until now our discussion of them. We will consider the last six points successively.

(1) *Killing.* In murder, as in manslaughter, a man may be held liable for a homicide which he effected, not by any direct violence, but only through some protracted chain of consequences; his own last act in it being remote, both in time and in order of causation, from the death which it brought about. This is vividly illustrated by two old cases mentioned by Blackstone. In one, a "harlot" abandoned her new-born child in an orchard, and covered it over with no better protection than leaves. Birds of prey being then common in England, a kite struck at the infant with its claws, and thereby inflicted wounds which caused the death of the child. The woman was arraigned of murder and executed.[2] The other case is that of a son who took his sick father from one parish into a second one in cold weather, against the old man's will, and so hastened his death.[3] Yet in murder, just as we saw in the case of Attempts,[4] there is a point at which the law refuses to

[1] 3 Coke Inst. 47.

[2] Crompton's *Justice* 24 (K. S. C. 92). So, where a woman injured herself by jumping out of a window, through a well-grounded apprehension of being dangerously attacked by *C*, *C* was held to have caused the injury, though he never touched her, *Rex* v. *Coleman* (1920), 84 J. P. 112.

[3] Y. B. 2 Ed. 3, f. 34, Hil. pl. 1 (K. S. C. 92).

[4] *Ante*, p. 92. Under Henry III judges who, by an illegal sentence, had hanged a man were only *fined*; Bracton's N. B., case 67.

continue to trace out chains of causation; and beyond which, therefore, any act is regarded as too remote to produce guilt.[1] But here, as before in Attempts, it is impossible to lay down any general rule for fixing this point; and the utmost that can be done is to suggest it approximately by illustrative instances. The most noteworthy is the rule that killing a man by perjury is not murder.[2] That rule, though it has been doubted by some lawyers, has the sanction of so great a criminal judge as Sir Michael Foster;[3] and is supported by the fact that, even in an age when the definition of murder was less narrowly construed than now, and when judges were more pliant to the Crown, the lawyers of James II did not venture to indict Titus Oates, the inventor of the imaginary "Popish Plot", for the murder of the men whose lives he had sworn away. Yet their desire to see him expiate his guilt by death, if it were legally possible, is sufficiently evidenced by the sentence passed (and executed) upon him when he was prosecuted for perjury —viz. two floggings of about two thousand lashes each. It used, again, formerly to be thought that killing by a *mental* shock would not be murder; but, in the clearer light of modern medical science, such a cause of death is no longer considered too remote for the law to trace.[4]

An act may amount to an unlawful killing, either as a murder or as a manslaughter, even though it be so remote in the chain of causes that it would not have produced

[1] See L. and C. 161. At the Cambridge assizes in 1667 Robert Dickman, B.A., of Sidney, was indicted for the manslaughter of Nicholas Christmas, a scholar of St John's, whom he beat for throwing stones at an apricot-tree, and who then, in running away, fell and was killed by the fall. But Sir T. Sclater, whose MS. notebook records it, does not say what was ruled as to the remoteness of the beating.

[2] *Rex* v. *Macdaniel* (1754), 1 Leach 44 (K. S. C. 97). But the Roman jurists treated such a perjurer as a murderer; *Dig.* 48. 8. 1. In England, killing by Witchcraft was not murder; though made capital in 1562.

[3] Foster's *Crown Law*, 130.

[4] *Rex* v. *Hayward* (1908), 21 Cox 692; *Reg.* v. *Towers* (1874), 12 Cox 530; *Wilkinson* v. *Downton*, [1897] 2 Q. B. 57.

death but for the subsequent acts or omissions of third parties;[1] unless this conduct of the third parties were either wilful or, at least, unreasonably negligent. The rule extends even to similar intervening conduct on the part of the deceased victim himself;[2] *e.g.* his refusal to submit to amputation. The rationale of it is, that a person who brought the deceased man into some new hazard of death may fairly be held responsible if any extraneous circumstances (that were not intrinsically improbable), *e.g.* septic poisoning, should convert that hazard into a certainty. An illustration, noteworthy both for the rank of the criminal and also because nearly twenty years elapsed between his crime and his trial, may be found in the case of Governor Wall.[3] He was tried and executed, in 1802, for the murder of Serjeant Armstrong, on the island of Goree, by sentencing him to an illegal flogging; though the illness thus caused might not have produced death, but for Armstrong's own rash act in drinking spirits whilst he was ill.[4]

It was held by Baron Martin[5] that if an engine-driver negligently causes a collision, and a passenger, on seeing this collision to be imminent, jumps out of the train and is killed by the jump, the liability of the engine-driver for the manslaughter of this passenger will depend on the question whether a man of ordinary self-control would have thus jumped, or only a man unreasonably timid. In like manner, Quain, J., held that if a man who lay drunk in the middle of a road, and did not get out of the way of

[1] Contrast *Reg.* v. *Hilton* (1838), 2 Lew. 214 (K. S. C. 133), with *Reg.* v. *Lowe* (1850), 3 C. and K. 123 (K. S. C. 132).

[2] Contrast *Reg.* v. *Holland* (1841), 2 M. and R. 351 (K. S. C. 93) with *Reg.* v. *Sawyer* (1887), C. C. C. Sessions Papers, CVI, 301 (K. S. C. 94). In Scottish law, the corresponding rule does not thus include the conduct of the deceased or the mere *omissions* of third parties.

[3] 28 State Trials, 51. See *All the year round*, vol. IX.

[4] Cf. *Reg.* v. *Holland* (1841), 2 M. and R. 351 (K. S. C. 93); and a like case in C. C. C. Sess. Pap. LXXVI, 259.

[5] *Reg.* v. *Monks* (1870), C. C. C. Sessions Papers (1870), LXXII, 424.

a vehicle, were driven over by it and killed, the driver would be indictable. For "contributory negligence" is no defence in criminal law.[1]

(2) *A reasonable creature.* Here "reasonable" does not mean "sane" but "human". In criminal law a lunatic is a *persona* for all purposes of protection, even when not so for those of liability.

(3) *In being.* This element of the definition has been sufficiently considered in discussing the felony of Child Destruction (*ante*, p. 144).

(4) *Under the King's peace.* "The King's majesty is, by his office and dignity royal, the principal conservator of the peace within all his dominions."[2] Yet in our Anglo-Saxon period the King's peace was only partial in its operation, and merely supplemented that national peace which it finally supplanted. The national peace, which apparently had its origin in the sanctity of the homestead, was protected only in the local courts; and these were weak. The King's peace, on the other hand, was enforced with vigour by royal officers of justice. At first it applied only in certain holy seasons, or to persons to whom it was specially granted by the King, or to places which were under the King's special protection (such as the precincts of his house and the four great roads).[3] These limits, however, soon became indefinitely extended. "The interests of the King and of the subject conspired to the same end."[4] The King profited in the way of fees, and the subject was anxious to appeal to the one authority which could not anywhere be lightly disobeyed. Accordingly, "after the Conquest, the various forms in which the

[1] C. C. C. Sess. Pap. LXXVII, 354. See *Reg.* v. *Dant* (1865), L. and C. 567 (K. S. C. 126) *per* Blackburn, J.; *Reg.* v. *Kew and Jackson* (1872), 12 Cox 455 (K. S. C. 135) *per* Byles, J.; *Reg.* v. *Swindall* (1846), 2 C. and K. 230 (K. S. C. 74) *per* Pollock, C. B. But it may mitigate the sentence; *Rex* v. *Stubbs* (1913), 8 Cr. App. R. 238.

[2] Blackstone Comm. 350.

[3] Cf. Maitland's *Collected Papers*, II, 290–7.

[4] Pollock, *Oxford Essays* (The King's Peace), p. 83.

King's special protection had been given disappear, or rather merge in his general protection and authority".[1] But even then the King's peace did not arise throughout the nation at large until he proclaimed it; and it lasted only till his death. So on the death of Henry I, the chronicler tells us, "There was seen tribulation in the land; for every man that could forthwith robbed another". Finally, as Edward I was away in Palestine when his father died, the magnates themselves proclaimed the King's peace, in spite of his absence, to avoid the confusion which would otherwise have arisen. Thenceforward even the King's death was never regarded as suspending the royal peace.

A man attainted of praemunire was not under the King's peace; and, therefore, until 5 Eliz. c. 1, it was not murder to kill him.[2] On the other hand, to kill an outlaw was murder;[3] and even a savage[4] or a condemned criminal[5] or an alien enemy[6] is under the King's peace. Hence an alien enemy cannot lawfully be killed except in the actual course of true war.[7] In such he, of course, may be; so, if the captured crew, on board a prize brought into British waters, should endeavour to release themselves from their British captors, and in the consequent struggle one of the prisoners should be killed by one of the captors, the homicide[8] would not be felonious.

[1] *Ibid.* p. 87.

[2] Brooke's *Abridgement*, Corone, 196.

[3] 1 Hale P. C. 433.

[4] See p. 155 n. *post.*

[5] 1 Hale P. C. 433; *Commonwealth* v. *Bowen* (1816), 13 Mass. 356 (K. S. C. 91).

[6] *E.g.* a prisoner of war; 1 Taunt. 32, 36.

[7] Hence in 1902 four Zeerust natives were sentenced to death by the criminal court at Pretoria for having killed a Boer in the war of 1900 *outside* their frontier, when their Chief's only commission from the British authorities was to defend his own territory. Similarly in the Transvaal, Van Aan was executed for having shot an English officer approaching under a flag of truce.

[8] *Per* James, L.J., in *Dyke* v. *Elliott* (1872), L. R. 4 P. C. 184.

The law (as we are often told) is no respecter of persons. Without being universally true, this is a principle which has always applied with special force to the law of Homicide. Thus the villein could not be killed by his lord. Nor could the slave, even in Anglo-Saxon times, be killed by his master; for the laws of Alfred inflicted a fine on the master who murdered his slave, and this at a time when most homicides admitted of being atoned for by mere payment of a fine. The King's peace was powerful to protect both villein and slave from the extremity of tyranny. It is instructive to notice that, even in much more recent times, a West Indian legislature imposed on masters no severer responsibility than Anglo-Saxon legislation had done in their dealings with the lives of their slaves. Thus one of the Acts of Barbados ran as follows: "If any slave under punishment by his master, for running away or any other misdemeanor towards his master, unfortunately shall suffer in life (!) or member, no person whatsoever shall be liable to a fine. But if any man out of wantonness or cruel intention shall wilfully kill a slave of his own, he shall pay into the public treasury £15 sterling."

(5) *Malice aforethought.* The preceding elements in the definition of murder are common to all forms of criminal homicide; but this fifth point is the distinctive attribute of those homicides that are murderous. When, as we have seen,[1] the legislature determined to take away the "benefit of clergy" from the most heinous cases of homicide, it adopted the already familiar[2] notion of "malice aforethought" (*malitia praecogitata*) as the degree of wickedness which should deprive a homicidal "clerk" of his ancient right to escape capital punishment. The phrase is still retained in the modern law of murder; but both the words in it have lost their original meanings. For the forensic experience of successive generations brought into

[1] *Ante*, p. 146. [2] See Maitland's *Collected Papers*, I, 305.

view many cases of homicide in which there had been no premeditated desire for the death of the person slain, and which yet seemed heinous enough to deserve the full penalties of murder. These accordingly, one after another, were brought within the definition of that offence by wide judicial constructions of its language. Hence a modern student may fairly regard the phrase "malice aforethought" as now a mere arbitrary symbol. It is a convenient comprehensive term for including all the very various forms of *mens rea* which are so heinous that a homicide produced by any of them will be a murder. But none the less it is only an arbitrary symbol. For the "malice" may have in it nothing really malicious; and need never be really "aforethought" (except in the sense that every desire must necessarily come before—though perhaps only an instant before—the act which is desired). The word "aforethought", in the definition, has thus become either false or else superfluous. The word "malice" is neither; but it is apt to be misleading, for it is not employed in its original (and popular) meaning. A desire for the death of the individual who was killed—or, as for distinctness' sake it may be termed, "Specific Malice"—is not essential to murder. Blackstone, indeed, in his treatment of this crime, sometimes uses the word Malice as if in this narrow sense; but at other times he includes under it, and more correctly, other states of mind far less guilty. For there are several forms of *mens rea* which have been held to be sufficiently wicked to constitute murderous malice. They are the following:

(i) Intention to kill the particular person who, in fact, was killed. This, of course, is the most frequent of all the six forms.

(ii) Intention to kill a particular person, but not the one who actually was killed.[1] If a man shoots at *A* with the

[1] *Reg.* v. *Salisbury* (1553), Plowden 100 (K. S. C. 102). Cf. Orsini's outrage, p. 490 *post*; and *Commonwealth* v. *Mink* (1877), p. 129 *ante*.

intention and desire (or, as Bentham would express it, the "direct intention") of killing *A*, but accidentally hits and kills *B* instead, this killing of *B* is treated by the law not as an accident but as a murder.[1] In old legal phrase, *malitia egreditur personam*; the *mens rea* is transferred from the injury contemplated to the injury actually committed. Austin has pointed out that such a murderer may have had any one of three mental attitudes with regard to the prospect of this latter injury. He may have—

(*a*) Thought it probable that he would hit *B* instead of *A*; and have risked doing so, though feeling no desire at all that *B* should be hit. Austin classes this as an "intention"; and Bentham gives it the specific name of "*indirect* intention". But in ordinary parlance it is not called "intention" at all;[2] because there was no desire of killing *B*.

(*b*) Thought it improbable that he would do so. This, Austin denominates "rashness".

(*c*) Not thought of it at all. This, Austin denominates "heedlessness".

(iii) Intention to kill, but without selecting any particular individual as the victim. This has been conveniently called "universal malice". It is exemplified by the case put by Blackstone, of a man who resolves to kill the next man he meets and does kill him;[3] and by the more frequent and more intelligible case of Malays who madden themselves, with hemp, into a homicidal frenzy, and then run "amok"; and by that of the miscreant who, about 1890, placed an explosive machine on board an Atlantic liner about to sail from Bremerhaven, in order to get the money for which he had insured part of the cargo. It is also exemplified by such atrocities as those attributed to the early settlers in Queensland, who are said to have

[1] Or manslaughter, if *A* has given such provocation as would reduce the killing of *him* to manslaughter; *Rex* v. *Gross* (1913), 23 Cox 455.

[2] Cf. p. 170 *post*.

[3] 4 Bl. Comm. 200.

rubbed poison into carcases of sheep or into masses of flour, and then placed them in the bush in hopes of their being eaten by the aborigines.[1]

(iv) Intention only to hurt—and not kill—but to hurt by means of an act which is intrinsically likely to kill. There is an old case of a park-keeper who, on finding a mischievous boy engaged in cutting some boughs from a tree in the park, tied him to his horse's tail, and began to beat him on the back; but the blows so frightened the horse that it started off and dragged the boy along with it, and thus injured him so much that he died.[2] The park-keeper was held to be guilty of murder. More recently, in 1885, a very similar case was tried at the Lewes Assizes. In it, a cow-boy had tied a child, who annoyed him whilst he was milking, to one of the hind legs of a cow; but the cow took fright at this, and started off, and in its course dashed the child's head against a post. Here, the jury, with the approval of the judge, convicted the prisoner of manslaughter only. The case is of course distinguishable from Halloway's; inasmuch as the cow, being both a less sensitive and a less active animal than the horse, was not so likely to do a serious injury. But the more lenient verdict is probably to be attributed less to this consideration than to the general tendency of modern tribunals to relax the severity of the old law of murder.

We have already seen[3] that even a parent or master, legally entitled to inflict corporal punishment upon a child, will be guilty of murder if he should, however unintentionally, kill the child by inflicting the punishment in some mode which was obviously likely to cause death.

[1] Haydon's *Trooper-Police of Australia*, p. 304. On Dec. 15, 1838, seven settlers were hanged in New South Wales for the unprovoked massacre of thirty natives; but pleaded "It has been so common that we had no idea it was against the law"; *ibid.* Cf. the case of Christiana Edmunds, who in 1872 used wilfully to supply a confectioner's shop with chocolate-creams imbued with strychnine.

[2] *Rex* v. *Halloway* (1628), Cro. Car. 131 (K. S. C. 103).

[3] *Ante*, p. 140.

Thus in *Rex* v. *Grey* (1666),[1] where a blacksmith was charged with the murder of his apprentice by striking him on the head with a bar of iron, it was held that the use of so dangerous an instrument "is all one as if he had run him through with a sword". And, similarly, a mother who had punished her child by stamping on its body, and had thereby killed it, was held guilty of murder.[2]

(v) Intention to do an act which is intrinsically likely to kill, though without any purpose of thereby inflicting any hurt whatever. Of this character is the intention of any workman who recklessly throws things off the roof of a house in a town, without looking over the edge to see if anyone is likely to be struck, or giving any warning.[3] We may add, as an instance of this fifth form of *mens rea*, Blackstone's case of the "unnatural" son who carried his sick father about, out of doors, in cold weather, which hastened the old man's death.[4] (This latter case, the printers of some thirteen successive editions of Stephen's *Commentaries* unwittingly represented as if it had been one of a deliberate intention to kill, by printing "rich" instead of "sick"!)

To treat this class of intentions as amounting to a murderous malice is perhaps impolitic; as being a more severe treatment than modern public opinion cordially approves. It certainly is felt by juries to be so. This was forcibly shewn at the trial of Leon Serné, at the Central Criminal Court in 1887.[5] He set fire to his house, which he had insured for considerably more than its value; and in the fire his two boys perished. He had been a kind father; and he had no intention of causing the death of the boys. On an indictment for their murder, he was acquitted. The acquittal seems to have been due

[1] Kelyng 64 (K. S. C. 105).
[2] K. S. C. 105.
[3] *Ante*, p. 141. *Rex* v. *Hull* (1664), Kelyng 40 (K. S. C. 125).
[4] *Ante*, p. 147. Y. B. 2 Ed. 3, f. 18, Hil. pl. 1 (K. S. C. 92).
[5] *Reg.* v. *Serné and Goldfinch* (1887), 16 Cox 311 (K. S. C. 106).

simply to the jury's dislike of the doctrine of "constructive" malice; for when indicted, in the following month, for arson, he was convicted. Yet if guilty of arson, he undoubtedly was legally guilty of murder.

(vi) (The older authorities add) Intention to commit a felonious act even though it be one unlikely to kill.

The oldest text-books had extended this principle to any *unlawful* act, but Sir Michael Foster limited it to *felonious* acts. Since his time, however, the effect of the rule, even as thus limited, has become enlarged, in consequence of various assaults and other acts having by statute been made into felonies. The illustration which Foster (*Crown Law*, p. 258) gives of this sixth rule is that of a man shooting at a fowl in order to steal it, and thereby accidentally killing a bystander. This, according to his view, would be murder; though if the intent had been merely to kill (and not to steal) the fowl, or if the bird aimed at had been a mere sparrow, the homicide would only have been manslaughter, as the act intended would not be a felony. Similarly, if a thief gives a man a push with intent to steal his watch, and the man falls to the ground and is killed by the fall—or if a man assaults a woman, with intent to ravish her, and she, having a weak heart, dies in the struggle—such a homicide would, according to Foster's rule, be murder.

Yet the severity of this rule has led to its being doubted. As early as 1773, in *Rex* v. *Lad* (1 Leach 96), the judges hesitated to say whether it would be murder to cause a child's death by a rape.[1] Both Stephen, J.,[2] and Huddleston, B., instructed juries that the Court for Crown Cases Reserved would probably not uphold Foster's rule. The draft Criminal Code of 1880 omitted it. Such an omission would still leave such felonies as are intrinsically likely to

[1] But it clearly is. See *Beard's Case*, *post*, p. 158.

[2] See *Reg.* v. *Serné and Goldfinch*, *loc. cit.*; study *Reg.* v. *Horsey* (1862), 3 F. and F. 287 (K. S. C. 109), and the discussion of this case by J. W. C. Turner in *Cambridge Law Journal*, VI, No. 1 at p. 56.

cause death to be dealt with as cases of our last mentioned rule, No. (v); though homicide resulting from any felony which was *unlikely* to cause death would be only a case of "involuntary" manslaughter.[1] On the other hand, Lord Alverstone, L.C.J., said[2] that "The experience of the judges shews that there are so many cases of death caused by attempts to commit felonies, that, for the protection of human life, it is not desirable to relax the rule which treats such crimes as murders".

Hence in the frequent cases in which death results from an abortion procured feloniously, yet by the woman's consent and therefore with no violence against her, and moreover in such a manner as seemed to involve no appreciable risk to her life, the judges formerly regarded it as clearly murder; and they passed sentences of death. But in later years these sentences were usually commuted by the Crown; and juries moreover shewed reluctance to convict of this merely "constructive" murder (cf. pp. 157, 315). Hence the judges developed a rule[3] that, in such cases, the jury may convict of a mere manslaughter; unless they think that the prisoner must as a reasonable person have contemplated (or did in fact contemplate) that death or grievous bodily harm was likely to result.[4]

In *Director of Public Prosecutions* v. *Beard*, [1920] A. C. 479, where the evidence established that the prisoner killed a child by an act of violence done in the course of or in the furtherance of the crime of rape, the House of Lords took the view that such an act was murder not because the felony was likely to cause death but (a

[1] *Ante*, p. 135. [2] To the grand jury at Liverpool, March 9, 1909.

[3] *Rex* v. *Lumley* (1912), 22 Cox 635; *Reg.* v. *Whitmarsh* (1898), 62 J. P. 711; cf. 12 Cr. App. R. 15, and 16 Cr. App. R. 24. This new rule unfortunately puts the practised abortionist into a more advantageous position than the mere first offender. Both Scotland and Ireland still retain the older and sterner doctrine.

[4] Hence it is well to add an express count for Manslaughter, so that the Murder count, if not pressed, may be dropped altogether.

harsher rule) because the felony was one of violence.[1] Lord Birkenhead said: "No attempt has been made in your Lordships' House to displace this view of the law and there can be no doubt about its soundness." In *Rex* v. *Betts and Ridley* (1930)[2], where death resulted from robbery with violence, the Court of Criminal Appeal characterised as a "too favourable description and definition of the law" a summing up which told the jury that they must be satisfied that the act done was calculated in the judgment of ordinary people to produce death.

(vii) There is authority for including, amongst the cases of malice that give the character of murder to homicide produced by acts that were *not* likely to kill, one form of intention which would not even be felonious; viz. the intent knowingly to oppose by force an officer of justice, when engaged in arresting or imprisoning an offender.[3] Sir James Stephen, for example, maintains that even if the opposition took no more violent form than merely that of tripping up the officer, yet, should his fall accidentally kill him, the case would be one of murder.[4] But he appears to have drawn this severe doctrine merely from general language used in the old authorities. In all the reported cases in which officers were killed, the actual means appear to have been intrinsically dangerous ones. Hence, in view of the modern tendency to narrow even the accepted rules as to constructive malice in murder, it may well be doubted whether the Court of Criminal Appeal would support this less definitely established doctrine. But the corresponding court in Ireland has ruled in its favour (*The State* v. *M'Mullen*, [1925] 2 I. R.

[1] For a criticism of this case see J. W. C. Turner in *Cambridge Law Journal*, VI, No. 1 at pp. 53 *et seq.* He points out that with the exception of Nos. vi and vii all the other forms of murderous malice fall within the simple rule that "the prisoner foresaw that his conduct might cause the death of some person".

[2] 144 L. T. 526; 22 Cr. App. R. 148, 153 (K. S. C. 554).

[3] See p. 527 *post.*

[4] *Digest of Criminal Law*, 7th ed., Art. 315; Illustration 11.

9); saying that if the fugitive fired back towards the pursuing arrestor, there would be Murder even if he did not *mean* to hit him.[1]

The existence of these various forms of "murderous malice" shews it to be much wider than mere "malice" in the popular sense, viz. ill-will; though much narrower than malice in the technical legal sense, viz. *mens rea*. There was until 1935 no little confusion in regard to the burden of proof of murderous malice. Sir Michael Foster[2] stated that: "In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, until the contrary appeareth." In 1935 one Woolmington was charged with the murder of his wife by shooting her and sentenced to death. The defence had been that the gun had gone off by accident, and the trial judge had directed the jury that once the prosecution had proved a killing by the prisoner, there was a presumption of murder which the prisoner had to displace. The Court of Criminal Appeal upheld the conviction,[3] but on appeal to the House of Lords the conviction was quashed.[4] The Lord Chancellor emphasised that in murder as in all other cases it is a principle of the common law of England, and no attempt to whittle it down can be entertained, that the prosecution must prove the guilt of the prisoner. Except where the defence of insanity is relied upon or where there is any statutory exception,[5] it can never be said that at any period of a murder trial the onus of proving innocence shifts to the prisoner. Subject to what has been said as to the defence of insanity and subject to any statutory exception

[1] For a criticism of this case see Turner *op. cit.* at p. 54.
[2] *Crown Law*, ed. 1762, p. 255.
[3] *Woolmington* v. *D.P.P.* (1935), 25 Cr. App. R. 72, 75 (K. S. C. 550).
[4] *Ibid.* 83 [1935] A. C. 462. [5] See pp. 47, 60 *ante*.

"throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt".[1] If it be proved that the conscious act of a prisoner killed a man and nothing else appears in the case, there is evidence upon which the jury may, not must, find him guilty of murder. It is sufficient for the prisoner to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence.[2] "The Crown must prove (*a*) death as the result of a voluntary act of the accused and (*b*) malice of the accused. It may prove malice expressly or by implication. For malice may be implied where death occurs as the result of a voluntary act of the accused which is (i) intentional and (ii) unprovoked. When evidence of death and malice has been given (this is a question for the jury), the accused is entitled to show by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted."[3]

As regards the malice which is to be imputed to the various members of a group of wrong-doers when one of them commits a homicide, the rule is that, if several persons act together in pursuance of a common intent, every act done in furtherance of it by any one of them is, in law, done by all. Hence if persons have agreed to waylay a man and rob him, and they come together for the purpose armed with deadly weapons, and one of them happens to kill him, every member of the gang is held guilty of the murder. But if their agreement had merely been to frighten the man, and then one of them went to

[1] 25 Cr. App. R. 95. [2] Cf. p. 402 *post*.
[3] 25 Cr. App. R. 95–96.

the unexpected length of shooting him, such a murder would affect only the particular person by whom the shot was actually fired. The act done must relate to the common design and not totally or substantially vary from it.[1]

(6) *A year and a day.* "Day" was here added merely to indicate that the 365th day after that of the injury must be included. Such an indication was rendered necessary by an old rule (now obsolete) that, in *criminal* law, in reckoning a period "from" the doing of any act, the period was (in favour of prisoners) to be taken as beginning on the very day when this act was done.[2]

The doctrine that a charge of homicide could not be sustained unless the death ensued within a limited period after the injury that caused it, was a wise precaution in view of the defectiveness of medical science in mediæval days. In Holland, indeed, so brief a period as six weeks was adopted; but the modern Roman-Dutch law of South Africa, in view of the present advanced state of forensic medicine, recognises no time-limit (Nathan, § 2605). Nor is any recognised in Scottish law (Hume, I, 186); nor in the Indian Penal Code. But in England the common-law rule is still retained, and has been applied in even a case of manslaughter, *Rex* v. *Dyson*, [1908] 2 K. B. 454.

The punishment of murder is death.[3] But until 1828 those murders which constituted an act of petit-treason (*e.g.* where a person was murdered by his wife or servant, or a bishop by one of his clergy) received an enhanced punishment. The offender, if a male, instead of being

[1] See *Reg.* v. *Macklin* (1838), 2 Lew. 225 (K. S. C. 100), where there was a common intent to frighten but no common intent to attack. Contrast *Rex* v. *Betts and Ridley* (1930), 22 Cr. App. R. 148; 144 L. T. 526 (K. S. C. 554), where there was an agreed plan to rob with some degree of violence, and cf. *Rex* v. *Short* (1932), 23 Cr. App. R. 170. See also p. 99 *ante*.

[2] Hob. 139. But *now* see *Radcliffe* v. *Bartholomew*, [1892] 1 Q. B. 161.

[3] Except for murderers not yet eighteen, who, instead, are "detained" during the King's pleasure. *Ante*, p. 57; *post*, p. 576.

taken in a cart to the scaffold, was dragged thither on a hurdle; and, if a woman, was not hanged but burned, as in the case of Catherine Hayes, in 1726, familiar to readers of Thackeray. By 31 & 32 Vict. c. 24, s. 2, every execution *for murder* must take place within the prison walls, before such persons only as the sheriff may admit. It should be noted that this necessity does not extend to the other three offences which still continue to be punishable with death (viz. treason,[1] piracies that are accompanied by any act which endangers life,[2] and the arson of a royal dockyard or man-of-war).[3] Yet the execution of Roger Casement for treason took place (August 3, 1916) inside the prison.

As murder is so heinous an offence, the legislature has enacted severe penalties for even mere incipient approaches to it. Thus any conspiracy to murder, though it still remains only a misdemeanor, is by statute punishable with ten years' penal servitude,[4] a far higher maximum of punishment than is allowed in the case of many felonies. And every attempt to commit a murder is now made by statute[5] a felony, and is punishable with penal servitude for life. It is also a felony punishable with ten years' penal servitude to send a letter threatening to murder,[6] or to destroy property.[7]

In concluding this subject, it may be added that murder affords a noteworthy exception to the general legal rule that "criminal jurisdiction is territorial".[8] Every nation tries and punishes all crimes committed in its own territory (or on its own ships), whether committed by its own subjects or by foreigners. Conversely, on the same principle, a nation usually does not concern itself with

[1] Petit-treason is abolished.
[2] 7 Will. 4 and 1 Vict. c. 88.
[3] 12 Geo. 3, c. 24, s. 1; 7 and 8 Geo. 4, c. 28, ss. 6, 7.
[4] 24 and 25 Vict. c. 100, s. 4.
[5] *Ibid.* ss. 11–15.
[6] *Ibid.* s. 16.
[7] 24 and 25 Vict. c. 97, s. 50.
[8] *Post*, p. 487. *Macleod* v. *Att.-Gen. of N.S.W.*, [1891] A. C. 455.

crimes committed anywhere else, even though committed by its own subjects. But to this latter branch of the rule, homicide has been made an exception in English law, by a succession of statutes commencing as far back as Henry VIII. The enactment now in force is 24 and 25 Vict. c. 100, s. 9; under which the courts of any part of the United Kingdom may try a British subject for *murder or manslaughter* committed by him anywhere outside the United Kingdom, whether within or without the Empire, provided it were on land. The power thus does not extend to homicides committed on a foreign ship. It is immaterial whether the person killed were a British subject or not. (It may be convenient to add here that similarly Bigamy, when committed by a British subject, even in a foreign country, may, by virtue of s. 57 of the same statute, be tried in the United Kingdom.)

As regards the effect of felonious homicide upon rights of property, it should be noted that both murder and manslaughter debar a sane killer from receiving any benefit under his victim's will[1]. It has been suggested that it might be otherwise under an intestacy, as the Statute of Distributions speaks imperatively;[2] but the contrary view is correct.[3] A policy of insurance on the life of the victim, effected by the killer with a view to the killing, is invalid, as a fraud.[4]

[1] *Re Crippen*, [1911] P. 108; *Re Hall*, [1914] P. 1; not where the killer is insane, *In re Pitts*, [1931] 1 Ch. 546.

[2] *In re Houghton*, [1915] 2 Ch. 173.

[3] *In re Pitts*, [1931] 1 Ch. 546; *Re Sigsworth* (1934), 152 L. T. 328.

[4] 25 Beav. 605. As to a policy of insurance effected by a suicide on his own life, see *Beresford* v. *Royal Insurance Co., Ltd.*, [1936] 2 All E. R. 1052.

CHAPTER X

OFFENCES AGAINST THE PERSON THAT ARE NOT FATAL

CRIMES of this class are of two sharply distinguished types, the sexual and the non-sexual; the one springing from lust, the other from anger.

To these offences that are of the former type, a very brief reference will be sufficient for the purposes of the present volume. The mediæval English law adopted, in all their entirety, the lofty ethical teachings of Christianity as to the mutual relations of the sexes. Those teachings are, for example, strictly followed by the common law in its doctrine of contract, when deciding what agreements shall be regarded as too immoral for the courts to enforce.[1]

And the same teachings were enforced by punitive sanctions in the ecclesiastical courts; a jurisdiction which, though long obsolete in practice, has never been formally abolished.[2] But the common law had no penal prohibitions of similar comprehensiveness; its criminal rules taking cognisance only of those grosser breaches of sexual morality that were rendered peculiarly odious, either by the abnormality of the form they took,[3] or by the violence with which they were accompanied; aggravations to which the legislature subsequently added that of the tender age of the female concerned in them;[4] or of her near consanguinity.[5] Hence, the voluntary illicit intercourse of

[1] Anson's *Law of Contract*, 17th ed., ch. VII.

[2] Stephen, *Digest of Criminal Law*, 7th ed., Art. 245; *History of Criminal Law*, II, 396–429. See the authorities cited *arguendo* in *Phillimore* v. *Machon* (1876), 1 P. D. 481.

[3] Stephen, *Digest of Criminal Law*, 7th ed., ch. XVIII.

[4] *Ibid.* ch. XXIX.

[5] Punishment of Incest Act, 1908, 8 Edw. 7, c. 45.

the sexes, even though it take the form of mercenary prostitution or of an adulterous violation of marital legal rights, furnishes no ground for a criminal indictment. Such a limitation of the sphere of penal law, like the modern abandonment of the ecclesiastical courts' penalties, is abundantly justified by the considerations, which have been already set out,[1] that distinguish those injurious acts that can prudently be repressed by criminal sanctions, from such as will more fitly be left to be restrained by the penalties of social opinion and of religion.

From this class of offences against the person we may pass to those that are unconnected with sexual relations. These call for a detailed consideration. They fall readily into two groups: according as the crime does or does not leave behind it, upon the sufferer's body, some actual hurt. The former alternative must first be considered.

A. *Offences where actual bodily injury is occasioned.*[2]

The present law regarding this aggravated class of crimes is entirely the creation of statutes. Wounding and maiming did, in early times, entitle the sufferer to bring an "appeal" of felony;[3] and if the appeal were successful the wrong-doer forfeited life and member. But these appeals seldom proved successful; as they were usually quashed for some technical informality; and if the appellee were then arraigned at the King's suit he received no heavier punishment than that of a mere misdemeanor—imprisonment or fine. Appeals for wounding consequently died out; though the injured parties, if unwilling to indict the offender for a mere assault, had still the alternative of a civil remedy in the shape of an action of trespass[4]

[1] *Ante*, p. 30.

[2] See Stephen, *History of Criminal Law*, III, 108–120; *Digest of Criminal Law*, 7th ed., Arts. 330–346.

[3] *Ante*, p. 20.

[4] Pollock and Maitland, II, 487.

to recover pecuniary damages. But subsequently, by various statutes, offences of this class have again been exposed to a more adequate punishment. The present law on the subject is, however, as Mr Justice Wright has said, "singularly fragmentary and unsystematic".[1] It is mainly to be found in the Act of 1861 consolidating the enactments that dealt with offences against the person (24 and 25 Vict. c. 100). By this Act the graver offences are made felonies, the others ranking as misdemeanors. We may mention some salient instances of each class.

1. *Felonies.*

(*a*) It is a felony, punishable with penal servitude for life, unlawfully and maliciously to wound or cause any grievous bodily harm to anyone—or shoot (or even attempt to shoot) at him—*with intent* to maim, disfigure, disable, or do any other grievous bodily harm, or prevent an arrest.[2]

Some of the phrases here used are so technical as to need explanation. Thus, to constitute a "wound" the continuity of the skin must be broken; *i.e.* that of both[3] skins, *cutis vera* as well as epidermis.[4] Hence a mere scratch in the latter is not a wound; nor will it even

[1] *Draft Criminal Code for Jamaica*, p. 106.

[2] 24 and 25 Vict. c. 100, s. 18. To make or attempt to make use of a firearm or imitation firearm with intent to resist or prevent the lawful apprehension of the offender or any other person is a felony punishable with fourteen years' penal servitude. The penalty for any offence lawful apprehension of which is resisted may be imposed in addition. Possession of the forbidden implement at the time of the commission of certain specified offences renders the possessor liable to seven years' penal servitude in addition to the penalty for the offence in question, unless he shews that he had possession for a lawful object (Firearms and Imitation Firearms (Criminal Use) Act, 1933, 23 and 24 Geo. 5, c. 50).

[3] The "three skins" of the older anatomists. Internal skin, *e.g.* in the mouth, suffices.

[4] So no injury can be a wound unless it do bleed. Thus a burn is not a "wound"; nor is a kick that causes internal hæmorrhage but breaks no skin.

suffice that bones have been fractured if the skin is not broken also. Harm may be "caused" without personal contact; so, if *A* break his leg by jumping out of a window to avoid *B*'s threatened attack, *B* is indictable for "causing" this injury.[1]

Bodily harm becomes "grievous" whenever it seriously interferes with health or even with comfort. It is not necessary that its effects should be dangerous, nor that they should be permanent.[2] The rather vague question whether, in any particular case, the harm done was serious enough to be classed as grievous, is for the jury to determine.

To "maim" is to do such a hurt to any part of a man's body that he is rendered less capable, in fighting, either of defending himself or of annoying his adversary.

The statutory "attempt" to shoot at a person is not made until some really proximate step is taken; as, for instance, that of drawing the trigger; cf. p. 92 *ante*. Hence merely to point a loaded pistol at a man (though it does amount to an "assault" on him) will not suffice for the crime we are now considering. But to pull the trigger, even though the discharge fails through a defect in the cartridge (or barely to put your finger on the trigger with the intention of pulling it, even though you be interrupted before you actually pull it), does suffice to constitute an attempt to shoot, within the statute.[3]

In this crime the Crown must prove the Intent. But the act itself *may* afford sufficient proof. Thus, to fire maliciously a loaded pistol at short range must shew this "intent of doing grievous bodily harm" (and it may well shew an intent to murder).

The wording of the statute does not make it necessary

[1] C. C. C. Sess. Pap. LIX, 393.

[2] Merely that "the shoulder was very much bruised" was held insufficient (C. C. C. Sess. Pap. LXXXI, 440). "Any bullet-wound, in any part of the body", even a finger, suffices (Avory, J.).

[3] *Reg.* v. *Duckworth*, [1892] 2 Q. B. 83.

that the person whom it was intended to harm should be the one actually harmed.

It is a felony, punishable with penal servitude for life, to administer or attempt to administer chloroform, laudanum, or other stupefying or overpowering matter in order to procure the commission of an indictable crime.[1]

(*b*) It is a felony, punishable with penal servitude for ten years, unlawfully and maliciously to administer any poison or other noxious thing to anyone so as thereby to endanger his life or inflict upon him grievous bodily harm.[2]

2. *Misdemeanors.*

Each of the three following statutory misdemeanors is punishable with five years' penal servitude.

(*a*) Unlawfully and maliciously[3] wounding, or inflicting any grievous bodily harm upon, any person.[4]

This offence differs from the somewhat similar felony above referred to as "1 (*a*)", in that the felony requires an actual intention to do the particular kind of grievous bodily harm, whereas in the misdemeanor it is sufficient that such harm has been done "maliciously", even though there was no intention to produce the full degree of harm that has actually been inflicted. Here we again meet with "that most unsatisfactory of all expressions"[5]—*malice*. But the "malice" required here is something narrower than that vague general idea of a wicked state of mind which the word usually denotes at common law,[6] as in cases of homicide or in the phrase "mute of malice".[7] For

[1] 24 and 25 Vict. c. 100, s. 22.

[2] *Ibid.* s. 23.

[3] Hence *accident* would not suffice.

[4] 24 and 25 Vict. c. 100, s. 20.

[5] Prof. E. C. Clark, *Analysis of Criminal Liability*, p. 82. "One of the most perplexing legal terms;...continually used in conflicting senses" (Bigelow on Torts, § 35).

[6] Cf. 2 Ld. Raymond 1485.

[7] *Post*, p. 558. Yet it is not so narrow as the popular sense of "spite"; any more than it is in the definition of Murder (see p. 160 *ante*).

in *statutory* wrongs the word "malice" is presumed to have been employed by the legislature in a precise sense; so as to require a wickedness which included an actual intention to do an injury, and, moreover, an injury of the same kind as that which in fact was done. Thus the intention to injure a man's body is not such malice as will support an indictment for malicious injury to his property; and similarly *vice versâ*. Accordingly if a stone aimed at a person misses him, but crashes through a window, the thrower will not necessarily be guilty of "maliciously" breaking this window.[1] And, similarly, had the stone been flung at the window, and then intercepted on its flight by the head of someone who unexpectedly looked out of the window, the thrower would not necessarily have committed a "malicious" injury to this person. In either of these two cases, however, there would be a sufficient "malice", if the man who threw the stone in the desire of doing the one kind of harm, knew that it was likely that the other kind might be done, and felt reckless as to whether it were done or not, though not desiring it.[2]

But if the harm done be of the *kind* intended, this is sufficient; even though it be produced in some degree, or in some manner, or upon some subject, that was not intended. Thus where a soldier aimed a blow at another man with his belt, but the belt bounded off and struck a woman who was standing by, and cut open her face, he was held guilty of maliciously wounding her.[3]

Much confusion hangs around the three cognate words —Malice, Intention, Purpose.[4] Clearly "purpose" always involves the idea of a desire. So, also, in popular parlance does "intention"; for a man is not ordinarily said to

[1] *Reg.* v. *Pembliton* (1874), 2 C. C. R. 119 (K. S. C. 157).
[2] *Re Borrowes*, [1900] 2 I. R. 593.
[3] *Reg.* v. *Latimer* (1886), 17 Q. B. D. 359 (K. S. C. 144).
[4] The reader should study Sir J. Salmond's exposition (*Jurisprudence*, 8th ed., chs. XVII, XVIII, XIX).

"intend" any consequences of his act which he does not desire but regrets to have to run the risk of[1] (*e.g.* when he shoots at an enemy, though seeing that a friend is close to the line of fire). Yet in law it is clear that the word "intention", like the word "malice", covers all consequences whatever which the doer of an act foresees as likely to result from it; whether he does the act with an actual desire of producing them, or only in recklessness as to whether they ensue or not.[2] The fact that he had means of knowing[3] a consequence to be likely, raises a *primâ facie* presumption that he did actually foresee it as being so. There is such a great difficulty in obtaining any evidence to rebut this presumption, as usually to render it practically equivalent to a conclusive one.[4]

Accordingly, to give legal proof of malice is less difficult than might theoretically have been expected. If the act was unlawful, and done with a bad motive, and was at all likely to cause injury of the kind that did in fact result, there is enough *primâ facie* proof of "malice" to warrant a conviction. Thus, where *A* was engaged in shooting wild-fowl, and *B* fired a gun in the direction of *A*'s boat with the mere object of frightening *A* so as to make him give up his sport, but, owing to the boat's being suddenly slewed round, the shot actually struck *A*, it was held that there was sufficient evidence of malice on the part of *B*.[5] And where *A*, merely in order to frighten *B*, pointed at him a gun which he knew to be loaded, and then, in consequence of *B*'s own act in seizing the muzzle, the gun accidently went off and shot *B*, it was held by Wills, J.,[6] that there was a sufficiently "malicious" wounding.

[1] Prof. E. C. Clark's *Analysis of Criminal Liability*, pp. 73, 78; Markby's *Elements of Law*, s. 222. And see *ante*, p. 153.

[2] *Reg.* v. *Welch* (1875), 1 Q. B. D. 23. Cf. Mr Justice Wright's *Draft Criminal Code for Jamaica*, pp. 3, 98; Austin, Lecture xxi.

[3] As to "Knowledge", see p. 292 *post*.

[4] But it is *not* conclusive. See p. 391 *post*.

[5] *Reg.* v. *Ward* (1872), 1 C. C. R. 356.

[6] Cambridge Assizes, Oct. 1899.

Unlawfully inflicting grievous bodily harm *without* (strict statutory[1]) "malice", is not known to the law as a specific offence; and can at most be dealt with as a mere form of assault. If it were inflicted by mere *negligence*, however gross, it probably, in *criminal* law, is not even an assault;[2] and thus is no offence at all, unless death results from it.[3] The quack, who makes his patient lose a limb or an eye, is only liable civilly and not criminally.

The question as to what kind of causation will suffice to constitute an "inflicting" shall be considered later on.[4]

(*b*) Occasioning actual bodily harm by an assault.[5]

The reason of the framers of the Act of 1861 for separating this offence from that last described (viz. "2 (*a*)") is not obvious; especially as they both entail the same punishment. Indeed, "occasioning actual bodily harm by an assault" would seem a description wide enough to include all the acts covered by 2 (*a*); unless "inflict" be taken to have been used by the legislature as a wider word than "assault", and as capable of including the production of harm by some indirect and protracted chain of causation, *e.g.* by poisoning (see p. 173), or infecting with disease. Arguments of great force have been used in favour of this wide construction.[6] And we may add to them that in *Reg.* v. *Halliday* (1889),[7] the Court for Crown Cases Reserved held that grievous bodily harm had been "inflicted", where the defendant had merely frightened a woman so that she jumped from a window and was hurt; and this frightening, though an "assault" in the old technical meaning of that word was no assault in the modern sense of a "battery". In *Rex* v. *Coleman* (1920),[8] in similar circumstances a husband was convicted of an

[1] *Ante*, p. 170.
[2] *Post*, p. 183. *Reg.* v. *Latimer* (1886), 17 Q. B. D. 359 (K. S. C. 144).
[3] Or unless it were negligence in managing a "vehicle"; see p. 173 *post*.
[4] *Post*, p. 173.
[5] 24 and 25 Vict. c. 100, s. 47.
[6] See *per* Hawkins, J., in *Reg.* v. *Clarence* (1889), 22 Q. B. D. at p. 49.
[7] 61 *Law Times*, 701. Cf. 7 Cr. App. R. 197; and 8 Q. B. D. 54.
[8] 84 J. P. 112.

assault occasioning actual bodily harm. But in ***Reg.*** v. ***Clarence*** (1889),[1] when the majority of the Court held that the communication of venereal disease by a husband (even though he knew of it) to his wife (even though she did not know of it) was no assault, inasmuch as there was consent to the contact, they decided that it consequently was not an "*inflicting* of grievous bodily harm"; on the ground that they considered that an "inflicting" must be by assault and battery[2] and requires a direct and immediate causing of the harm.

(*c*) Unlawfully and maliciously administering to anyone any poison or other noxious thing with intent to injure, aggrieve, or annoy him.[3]

If the thing administered be a recognised "poison", it seems probable that the offence would be committed by giving even a quantity so small as to be incapable of doing harm.[4] But if it be not a poison, and be "noxious" only when taken in large quantities (as, for example, castor-oil or ardent spirits), the offence will not be committed by giving a person only a small dose of it.

A misdemeanor less severely punishable (viz. only by two years' imprisonment with hard labour) is committed when any person having the charge of any carriage or vehicle (for instance, a bicycle) causes bodily harm to any one by wanton or furious driving, or racing, or other wilful misconduct, or even merely by wilful *neglect*.[5]

To drive recklessly or at a speed or in a manner dangerous to the public is punishable on conviction on indictment with two years' imprisonment and/or a fine

[1] 22 Q. B. D. 23. Cf. *Hegarty* v. *Shine* (1878), 14 Cox 145.

[2] Wills, J., at p. 37; Stephen, J., at p. 41; Pollock, B., at p. 62.

[3] 24 and 25 Vict. c. 100, s. 24.

[4] See *per* Field, J., and Stephen, J., in *Reg.* v. *Cramp* (1880), 5 Q. B. D. 307; a case arising upon similar words in a different statute.

[5] 24 and 25 Vict. c. 100, s. 35. "'Wilfully' means deliberately, not by inadvertence" (Lord Russell, C.J., 47 W. R. 369). It has been held by Acton, J. (C. C. C., April 19, 1923) that the driver's neglect must be of the criminal, *i.e.* wicked, degree (cf. *ante*, p. 138).

and on summary conviction[1] to a fine not exceeding £50 or four months' imprisonment and on a second or subsequent conviction to a fine not exceeding £100 and/or four months' imprisonment. On a second or subsequent conviction the Court shall unless there are special reasons to the contrary disqualify the offender from holding a licence for such period as the Court thinks fit and may do so in the case of a first conviction.[2]

To drive a motor-car without due care or reasonable consideration for others is punishable summarily[1] with a fine not exceeding £20 and in the case of a subsequent conviction with a fine not exceeding £50 or with not more than three months' imprisonment. A first or second conviction for an offence under this section shall not render the offender liable to be disqualified from holding a licence for a longer period than, in the case of a first conviction, one month, or in the case of a second conviction (or a first conviction following a conviction within the previous three years for dangerous driving), three months.[3]

In *Rex* v. *Stringer*, [1933] 1 K. B. 704, the Court of Criminal Appeal upheld a conviction for dangerous driving though on the same facts the accused had been acquitted by the same jury on a charge of manslaughter. The Court did not in this very unsatisfactory decision point out in what respect the *mens rea* required to establish a charge of dangerous driving differs from that required in manslaughter.[4]

[1] See pp. 508 *et seq. post.*

[2] Road Traffic Act, 1930 (20 and 21 Geo. 5, c. 43), ss. 6 and 11, cf. p. 72 *ante*; Road Traffic Act, 1934 (24 and 25 Geo. 5, c. 50), s. 4.

[3] Road Traffic Act, 1930 (*supra*), ss. 12 and 113; Road Traffic Act, 1934 (*supra*), s. 5.

[4] For a discussion and criticism of this case see "*Mens Rea* and Motorists", J. W. C. Turner, *Cambridge Law Journal*, v, 61. Where it is intended to charge an accused with both manslaughter and dangerous driving, the offences should be charged in separate indictments, *Rex* v. *Stringer* (*ante*), but since that decision it has been enacted that on an indictment for manslaughter a jury may find an accused guilty of dangerous driving, Road Traffic Act, 1934, s. 34; for a discussion of this enactment, see J. W. C. Turner in *Cambridge Law Journal*, vi, No. 1 at p. 51.

B. *Offences in which actual bodily harm is not essential.*

An "assault" is an unlawful attempt, or offer, to do with violence a corporal wrong to another person.[1] A "battery" is such a wrong actually done to him in an angry, revengeful, rude or insolent manner. In other words, an assault is a movement which attempts, or threatens, the unlawful application of force[2] to another person; whilst such an application itself, when actually effected, constitutes a battery. Thus riding *at* a person is an assault, riding *against* him is a battery. Even a mere assault, without any battery, is not only a tort but also a misdemeanor. Hence if a battery ensue, it does not enhance the degree of the crime; though it is important as affording clear proof of the hostile intention of the movements which constitute the assault. Usually, of course, both the two offences are committed together; and the whole transaction is legally described as "an assault and battery". This became shortened in popular language to "an assault"; and now the current speech even of lawyers habitually uses that word as if inclusive of "battery".

Even in a battery, no actual harm need be done or threatened. The slightest force will suffice, if it were exercised in a hostile spirit; thus merely spitting on a person may amount to an indictable battery.[3] The force applied (or threatened) need not involve immediate contact of the assailant with the sufferer. Thus it is sufficient if harm is done (or threatened) to a person's clothes without touching his skin. And, similarly, the hostile force may be exercised either directly or even indirectly; as by

[1] An assault committed in a *public* place becomes an "Affray". For an assault without a battery, see *Smith* v. *Newsam* (1673), 3 Keble 283.

[2] The learned editors of Russell on Crimes, 8th ed., consider (p. 839) that "force" here includes light, heat, gas, electricity, or odour.

[3] A MS. in the British Museum records an action of assault brought in 1693 against a tavern-keeper whose servants had refused to let the plaintiff leave until he paid his bill. Holt, C.J., declared the detention illegal; "but ordered *small* damages".

striking a horse and thereby making it throw its rider,[1] or by breaking the ice just in front of a skater.[2]

To deprive another person of his liberty will usually involve touching or threatening to touch him; and thus the tort of false imprisonment[3] usually involves an obvious assault. And even though the force used for that tort do not involve any threat of contact, it is held still to amount to an assault civilly; and, if the assailant knew himself to be acting wrongly, to an indictable assault.[4] Some bodily *movement* is essential to an assault or battery; so that supposing you only offer mere motionless obstruction, acting as if you were "a door or a wall"[5]—as where a cyclist is brought down by collision with a person who only stands still, however wilfully, in front of him—no proceedings can be taken for assault. (The much graver offence of "maliciously causing grievous bodily harm" may, however, have been committed.) Similarly, mere words, however threatening, can never make an assault.[6] Yet they may *un*make an assault; as in a case where a man laid his hand menacingly on his sword, but at the same time said, "*If it were not assize time*, I'd run you through the body".[7]

Alarm is essential to an assault.[8] Hence if a person who strikes at another is so far off that he cannot by possibility

[1] *Dodwell* v. *Burford* (1670), 1 Mod. 24.

[2] Stephen, *Digest of Criminal Law*, 7th ed., Art 340, n. 3. Similarly in *Rex* v. *Jolly* (S. A. Law Reports, 1923, 176) the Supreme Court of South Africa held that a "battery" had been committed when *J* so tampered with a railway line as to secure the derailment of the next train, several hours later, and a consequent hurt to the engine-driver.

[3] For this tort see Pollock, *Law of Torts*, 13th ed., ch. VI.

[4] *E.g.* where an accoucheur was locked into the patient's room, lest he should depart before her child was born, *Rex* v. *Linsberg* (1905), 69 J. P. 107. But a doubt was there expressed as to the *criminality* of an imprisonment inflicted in a *bonâ fide*, though erroneous, belief or right, *e.g.* in a wrongful arrest.

[5] *Innes* v. *Wylie* (1844), 1 C. and K. at p. 263.

[6] Thus the alarming utterance which caused "weeks of physical suffering" in *Wilkinson* v. *Downton*, [1897] 2 Q. B. 57, was no assault.

[7] *Tuberville* v. *Savage* (1669), 1 Mod. 3. [8] In the absence of contact.

touch him, it is certainly no assault. And it has even been said that to constitute an assault there must, in all cases, be the means of carrying the threat into effect.[1] Accordingly, whilst pointing a loaded pistol at a person is undoubtedly an assault, it was ruled, in *Reg.* v. *James* (1844),[2] that it was no assault to present one incapable of being discharged. But in an earlier case, *Reg.* v. *St George* (1840),[3] it was ruled, on the contrary, that if a person presents a firearm which he knows to be unloaded at a man who does not know that it is unloaded, and who is so near that (were it loaded) its discharge might injure him, an assault is committed. This latter view, which makes the offence depend upon the alarm naturally (however mistakenly) aroused in the person threatened, is in accord with the Scottish law;[4] and it agrees with the predominance of authority in America, where this question has much more frequently arisen than in this country.[5]

Poisoning, where the poison (as is usually the case) is taken by the sufferer's own hand, does not constitute an assault.[6] A contrary view was at one time taken here; and is still favoured in America.[7] But it is essential to an assault that there should be a personal exertion of force by the assailant. If therefore the actual taking up of the glass was the act of the person poisoned, there is no assault;[8] even though he took it in consequence of the

[1] *Per* Tindal, C.J., in *Stephens* v. *Myers* (1830), 4 C. and P. 349.

[2] 1 C. and K. 530.

[3] 9 C. and P. 483 (contrast 626). So Comyn's *Digest* tit. Battery, A. n. r.

[4] 1 Broun 394; and with Queensland law (Q. L. R. 1911, p. 206).

[5] *Commonwealth* v. *White* (1873), 110 Mass. 407. In 1891 the Supreme Court of New South Wales pronounced *for* the liability (12 N. S. W. 113); though in 1870 it had decided against it (9 S. C. R. 75). To possess any firearm or ammunition with intent to endanger life or cause serious injury to property is a felony punishable with penal servitude for twenty years (10 and 11 Geo. 5, c. 43, s. 7).

[6] See *Reg.* v. *Clarence* (1889), 22 Q. B. D. at p. 42.

[7] *Commonwealth* v. *Stratton* (1873), 114 Mass. 303.

[8] But there will be a statutory offence (see p. 173, *ante*) of "administering poison".

poisoner's false representation that it was harmless. The further argument has been urged, that poison, unlike an ordinary "battery", takes effect internally instead of externally, and acts chemically instead of mechanically.

The exercise of force against the body of another man is not always unlawful.[1] The principal occasions on which it is legally justifiable (provided that no more force is used than is proportionate to the immediate need) are the following:

(1) In the furtherance of public authority; as in preventing a breach of the peace, or arresting[2] a felon, or executing any process issued by a court of law, or forcibly feeding a "hunger-striking" prisoner.[3] This has been already sufficiently considered in Homicide.[4]

(2) In correcting your children, or the scholars or apprentices who have been placed under your authority. This right has also been already considered.[5]

(3) In defending either (*a*) your person, or (*b*) your existing lawful possession of any property (whether it consist of lands or merely of goods).

"Nature prompts a man who is struck to resist; and he is justified in using such a degree of force as will prevent a repetition" (Parke, B.). Nor is it necessary that he should wait to be actually struck, before striking in self-defence. If one party raise up a threatening hand, then the other may strike. Nor is the right of defence limited to the particular person assailed; it includes all who are under any obligation, even though merely social and not legal, to protect him. The old authorities exemplify this by the cases of a husband defending his wife, a child his parent,

[1] Cf. *ante*, pp. 116–126.

[2] But any *unnecessary* handcuffing would be an assault; 3 D. and R. 300.

[3] 26 T. L. R. 139.

[4] *Ante*, p. 117.

[5] *Ante*, p. 123. It was upheld in 1910 for an apprentice as old as seventeen, *McGee* v. *Robinson* (*The Times*, Nov. 30, 1910).

a master his servant, or a servant his master[1] (and perhaps the courts would now take a still more general view of this duty of the strong to protect the weak[2]). A familiar modern instance is the force exercised by the stewards of a public meeting to remove those who persistently disturb it.

But the justification covers only blows struck in sheer self-defence and not in revenge.[3] Accordingly if, when all the danger is over and no more blows are really needed for defence, the defender nevertheless strikes one, he commits an assault and battery.[4] The numerous decisions that have been given as to the kind of weapons that may lawfully be used to repel an assailant, are merely applications of this simple principle. Thus, as we have already seen,[5] where a person is attacked with such extreme violence that his very life is in danger he is justified in even killing his assailant. But a mere ordinary assault must not be thus met by the use of firearms or other deadly weapons.[6] And, similarly, a knife is not usually a proper instrument of self-defence, but must only be employed where serious bodily danger is apprehended, or where a robbery (*i.e.* a theft *by violence*) is to be prevented.[7] Hence it is unjustifiable for a man to use it where the attack upon him is made with a mere strap.[8] It should, however, be noted that where more force than was necessary has been used for self-defence, the case is not to be treated as if all the force employed had been illegal. The fact that part of it was justifiably exerted may, for instance, have the effect of reducing a charge of "wounding with intent

[1] Cf. p. 117, *ante*; *Reg.* v. *Rose* (1884), 15 Cox 540 (K. S. C. 140).

[2] Cf. 2 C. C. R. 178; 11 Mod. 242; 1 East P. C. 292; 1 Hawkins P. C. XXXI, ss. 56 and 57. See p. 117 *ante*.

[3] Study on "Self-Defence", Dicey, *Law of the Constitution*, 8th ed., App. note IV.

[4] *Reg.* v. *Driscoll* (1841), C. and M. 214 (K. S. C. 151).

[5] *Ante*, p. 117.

[6] *Osborn* v. *Veitch* (1858), 1 F. and F. 317 (K. S. C. 150).

[7] *Reg.* v. *Hewlett* (1858), 1 F. and F. 91 (K. S. C. 150).

[8] Or to repel with a razor an attack by the mere fist; 4 Cr. App. R. 51.

to do grievous bodily harm" to one of mere unlawful wounding.

The right of self-defence extends, as we have said, to the defence not only of your person but also of your property. Thus force may lawfully be used in expelling anyone who is trespassing in your house, or on your land (or even on a railway-carriage *reserved* for you),[1] if no milder mode of getting rid of him would avail. Hence if his entry had itself been effected forcibly, as by a burglary or even by breaking open a gate, you may at once use force to expel him.[2] But in the case of an ordinary peaceful trespasser, it will not be until you have first requested him to depart, and he has failed to comply with the request, that you will be justified in ejecting him by the strong hand. Disturbance of an easement is a wrong in the nature of a trespass, and therefore force may similarly be used to prevent it.[3]

A similar right exists in the case of movable property. Force may accordingly be used to resist anyone who attempts to take away your goods from you.[4] And there is modern authority[5] for saying that force may even be used to *recapture* your goods, after they have been actually taken out of your possession. In the case of real property this right to recover by force certainly does not exist. Under an Act of Richard II (5 Ric. 2, St. 1, c. 8) a landlord commits an indictable offence by "forcibly entering" a house, although it is his own, if any full (though unlawful) possessor is excluding him.[6] For real property, unlike

[1] Cf. [1915] 1 K. B. 1.

[2] *Green* v. *Goddard* (1704), 2 Salk. 641 (K. S. C. 147).

[3] To defend one's precedence in a procession does not justify a battery, *e.g.* a contest between a D.D.'s wife and a J.P.'s wife, *Ashton* v. *Jennings* (1675), 2 Levinz 133.

[4] *Bird* v. *Jones* (1845), L. R. 7 Q. B. 742.

[5] In *Blades* v. *Higgs* (1865), 11 H. L. C. 621, the House of Lords seems to have tacitly accepted this doctrine. Yet see Pollock, *Law of Torts*, 13th ed., pp. 390 and 404.

[6] *Newton* v. *Harland* (1840), 1 Scott, N. R. 474; cf. 17 Ch. D. at p. 188.

personal, is in no danger of being meanwhile destroyed, or lost, if the owner waits to sue at law for it.

(4) There is, again, a legal justification for the trifling degree of force involved in those petty instances of contact which inevitably arise in the ordinary social intercourse of everyday life; such as tapping a friend's shoulder to attract his attention, or jostling past one's neighbour in a crowd. But, to be thus justifiable, these acts must be done *bonâ fide*,[1] and with no unusual vehemence.

(5) There is, further, a justification for acts that are done by consent of the person assaulted; unless the force be a breach of the peace, or be causelessly dangerous. *Volenti non fit injuria.* Hence seduction is no assault, either in the law of crime or even in that of tort.

But the consent must be given freely (*i.e.* without force, fear or fraud), and by a sane and sober person, so situated as to be able to form a reasonable opinion upon the matter to which consent is given.[2] "Fraud vitiates consent"; if the fraud relate to a fundamental Fact,[3] like the identity of the deceiver, or the nature of the assault.[4] Accordingly an impostor, who, by pretending to be a surgeon, induces an invalid to submit to be operated upon by him, will be guilty of assault, notwithstanding the consent which was nominally given. As regards the mental capacity to consent, it may be mentioned that, in the case of indecent assaults, the legislature has established a definite rule as to age, by enacting that consent given by a child of either sex under sixteen years of age shall not constitute a

[1] A man was indicted at the Central Criminal Court in 1925 (June 18) for an assault on his former fiancée, though her utmost charge was "He caught hold of my coat and said he wanted a few words with me." Sankey, J., left it to the jury; but only as "a very, very small matter". They acquitted.

[2] For a Submission is not always a Permission.

[3] But error as to a matter of law does not vitiate consent.

[4] *Reg.* v. *Clarence* (1889), 22 Q. B. D. 23 *per* Stephen, J., and see *Rex* v. *Williams*, [1923] 1 K. B. 340.

defence,[1] but it is provided by the Age of Marriage Act 1929 (19 and 20 Geo. 5, c. 36), which renders void marriages between persons either of whom is under the age of sixteen, that it shall be a sufficient defence upon a charge of indecent assault or of unlawful carnal knowledge to prove that the accused had reasonable cause to believe that the girl in respect of whom an offence is alleged to have been committed was his wife. It is no defence to a charge of indecent assault on a girl under sixteen to prove that the girl consented and that the prisoner had reasonable cause to believe that the girl was over the age of sixteen, but this defence is available as an answer to the graver charge of unlawful carnal knowledge of a girl of between thirteen and sixteen years of age in cases where the accused is of twenty-three years of age or under and is charged with the offence for the first time, *Rex* v. *Forde*, [1923] 2 K. B. 400.[2] This defence is available until the twenty-fourth birthday of the accused, *Rex* v. *Chapman*, [1931] 2 K. B. 606. This defence is not available where the offence relates to a girl of under thirteen years of age. And, again, even the most complete consent, by the most competent person, will not suffice to legalise an assault which there are public grounds for prohibiting. Thus consent is no defence, criminally,[3] for any assault that involves some extreme and causeless injury to life, limb, or health; or even one that constitutes a mere breach of the peace; nor for any assault likely to cause bodily harm (whether extreme or not) and not justified by any good

[1] Criminal Law Amendment Act 1922, s. 1.

[2] In *Rex* v. *Laws* (1929), 21 Cr. App. R. 45 Lord Hewart, C.J., said: "It is indeed a grotesque state of affairs that the law offers a defence upon the major charge, but excludes that defence if the minor charge is preferred", but see *Rex* v. *Keech* (1929), 21 Cr. App. R. 125. See also *Rex* v. *Maughan* (1934), 24 Cr. App. R. 130 (K. S. C. 547) and p. 52 *ante*.

[3] *Reg.* v. *Coney* (1882), 8 Q. B. D. 534. *Ante*, p. 125. For the (disputed) effect of such consent upon the *civil* liability, see Pollock, *Law of Torts*, 13th ed., pp. 163 *et seq.*; Kenny's *Select Cases on Tort*, p. 157; Beven on Negligence, I, 111.

reason, *e.g.* sport, lawful chastisement, etc.[1] If, therefore, one of the parties to a duel is injured, his consent is no excuse. Yet it is uncertain at what degree of danger the law thus takes away a man's right to consent to be placed in situations of peril (as, for instance, by allowing himself to be wheeled in a barrow along a tight-rope[2]). But in the case of a surgical operation carried out by a competent surgeon, however great be the risk, there will usually be adequate cause for running it; and so the patient's consent will be full justification for what would otherwise be an aggravated assault. And even injuries which are occasioned in the course of a mere game, if it be a lawful one and be played with due care, are not regarded as causeless.[3]

These rules as to the amount of violence which constitutes an assault, and as to the circumstances which will excuse that violence, hold equally good in the law of tort and in the law of crime. But those two branches of law differ in their rules as to the state of mind which will render a man liable for the exercise of such violence as has been shewn to be a forbidden act. In actions of tort, either intention or even mere negligence[4] (as where a waiter clumsily upsets over a customer a boiling teapot) will—if the degree of negligence be adequate—suffice to render the wrong-doer liable to damages. But an assault will not render a man liable to criminal punishment unless it were committed with actual intention.[5]

We have, however, seen (*ante*, p. 173) that bodily harm

[1] See p. 125 *ante*.

[2] But as to *juvenile* acrobats, see Children and Young Persons Act 1933, Part II.

[3] *Ante*, p. 125. Cf. Deiser's Yearbook of 12 Ric. 2, p. 125.

[4] *Weaver* v. *Ward* (1627), Hobart 134; yet see Bigelow on Torts, 7th ed. § 374.

[5] *Ackroyd* v. *Barett* (1895), 11 T. L. R. 115. Cf. *Commonwealth* v. *Adams* (1873), 114 Mass. 323. In India, in the United States (Wharton's *Criminal Law*, Bk. IV, ch. VIII), and in Scotland (Macdonald's *Criminal Law*, p. 154), negligence is similarly held to be not sufficient to make assaults criminal.

done by the wrongful *driving of a vehicle* may be criminal though caused by "wilful neglect" only.

The following assaults are statutory misdemeanors, punishable with the statutory penalty of imprisonment with hard labour for two years, or a fine, viz.:

1. Assault with intent to commit a felony.[1]

2. Assault with intent to prevent the lawful apprehension either of the assailant himself or of any other person.[2]

3. Assault upon a constable in the execution of his duty, or upon any person acting in aid of such constable.[3]

4. Indecent assault upon a female.[4]

Even a mere common assault is also an indictable misdemeanor, punishable on indictment by imprisonment for one year with hard labour, or by a fine.[5]

The person assaulted has usually also the option of prosecuting the offender summarily before a court of petty sessions. For though an assault must be dealt with by

[1] 24 and 25 Vict. c. 100, s. 38. [2] *Ibid.* [3] *Ibid.*

[4] *Ibid.* s. 52. But an indecent assault on a male, although it is only a misdemeanor, can be punished by ten years' penal servitude (s. 62).

A question arises which has caused differences of opinion. Is an indecent *act* essential to this offence, or does it suffice that an assault, decent in itself, was committed with an indecent *aim*? The former view was taken by the Supreme Court of New South Wales (*Reg.* v. *Culgan* (1898), 19 N. S. W. 160); who held it not sufficient that the accused had "tried to drag" the prosecutrix to a place where he could have intercourse with her; and by that of South Africa (*Rex* v. *Abrahams*, C. G. H. [1918] 590). But the contrary view was adopted by the Supreme Court of Ontario (*Rex* v. *Chong* (1915), 32 Ontario 66); they holding that "an indecent assault is an assault which has in it *an element* of indecency", even a merely mental one. The author can find no English authority upon the question, except that of Lord Esher (then Brett, J.) in the case of Col. Valentine Baker (*The Times*, July 30 and Aug. 3, 1875). He took the Canadian view, by instructing the grand jury that "If a man kisses a young woman against her will, and with feelings of carnal passion and with a view to gratify his passions or to excite hers, that would be an Indecent Assault. The kisses of young people in seasons of universal gaiety are not indecent, but kisses given by a man under the influence of carnal passion are indecent." "Kissing is not nowadays considered the '*execrabile scelus*', the terrible offence that it was in the time of the Romans" (Judge Eusebio Gomez of Buenos Aires, April, 1933).

[5] 24 and 25 Vict. c. 100, s. 47.

indictment if it either (i) involves the title to lands,[1] or (ii) is accompanied by an attempt to commit a felony, yet in ordinary cases of assault the offender may be summarily convicted, without a jury, before two justices of the peace.[2] Still the maximum penalties that such a court can inflict are only:

(*a*) Nine months' imprisonment with hard labour; for assaulting a constable in the execution of his duty, after having been recently convicted of a similar assault.[3]

(*b*) Six months' imprisonment with hard labour, or a fine

i. of £20 for assaulting a constable in the execution of his duty,[4]

ii. of £50[5] for assaulting a boy under fourteen, or any female; if the assault is of an aggravated nature.[6]

(*c*) Two months' imprisonment with hard labour, or a fine of £5, for a common assault. The justices in this instance can summarily convict only when the complaint has been made by (or, as in the case of children assaulted, on behalf of) the party aggrieved and not merely by the police.[7] For a resort to this summary procedure takes away the aggrieved party's right of civil action.[8]

[1] *Ibid.* s. 46. [2] *Ibid.* s. 42.

[3] 34 and 35 Vict. c. 112, s. 12.

[4] *Ibid.* Even though not knowing him to be a constable; 73 J. P. 176.

[5] Under the Criminal Justice Act, 1925, s. 39. By this Act the offender, in (*b*) ii and in (*c*), may be *also* bound over.

[6] Aggravated, not by its indecency but by its violence.

[7] But in proceedings under 24 and 25 Vict. c. 100, s. 43 for "aggravated" assaults on females or boys, the right of prosecution is not thus limited. The legislature had wife-beaters in view; and realised that injured wives are often too ready to forgive.

In Cambridge, on the other hand, the Proctors and their men enjoy exemption from all summary jurisdiction of justices, in respect of assaults committed by them "in the exercise of the authority of the Proctor"; though the person assaulted may still proceed by indictment or by civil action; Cambridge Award Act, 1856, 19 Vict. c. xvii, s. 7. This enactment arose from fines having been imposed upon a Proctor and two of his men, by the borough justices, on Dec. 3, 1850.

[8] Railway Companies in 1932 agreed not to prosecute for assaults committed upon their employees until the employee assaulted has had an opportunity to sue for damages.

By 58 and 59 Vict. c. 39, any court which convicts a husband (either summarily or not) of an aggravated assault on his wife may, if satisfied that her future safety is in peril, make an order that she shall no longer be bound to cohabit with him; and may also make an order for her maintenance. The first-mentioned order will have the effect of a judicial separation.[1] The word "aggravated", in this enactment, is not limited to the various statutory aggravations of assaults.

[1] But not of a Divorce; neither party can marry anyone.

CHAPTER XI

ARSON AND OTHER MALICIOUS INJURIES TO PROPERTY

PASSING from crimes against the Person to crimes against Property, our discussion of the various offences which violate rights of ownership ought to begin with those groups which centre round two ancient crimes of peculiar heinousness—Arson and Burglary—whose historical importance can be traced to the peculiar sacredness which early English law attached to men's habitations. For a dwelling-house was regarded as being its occupier's "castle and fortress, as well for his defence against injury and violence, as for his repose. *Domus sua cuique est tutissimum refugium*".[1] Hence to set fire wilfully to the humblest cottage is still a heinous felony; though to set fire equally wilfully to some unique picture or some priceless tapestry is at most a misdemeanor, and at common law was no crime at all.

This felony of Arson (so called from the Latin *ardeo*, I burn) was at one time punished with the terrible retaliation of death by burning.[2] Yet to destroy a house in any other manner than by fire was not regarded by the common law as a criminal offence at all. The legislature has, however, now supplied this omission by making it a felony *riotously* to demolish a house[3] and a misdemeanor *riotously* to damage[4] one; and more generally, apart from any riot, by rendering the doing of malicious injury to any property—whether a house or not—a crime. That crime is punishable in some cases as an indictable misdemeanor and in others as a mere petty offence, according to the amount of damage done; see p. 189.

[1] *Semayne's Case* (1604), 5 Co. Rep. 91.
[2] Britton, I, 41.
[3] 24 and 25 Vict. c. 97, s. 11.
[4] *Ibid.* s. 12.

Arson at common law was defined as "the malicious and wilful burning of the house or outhouse of another man". The requirement of malice suggests the remark that arson seems to have been one of the earliest crimes in which the mental element was emphasised. "At a very early time, men must distinguish between fires that are, and fires that are not, intended."[1] So far back as the days of Bracton[2] it was already settled that "Incendia fortuita, vel per negligentiam facta, et non malâ conscientiâ, capitali sententiâ non sic puniuntur, quia civiliter agitur contra tales."

In limiting the crime to the burning of the house of "another man", attention was concentrated on the interference with the rights, not of the owner, but of the immediate occupier. Hence, if a tenant were actually in lawful possession of a house, even though his tenancy was to last no longer than for the single day, he would commit no arson by burning the house down. And, on the other hand, his landlord (though the owner of the house) would commit arson if he burned it whilst it was still in the occupation of the tenant.

But the common law definition no longer holds good. It has been superseded by the somewhat different language adopted in various statutes dealing with arson, which are now consolidated by the Malicious Damage Act, 1861.[3]

Arson under this enactment is now the felony of unlawfully and maliciously setting fire to buildings or to certain peculiarly inflammable kinds of other property. The possible punishments vary. In one extremely rare class of cases arson is still (nominally) punishable with death, under statute law; viz. when it consists in setting fire to a King's ship or dockyard.[4]

[1] Pollock and Maitland, II, 491. [2] Fo. 146b.

[3] 24 and 25 Vict. c. 97. See Stephen, *Digest of Criminal Law*, 7th ed., Arts. 532–538.

[4] 12 Geo. 3, c. 24, s. 1 (Dockyards Protection Act); 7 and 8 Geo. 4, c. 28, ss. 6, 7.

The next most heinous class of cases are those in which penal servitude for life may be inflicted; viz. the offences of setting fire to: (1) a church,[1] railway station,[2] public building,[3] stack,[4] coal mine,[5] or ship;[6] (2) a dwelling-house when any person is therein;[7] and (3) almost any kind of building if the act be done with intent of injuring or defrauding any person.[8] But for setting fire to any building under any other circumstances than those above mentioned,[9] or for setting fire to crops or plantations,[10] the maximum penalty is only penal servitude for fourteen years.

It will be seen that the statutory law of arson is far wider than was the common law doctrine. The crime is no longer confined to houses and outhouses; and moreover it may be committed even by a person who is in possession of the thing burned.

Two of the statutory phrases call for comment—the "maliciously" and the "setting fire to".

(*a*) "*Maliciously.*" Burning a house by any mere negligence, however gross it be, is, as we have seen,[11] no crime (an omission in our law which may well be considered as deserving the attention of the legislature). Even the fact that this gross negligence occurred in the course of the commission of a felonious act will not suffice to render the consequent burning-down indictable as an arson. For in any statutory definition of a crime, "malice" must, as we have already seen,[12] be taken—not in its vague common law sense as a "wickedness" in general, but—as requiring an actual intention to do the particular kind of harm that in fact was done (or at least a recklessness as to doing it).[13]

[1] 24 and 25 Vict. c. 97, s. 1. [2] *Ibid.* s. 4.
[3] s. 5. [4] s. 17. [5] s. 26. [6] s. 42.
[7] s. 2. [8] s. 3. [9] s. 6. [10] s. 16.

[11] *Ante*, p. 188. *E.g.* if a smoker thoughtlessly throws away his match against a stack.

[12] *Ante*, p. 170; *Reg.* v. *Pembliton* (1874), 2 C. C. R. 119 (K. S. C. 157).

[13] On the other hand it is not limited to, nor does it require, any ill-will to the person injured; cf. p. 153 *ante* and p. 194 *post*.

Consequently, if a criminal, when engaged in committin some burglary or other felony, negligently sets fire to house, he usually will not be guilty of arson.[1] He would however, be so in those rarer cases where the original crim he was engaged in was itself an act of burning, such as h would know to be likely to result in producing an arson For a man is responsible for all the foreseen consequence of his acts. Thus under the old common law, if a man b wilfully burning his own house (which *then* would not b arson), accidentally burnt the closely adjacent house of neighbour, he might be guilty of arson; since in such case the law would raise a *primâ facie* presumption o malice from the manifest obviousness of the danger. Bu it must not be supposed that everyone who has maliciously set fire to some article which it is not arson to burn, wil necessarily become guilty of arson if the fire shoul happen to spread to an arsonable building. For if a ma mischievously tries to burn some chattels inside a house and, quite accidentally and unintentionally, sets fire to th house thereby, this is not an arson of the *house*.[2] An even if his setting fire to the chattels inside the buildin was intrinsically likely to result in setting fire to th building itself, he still will not necessarily be guilty o arson of it. For it is essential to arson that the incendiary either should have intended the building to take fire, or at least, should have recognised the probability of it taking fire and have been reckless as to whether or not i did so.[3]

[1] *Reg.* v. *Faulkner* (1876), 11 Ir. C. L. 8 (K. S. C. 152).

[2] Not of the house; and not even of the chattels burned, for, thoug s. 7 does make it a felony to set fire to "*any* matter or thing" in (o against) a building, it does so only where the incendiary knows an disregards the danger to *the building*. *Reg.* v. *Child* (1871), 1 C. C. R. 307 *Reg.* v. *Nattrass* (1882), 15 Cox 73 (K. S. C. 156).

[3] *Reg.* v. *Harris* (1887), 15 Cox 75 (K. S. C. 154). Similarly where prisoner, indicted (under 24 and 25 Vict. c. 100, s. 32) for maliciousl obstructing a railway line with intent to endanger the safety of person travelling thereon, was found by the jury to be "guilty of the act, bu with an intent, not of causing injury, but only of gaining favour with h

(*b*) The statute speaks of "setting fire to" houses, where the common law required a "burning". But this appears to be a distinction without a difference; since "set fire to" is regarded as meaning not merely "place fire against", but actually "set on fire". It will be sufficient if any part of the woodwork of the building has been charred by being raised to a red heat, even without any blaze;[1] for some kinds of wood will burn away completely without ever blazing at all. But it has been held not to be sufficient that the action of the fire has scorched some of the wood to blackness, if no part of it has been actually "consumed".[2] Yet even a mere blackening of wood shews that the chemical constitution of its cell-walls has (as in the case of charcoal) undergone a change. There must consequently have been a "decomposition" (which is the test suggested by Sir James Stephen[3]), with a consequent actual loss in weight; and therefore, in fact, a "consumption" of part of the wood, though this appears to have been denied in *Reg.* v. *Russell* (1842).[2]

Arson was the only form of injury to property that was recognised by the common law as a crime. All other kinds of mischievous damage to it were merely trespasses; to which only a civil remedy was attached. But by statutory legislation, numerous provisions have been made for the criminal punishment of various forms of malicious injury to property.

Under the Malicious Damage Act, 1861 (24 and 25 Vict. c. 97), malicious injuries to various specified classes of property are rendered criminal offences of various degrees of guilt, ranging from that of felonies punishable with penal servitude for life (*e.g.* for destroying machinery used in textile manufactures, or textile goods exposed in

employers by professing to discover the obstruction", this was held to amount to a verdict of Not guilty (*The Times*, July 29, 1901).

[1] *Reg.* v. *Parker* (1839), 9 C. and P. 45.

[2] C. and M. 541.

[3] *Digest of Criminal Law*, 7th ed., Art. 532 n. 8.

process of manufacture[1]), down to offences punishable on summary conviction.

Malicious injuries to all other real or personal property, not included in these classes, are dealt with as follows:

(1) Maliciously causing damage is an indictable misdemeanor; and (*a*) when committed by night (*i.e.* between 9 p.m. and 6 a.m.) is punishable with penal servitude for five years, or imprisonment for two years, with or without hard labour,[2] or a fine;[3] or (*b*) when committed by day, is punishable with such imprisonment, or a fine. But no person is to be sent for trial by indictment unless the committing justice considers the damage to exceed £5.[4]

(2) Maliciously, or even merely wilfully,[5] causing damage to any amount not exceeding £20 may be dealt with as a petty offence, punishable on summary conviction (*a*) if the damage exceeds £5, by imprisonment for three months or by a fine not exceeding £20; or (*b*) if it be only £5 or less, by imprisonment for two months or by a fine not exceeding £5.

Both in (1) and in (2) compensation may, in addition, be awarded to the party aggrieved.[6]

These provisions do not extend to mischief done either (*a*) under a reasonable supposition of right;[7] or (*b*) with-

[1] 24 and 25 Vict. c. 97, s. 14.

[2] *Ibid.* s. 51.

[3] *Ibid.* s. 73.

[4] 4 and 5 Geo. 5, c. 58, s. 14 (2).

[5] *Ibid.* s. 14. "Wilfulness" (*i.e.* acting "with a will") is advertent and deliberate action with knowledge that the Thing is damaged, even though there be no "malice" against its Owner. *E.g.* a dairyman waters his employer's milk, but only in order to have more to sell, *Roper* v. *Knott*, [1898] 1 Q. B. 868.

[6] 4 and 5 Geo. 5, c. 58, s. 14 (1). In either case the imprisonment may be either with or without hard labour; s. 16 (1).

[7] *Ibid.* s. 14 (1). Cf. *Miles* v. *Hutchings*, [1903] 2 K. B. 714, where it was held that it was not malicious for a gamekeeper to shoot a dog under the *bonâ fide* though mistaken belief that so only could he protect his master's property. Contrast *Barnard* v. *Evans*, [1925] 2 K. B. 794, a charge of "cruelly ill-treating a dog" under the Protection of Animals Act, 1911. In Canada it has been held (7 Ontario L. R. 530), following a New Zealand decision, that the supposition excuses only when it is a

ut producing any actual harm—merely nominal damage
ıs in walking on a gravel path) that would suffice for an
ction of Tort, thus not being enough. But if the damage,
ıough slight, is quite appreciable, the statute applies. In
Iamilton v. *Bone* (1888),[1] a conviction was sustained for
ıtting blossom from a chestnut tree, though the blossom
as only worth elevenpence. But a conviction was held
npossible where persons, in playing football, repeatedly
'espassed into an adjoining pasture to recover the fugi-
ve ball, yet (it being winter) did no appreciable harm to
ıe grass thereby.[2] So the familiar announcement "Tres-
assers will be prosecuted" is often a prophecy utterly
ıcapable of fulfilment.[3] But where the land to which it
'fers is bearing such a crop (*e.g.* mowing grass) as is
ıpable of receiving appreciable damage from the tres-
ass, the presence of a prohibitory notice may be im-
ortant as shewing the "wilfulness"—and therefore the
'iminality—of a trespass committed in defiance of it.[4]

Moreover it must be remembered that to damage
roperty is one thing, and to carry it off is another. Hence
ı *Gardner* v. *Mansbridge* (1887)[5] a conviction *under the*
ct of 1861 for plucking wild mushrooms (though to a
alue of as much as two shillings) was quashed; partly
pon this very ground, viz. that the Act does not regard
ıe loss to the owner, but the damage to the realty. And
ere the realty itself was no worse, for sections 16–24 shew
ıat the statute treats the fruits of realty not as being a
ırt of the realty, but as distinct from it. (In our case of
lucking blossom from a tree, part, and a cultivated part,
' the freehold stood visibly mutilated.) A further ground

istake of Fact, not of Law; *i.e.* it must be an erroneous but honest
lief in the existence of circumstances that really would, in law, have
nstituted a right.

[1] 16 Cox 437. [2] *Eley* v. *Lytle* (1885), 50 J. P. 308.

[3] Cf. Pollock, *Law of Torts*, 13th ed., ch. IX; Maitland's *Justice and*
olice, p. 13.

[4] See *Gayford* v. *Chouler*, [1898] 1 Q. B. 316.

[5] 19 Q. B. D. 217.

was that, as s. 24 inflicts only one month's imprisonment for destroying cultivated plants, the mere general words of s. 52,[1] which inflicts two months' imprisonment, must not be allowed to include *un*cultivated plants. Hence to take, however wilfully and maliciously, such things as fern-roots, primrose-roots, watercresses, mushrooms, sloes, hips, nuts, blackberries, when they are growing *wild*, usually constitutes no offence under this Act. Yet where, as in the case of nuts and sloes, a shrub or underwood is concerned, the plunderer will commit a punishable offence if his depredations are so effected as to involve injury to the shrub itself. In all other cases his act is merely a civil wrong; for, even when looked at as a theft, it will fall neither within the common law[2] (which punishes no thefts of realty), nor within the Larceny Act of 1861, which does not, even under ss. 36 and 37, protect uncultivated plants. Hence the prudence of those farmers who, in fields where mushrooms are plentiful, place some spawn here and there under the turf, and put up a notice that "Mushrooms are cultivated in this field".[3]

We have already more than once said[4] that in *statutory* wrongs of malice, there must be an intention to do the particular kind of harm that actually was done. It is scarcely necessary to point out here that, as all the offences with which we are now dealing are purely statutory, this principle applies to them with full force. It is, at the same time, provided by s. 58 of the Act, that the malice need not be against the owner of the property. And indeed, it need not be against any human being at all. It is true that on the construction of a similar statute, 9 Geo. 1, c. 22, which first made it a crime "maliciously to kill or wound cattle", the judges of the eighteenth

[1] Now Criminal Justice Act, 1914, s. 14.

[2] *Post*, p. 225.

[3] But whether this amounts to cultivation *quaere*, see 99 J. P. (Jo.) 124.

[4] *Ante*, p. 170.

century repeatedly held it to be necessary that the wound should have been inflicted from a feeling of malice against the owner of the animal; so that spite merely against the animal itself would not suffice, even where the injury to it would necessarily violate the rights of its owner.[1] But in a modern case a man, who had in a fit of drunken spite cruelly kicked and stabbed a horse which was his own, was indicted (under 24 and 25 Vict. c. 97, s. 40) for having feloniously and maliciously wounded it.[2] It was urged that he was only liable to be convicted of a petty offence under the Act for the prevention of cruelty to animals.[3] But it was held by Lord Russell, C.J. (after consultation with Grantham, J.), that he might be convicted of the felony. This extension of the idea of malice to cases of mere cruelty, in which a sentient creature is hurt but the rights of no human being are infringed, affords a striking instance of the advance which has taken place during the past century in the current ethical conception of man's duties towards the lower animals.[4]

[1] 2 East's *Pleas of the Crown*, 1072–1074.

[2] *Reg.* v. *Parry* (Chester Assizes), *The Times*, July 27, 1900. Cf. *Reg.* v. *Welch* (1875), 1 Q. B. D. 23.

[3] 12 and 13 Vict. c. 92, s. 2.

[4] The doctrine laid down in this decision as to the felony of wounding "cattle", under s. 40, will find more frequent application in the petty offence, under s. 41, of wounding any other animal that either is larcenable at common law or else is "ordinarily kept in a state of confinement or for any domestic purpose". The clause in inverted commas applies whenever the animal belongs to a species ordinarily so kept (*e.g.* cats) even though there is no proof that this individual was so kept; and also whenever there is proof that the individual was so kept, although those of its species (*e.g.* pheasants, tortoises, tigers) ordinarily are not, *Nye* v. *Niblett*, [1918] 1 K. B. 23. Cf. p. 254 *post*.

Buddhist tenderness to animals caused France's Code of 1924 for the kingdom of Cambodia to impose imprisonment on any one who "uselessly" kills an elephant or horse or ox, even though it be his own property (s. 475).

CHAPTER XII

BURGLARY AND HOUSEBREAKING

In consequence of the peculiar sanctity which, as we have seen,[1] the common law attaches to even the humblest dwelling-house, capital punishment was inflicted upon those guilty of the nocturnal violation of any habitation, even when little or no injury had been done thereby to the fabric. The crime of Burglary[2] is committed when anyone, in the night, either (1) breaks and enters another person's dwelling-house with intent to commit a felony therein; or (2) breaks *out of* another person's dwelling-house after having either (*a*) entered it with intent to commit a felony therein, or (*b*) actually committed a felony therein. Let us consider successively the five points in this definition; the place, the breaking, the entry, the time and the intention.

(1) *The Place.* It must, now, be a dwelling-house. Yet at common law even the outer walls of a town were protected by the same penalties which safe-guarded the townsmen's actual homes. This will not surprise any one who is familiar with the Roman treatment of city-walls as *res sanctae*; or who has learned from a visit to Berwick, or York, or Chester, the importance of the defence, against private as well as public violence, which a mediæval town derived from its circumvallation.[3] And a reverence for religious edifices led mediæval criminal lawyers to extend also to churches the full protection of the penalties which guarded a dwelling-house—an extension for which Sir Edward Coke offers the verbal justification that "a church is the *dwelling-house* of God".[4]

[1] *Ante*, p. 187. [2] Larceny Act, 1916 (6 and 7 Geo. 5, c. 50), s. 25.

[3] The original importance of this form is illustrated by the fact that the earliest English name of the crime was "*burgh*-breche". Its Latin name (A.D. 1200) was "burgaria". See Dr Murray's Dictionary.

[4] 3 Coke *Inst.* 64.

Much technicality has arisen in determining what buildings are to be regarded as "houses", and when a house is to be regarded as being "dwelt" in. Clearly a house must be something more than a mere caravan or tent or booth, it must be a permanent structure. But it is not necessary that it should consist of the whole of such a structure. Thus one building may contain several dwelling-houses; each single set of chambers, or even each single room, in it may be a separate dwelling-house.[1] The test of separateness is merely whether or not there is internal communication between this part of the building and the rest of it.[2] If any one occupier's part has no internal communication with other parts, it becomes a separate house. Conversely, a house is regarded as including its accessory buildings that stand outside its own walls, if only they (*a*) stand in the same curtilage[3] with the house, and (*b*) are occupied along with it, and (*c*) communicate with it either directly or at least by a covered and enclosed passage.[4] So to "break" an area gate, for the purpose of gaining admittance to the house through a door in the area, is not a breaking of the house itself.[5]

But a building, although it be a "house", is not to be regarded as being "dwelt" in unless some person habitually sleeps there,[6] and sleeps in it as his *home*. He must thus be a member of the household that occupies it[7]—whether as himself the possessor[8] of the house or only as one of that possessor's family or servants—and not a mere temporary licensee whose home the place is not. But though he must sleep there habitually, he need not do

[1] As in colleges; 3 Coke *Inst.* 65.
[2] *Rex* v. *Egginton* (1801), 2 B. and P. 508.
[3] The "curtilage" is the ground immediately round the house, such as passes upon a grant of the messuage without being expressly mentioned.
[4] Larceny Act, 1916, s. 46 (2). Would an underground passage suffice?
[5] *Rex* v. *Davis* (1817), R. and R. 322 (K. S. C. 160).
[6] *Rex* v. *Martin* (1806), R. and R. 108 (K. S. C. 161).
[7] *Rex* v. *Harris* (1795), 2 Leach 701 (K. S. C. 163).
[8] Even a mere tenancy at will suffices; 1 Cox 261.

so invariably, *i.e.* his residence may at intervals be interrupted. For if a householder goes away from home, but with an *animus revertendi*, his house is still considered to be a dwelling, although not a single person remains in it.[1]

(2) *The Breaking.* This may be either actual or constructive. It is considered as "actual" whenever the intruder displaces any part of the building or of its closed fastenings. It is therefore not necessary that there should be an actual fracture of anything. Drawing a bolt, or turning a key, or even lifting a latch will suffice. And, similarly, if a "cat burglar" climb up a rain-pipe and open a closed bedroom window, even though its sash be kept in position by nothing but its own weight, his raising the sash will amount to a "breaking".[2] So, too, will the raising of a cellar flap even though it be held down by nothing more than its intrinsic weight; or the turning of a swing window. Yet if a window or fanlight or door be already partly open, it will not be a "breaking" to open it still further[3] and gain admittance thereby. For when a householder leaves a window or a door partly open, he gives, as it were, a visible invitation to enter; but the fact of his having left it merely unbolted is not thus conspicuous to the passers-by.

But besides these so-called "actual" breakings, in which the intruder himself displaces the fastenings of the house, the definition of burglary is interpreted as extending even to cases in which the breaking is admittedly a purely "constructive" one. Such cases may arise (*a*) where the displacement has been effected by some authorised person (some innocent member of the household), or even (*b*) where there has been no displacement at all.

In (*a*) the burglar, by force or fraud, gets some inmate of the house to open it; but, though it is thus opened to

[1] *Rex* v. *Nutbrown* (1750), Foster 76 (K. S. C. 164).

[2] *Rex* v. *Haines* (1821), R. and R. 451 (K. S. C. 167). But what of a window opening *laterally* (a "casement")?

[3] *Rex* v. *Smith* (1827), 1 Moody 178 (K. S. C. 168).

him by consent, that consent is deprived of all its ordinary legal effect by the way in which it was obtained. Thus if an intending burglar gains admittance to the house by threats of violence, which put the inmates into such fear that they open the door to him, there is a constructive breaking. Or, again, if, as is more common, he rings the bell like an ordinary visitor, and then, when the door is accordingly opened to him, he comes in on pretence of wanting to speak to some member of the household, this is held to be as true a breaking as if he had himself opened the door. The fraud vitiates the consent. But if a pretence thus attempted should fail to deceive (so that, though the door be opened to the evil-doer, it is opened solely for the purpose of entrapping him), the law does not regard such an opening as being in any way *his* act, and therefore does not hold it to be, even "constructively", a breaking.[1]

We have said that (*b*) a constructive breaking may also occur even though nothing whatever be displaced. This occurs where the burglar comes into the house by some aperture which, by actual necessity, is permanently left open. There is thus a sufficient "breaking" if the thief comes down into the house by the chimney:[2] though there would be no breaking if he came in through a window which the builders had not yet filled with glass.

It should be added that "breaking", whether actual or constructive, need not be committed upon the external parts of the house; it will be sufficient, for instance, if an inner door be "broken". And therefore if a robber gain admittance to a house by means of an open window or

[1] *Reg.* v. *Johnson* (1841), C. and M. 218 (K. S. C. 171). Contrast with this case *Rex* v. *Chandler*, [1913] 1 K. B. 125.

[2] *Rex* v. *Brice* (1821), R. and R. 450. Cf. the case tried at Cambridge by Sir Matthew Hale, 1 Hale P. C. 552; and an American case (*The State* v. *Donohoe* (1860), 36 Alabama 271). In the latter, the chimney proved to be of such inadequate dimensions that the burglar stuck fast in it, and it had to be pulled down to extricate him.

door, but then, when inside, proceed to unlock a parlour-door and enter the parlour, he from that moment becomes guilty of burglary.[1] The same principle holds good, of course, in the case of a servant[2] or guest who, whilst resident in the house, opens and enters any of the rooms for a felonious purpose. But whether this is to be extended to the opening of the door of a mere cupboard in the wall is very doubtful. There is certainly no burglarious "breaking" in opening the door of a mere piece of movable furniture, like a sideboard or bureau.

At common law, to break *out of* a house did not amount to a burglarious breaking. But by statute[3] it is now provided that if a person who has committed a felony in a dwelling-house—or even has entered a dwelling-house with the intention of committing a felony—shall proceed to break out of this dwelling-house by night, he is to be held guilty of a burglary. Thus while both a breaking and an entering are still necessary, either of them may now precede the other.

(3) *The Entering.* The entry may be sufficiently made by the insertion of any part of the intruder's own body, however small that part be. Thus a finger, or even a part of a finger,[4] will suffice. And there may even be a sufficient entry—without any part whatever of the man himself having come into the house—by his merely inserting some instrument which he is holding. But in this case, a subtle distinction is drawn. The insertion of an instrument, unlike that of a limb, is not regarded by law as constituting an entry, unless it were thus inserted for the purpose (not merely of entering or of breaking but) of accomplishing

[1] Cresswell, J., held it no *burglary* if, having thus entered only by an open door, he do not enter the inner room which he breaks into; C. C. C. Sess. Pap. XL, 706. But it is an indictable nocturnal entering; p. 204 *post*.

[2] So an innkeeper breaking into a guest's room; like Bradford, p. 595 n. *post*.

[3] Larceny Act, 1916, s. 25. *Ante*, p. 196.

[4] *Rex* v. *Davis* (1823), R. and R. 499 (K. S. C. 172).

that ulterior felony for the sake of which the house is being broken into. Thus if a man pushes a bar through a window for the simple purpose of making a hole in the shutter, there is only a breaking, but no entry.[1] Yet if he had pushed the bar through the window for the purpose of drawing towards him a spoon which he was going to steal, there would have been both a breaking and also an entry.[2] So, again, it would be no entry to push a pistol through a window, merely in order to make an aperture to get in at. But if after having broken a window, he were to thrust a pistol through the hole, in order to shoot one of the persons in the room, this would be a sufficient entry.[3] Perhaps the best justification that can be given for this very technical distinction as to entry by instruments, is that if the mere insertion of an instrument were always to be sufficient to constitute an "entry", most of the common acts of breaking would of themselves include an entry, whereas the definition of Burglary evidently supposes the two things to be quite distinct.

(4) *The Time.* In the earliest law, burglary might be committed in the day-time as well as at night.[4] But afterwards it became essential that it should take place at night. By "night" was then understood the period between sunset and sunrise. Later, however, it was held not to be night if there was even sufficient sun-light to tell a man's face. This test again was discarded; and night was defined as the period between 9 p.m. and 6 a.m.[5] As to the precise instant when that period begins and ends, it should be noted that here (as always when a reference to time occurs in an Act of Parliament or other legal instrument, without the expression of a contrary mode

[1] *Rex* v. *Rust and Ford* (1828), 1 Moody 183 (K. S. C. 174).
[2] *Rex* v. *Hughes* (1785), 1 Leach 406 (K. S. C. 173).
[3] 1 Anderson 114 (K. S. C. 173).
[4] Pollock and Maitland, II, 491.
[5] See *now* the Larceny Act, 1916, s. 46.

of reckoning), it is to be understood to be *Greenwich* mean time.[1]

To constitute a burglary, then, the breaking must always take place during this statutory night-time. And if, as is usually the case, the breaking precedes the entering, both must take place at night, though not necessarily on the same night.[2] But if the entry precedes the breaking, *i.e.* if the latter is not a breaking-in but a breaking-*out*, the entry need not be at night.[3]

(5) *The Intent.* There must be an intention to commit some felony (*e.g.* to kill, or to commit a rape, most commonly it is an intention to steal). But it is not necessary that the felony should actually be accomplished. Moreover this intention must exist at the time of the breaking and the entering; and not arise merely after he is in the house.[4] Hence if people break open the front door of a house illegally, but only for some honest purpose (*e.g.* constables acting with an invalid search warrant), and then are so tempted by the sight of something inside that they steal it, they will not be guilty of any burglary.[5]

Accordingly if only a tort, or even a misdemeanor, be intended—as, for instance, to get a night's shelter,[6] or to commit an adultery or an assault—the breaking and entering for such a purpose will not be burglary, but either a mere civil trespass and no crime at all, or, if a

[1] Except in months when the Summer Time Act prescribes sixty minutes earlier. In Ireland, *Dublin* mean time. But "sunset" and "sunrise", for lighting-up vehicles, refer to local time.

[2] 1 Hale P. C. 551; *Rex* v. *Smith* (1820), R. and R. 417.

[3] Larceny Act, 1916, s. 25.

[4] But if he break *out* after actually committing a felony inside, felonious intent at the time of entry is not necessary.

[5] *Rex* v. *Gardiner* (1665), Kelyng 46 (K. S. C. 178).

[6] For a quaint case where the intruder declined to quit the agreeable shelter, see 4 Cr. App. R. 41. In 1922 a charge was dismissed because the only purpose of the supposed burglars had been to see the apparitions by which the house was reputed to be haunted. See 18 Cr. App. R. 174, as to a *bonâ fide* claim of right.

crime, only an attempt to commit a misdemeanor. And thus, in 1770, where a man broke into a stable and cut the sinews of a horse's fore-leg in such a manner that it died, but it was shewn that his intention had not been to kill the horse (which would have been even then a felonious act) but only to maim it, so as to prevent it from running in a race, he was held not to have committed a burglary.[1] For in 1770, although killing a horse had already been made a statutory felony, any lesser injury to the animal was merely a tort. At the present time it is a felony, not only to kill but, even to maim a horse.[2]

The fact that the burglar actually committed some felony in the house, is excellent evidence that he broke and entered it with an intention of committing this felony. Thus if he drank some wine which he found in the dining-room, this theft would be evidence, though certainly only weak evidence, that he entered the house with intent to steal. In the great majority of cases the question of intention will resolve itself simply into Lord Beaconsfield's old antithesis of "Plunder or Blunder?" Drunkenness may be useful as evidence to support the latter alternative. But the question is not always an easy one to answer, and it often has to be determined by a somewhat weak chain of inference. Thus in 1899 a boy broke into a house while the family were away; but contented himself with winding up all the clocks and setting them going. Had he been detected before he had undertaken this comparatively innocent course of action, he might have found it difficult to rebut the inference that he had broken into the house for purposes of theft.

Under the Larceny Act, 1916, s. 25, the maximum punishment for burglary is penal servitude for life.[3] The

[1] *Rex* v. *Dobbs* (1770), 2 East P. C. 513 (K. S. C. 176). The stable was part of a dwelling-house.

[2] 24 and 25 Vict. c. 97, s. 40.

[3] Imprisonment for two years or less may be imposed; s. 37 (4).

same enactment deals also with some statutory nocturnal offences, which are approximations to burglary, but much less heinous than it. We may mention the following:

1. Entering (*i.e.* without breaking) a dwelling-house, by night, with intent to commit felony therein, is a felony. It is punishable with seven years' penal servitude.[1]

2. Being found by night in any building (*i.e.* although the entry may have been effected only in the day-time), with intent to commit felony therein, is a misdemeanor. It is punishable with five years' penal servitude.[2]

3. Being found by night in possession[3] of housebreaking implements, without lawful excuse, is a misdemeanor. It is punishable with five years' penal servitude.[4] Cf. p. 411 *post*. Similarly punishable are the misdemeanors of (*a*) being by night armed with a dangerous or offensive weapon or instrument with intent to break in or enter any building and to commit a felony therein and (*b*) of having the face blackened or disguised by night with intent to commit a felony.[5]

We have seen that burglary is essentially a nocturnal offence. To do in the day-time what it would be a burglary to do at night was at common law a mere misdemeanor. It was known as Housebreaking. But statutory enactment has now erected it into a felony. It is identical with burglary so far as concerns the breaking, the entry, and

[1] s. 27 (1). But such an entry in the day-time is not indictable at all; though there may under the Vagrancy Act be the petty offence mentioned in the next note.

[2] s. 28 (4). Even in the day-time it is a petty offence, punishable with three months' imprisonment, under the Vagrancy Act, to be found in a house or an enclosed garden, for *any* criminal purpose (5 Geo. 4, c. 83, s. 4). See p. 382 *post*.

[3] Both the possession and finding must be by night, and the possession must be before arrest, *Rex* v. *Harris* (1924), 18 Cr. App. R. 157; 41 T. L. R. 205.

[4] s. 28 (2). See p. 5, *ante*. Even in the day-time such a possession, if *with the intention of housebreaking*, would be a petty offence similarly punishable under the Vagrancy Act.

[5] Larceny Act, 1916, s. 28 (1) and (3).

the intention that it requires. But in some points it differs from burglary. Thus (1) it is not limited to any particular hours. An indictment for burglary must state that the offence was committed at night; but an indictment for house-breaking omits all reference to time. Again, (2) it extends to a wider range of buildings; including, besides dwelling-houses, mere shops, warehouses, etc. And (3) it admits of different maxima of punishment accordingly as the ulterior felony intended is actually committed or not. For, under the Larceny Act, 1916, it is punishable with penal servitude (1) for fourteen years, if any ulterior felony is actually committed; but (2) only for seven years, where nothing more is proved than that the breaking and entering were effected with the intent to commit some felony.[1] A breaking-*out* will suffice in the first of these two forms, but not in the latter.

We have seen (p. 196) that the old idea of burglary included a sacrilegious form, in which the place broken into at night was a church. Modern enactments have replaced this by a statutory crime of Sacrilege, which differs from that just now mentioned, (1) in being irrespective of the hour of the day, and (2) in extending to other places of worship besides those of the established religion. For, under provisions that are now consolidated in the Larceny Act, 1916, it is a felony, punishable with penal servitude for life,[2] to break and enter and commit a felony in—or to enter and commit a felony in and then to break out of—"any place of Divine worship". And it is also a felony, but punishable with only seven years' penal servitude, to break and enter such a place with the intention of committing a felony, though without accomplishing that intention.[3] In either case, instead of penal servitude, imprisonment for not more than two years, with or without hard labour, may be imposed.

[1] Larceny Act, 1916, ss. 26, 27.
[2] s. 24.
[3] s. 27 (2).

It will readily be observed that the definitions of both burglary and housebreaking are wide enough to cover, along with acts of heinous guilt, others of a very trivial character. In 1801, Andrew Branning, a boy of thirteen (to whom three witnesses gave a good character), was sentenced[1] to death for burglary, in having, after sunset but before closing-time, broken a pane of glass in a shop window and put his hand through the hole, and stolen a spoon that lay inside.

[1] Sess. Pap. LXXVIII, 104. Probably not *executed.*

CHAPTER XIII

STEALING

§ 1. Historical

We now pass from the offences which consist in destroying or damaging a man's property, to those which consist in depriving him of the enjoyment of it, though probably leaving the property itself uninjured. Of such offences the most ancient in English law is Larceny.[1] The rules relating to it can be traced back through a history of several centuries; and they have now become so complex as to be scarcely intelligible without a knowledge of their history.

Some seventeen hundred years ago, the jurist Paulus elaborated for Roman law a definition of the offence of Theft (*furtum*) which subsequently received legislative approval from Justinian. Bracton, more than a thousand years afterwards, embodied this definition, with some verbal alteration, in his account of English law as it then stood, in Henry III's reign. His words are "Contrectatio rei alienae fraudulenta cum animo furandi, invito illo cujus res illa fuerit".[2] ("The fraudulent dealing with another man's property against his will, with an intention of stealing it.") Bracton thus retains the wide Roman idea of theft, as including any kind of dealings (*contrectatio*) by which a dishonest appropriation could be effected. But it would seem that, in so doing, he greatly exaggerated the comprehensiveness of the English idea of theft. Here, as in all Germanic nations, that idea was too

[1] Stephen, *History of Criminal Law*, III, 121–176; *Digest of Criminal Law*, 7th ed., Arts. 405–416.

[2] Bracton, f. 150 *b*. The words of Paulus had been "Contrectatio rei fraudulosa lucri faciendi gratia vel ipsius rei vel etiam usus ejus possessionisve". *Digest*, XLVII, 2. 1. 3.

crude to go beyond punishing such dishonest dealings as took the "violent and unmistakeable form of a change of possession".[1] This narrow conception was subsequently narrowed still further by various subtleties which were introduced by judicial decision. Some of these limitations would seem to us unaccountable, if we did not know that they had been inspired by motives of humanity. The desire of avoiding capital punishment—and in later times that of restricting the number of offences in which, by the old procedure in trials for felony,[2] the accused person was denied the support of counsel and witnesses—led our mediæval judges to invent ingenious reasons for depriving many acts, that seemed naturally to fall within the definition of larceny, of all larcenous character. So extreme was the severity of the law of larceny that it exacted death as the penalty for stealing, except when the thing stolen did not exceed the value of twelve pence; see p. 249 *post*. This severity was ultimately tempered by two active forces. One was what Blackstone[3] leniently terms "a kind of pious perjury" on the part of juries; who assessed the value of stolen articles in a humanely depreciatory manner. Thus in 1808, to avoid convicting a woman for the capital offence of "stealing in a dwelling-house to the value of forty shillings", a jury went so far as to find on their oaths that a £10 Bank of England note was worth only 39*s*.[4] The other force which similarly opposed putting men to death for thefts was that ingenious judicial legislation which we have already mentioned. By it, as early

[1] Pollock and Maitland, II, 497. "There can we think be little doubt that the 'taking and carrying away', upon which our later law insists, had been from the first the very core of the English idea of theft"; *ibid.*

[2] *Ante*, p. 107. [3] 4 Bl. Comm. 239.

[4] *Rex* v. *Macallister* (C.C.C. Sess. Pap. LXXXVI, 18). Sir S. Romilly mentions another, in 1732, where a woman had stolen two guineas and two half-guineas, yet the jury pronounced the total value of the four coins to be "under 40*s*." In 1823, in an indictment for stealing a guinea and a sovereign, their value was prudently placed at *ten pence*, in order to make a conviction more probable (*The Times*, Oct. 21, 1823).

as the reign of Edward III, many articles were placed outside the protection of the law of larceny on the ground of their technical connection with immovable property, as for instance, title deeds to land, or even the boxes in which such deeds were kept. Again, under Edward IV, the judges declared certain acts of dishonest appropriation to be no larcenies, on account of their not involving a sufficient change of technical possession.

By these and other modifications, the legal idea of larceny came at last to be that of the crime which is committed when any person (1) takes, and (2) carries away—or when (3) a bailee appropriates—(4) another person's (5) personal chattel, (6) of some value, (7) without any claim of right, and (8) with an intention to deprive that other person of the whole benefit of his title to the chattel.

But a step towards a definition by Statute was taken in 1916 by a very valuable "Act to consolidate and simplify the law relating to Larceny triable on indictment,[1] and similar offences" (6 and 7 Geo. 5, c. 50). It commences by defining *Stealing*; enacting—by s. 1 (1)—that a person is to be held to "steal" when he "without the consent of the owner, fraudulently and without a claim of right made in good faith, *takes* and carries away anything capable of being stolen, with intent, at the time of such taking, permanently to deprive the owner thereof".

"Provided that a person may be guilty of stealing any such thing notwithstanding that he has lawful possession thereof, if, being a bailee or part-owner thereof, he fraudulently *converts* the same to his own use or the use of any person other than the owner."

On this basis, a definition[2] of the narrower crime of "Simple Larceny" is established (s. 2); which declares it

[1] It was left to some future enactment to deal with the thefts that are punishable only on summary conviction.

[2] Curiously narrow; since turning on a mere arbitrary technicality.

to be "Stealing for which no *special*[1] punishment is provided under this Act or any other Act for the time being in force". The maximum punishment for this Simple Larceny is to be five years' penal servitude; together with a private whipping if the offender be a boy under sixteen. It is a felony. The Act also recognises a variety of other forms of felonious Stealing that are punishable with periods of long punishment varying up to penal servitude for life. Some of the graver of these had, before the Act, been classed together as "Compound", or "Aggravated", or "Grand", Larceny; but none of these antitheses to "Simple" appears in the Act. No definition of "Larceny", in the abstract, is given; probably it must now be "Felonious Stealing". It might seem natural to adopt for it the Act's definition of Simple Larceny. But a difficulty in so doing is raised by the fact that the marginal notes[2] of sections 5, 11, and 16 (*b*) of the Act apply the term "Larceny" to species of stealing which do have "special punishments", and moreover are less severely punishable than Simple Larceny.

Let us proceed to consider the various points which the definition of Stealing involves.

§ 2. The Taking

The Act of 1916, by requiring a "Taking" as essential to one of its two forms of Stealing, recalls the common-law rule which made a change of possession essential to larceny. Where there was no infringement of possession, *i.e.* no "trespass", there could be no larceny. Thus the definition of this felony became embarrassed with "that vaguest of all vague questions—the meaning of the word

[1] Even the words "to be punished as in the case of Simple Larceny" constitute a "special punishment"; cf. s. 37 (2). Cf. 7 C. and P. 665; 8 C. and P. 293.

[2] For the unsettled question of the admissibility of such notes in interpreting a statute, see *Laws of England* (Halsbury), xxvii, 121.

Possession".[1] The utter technicality of that question is illustrated by the legal theory of conjugal life. A wife is held to be one person with her husband; and therefore a possession by her is possession by him. Consequently an appropriation of his goods by her would not constitute a change of possession; and therefore did not at common law constitute a larceny.[2] Nor did even adultery put an end to this. So if a wife went away with money of her husband's, and then met her adulterer and gave him this money, he could not be convicted of receiving stolen goods; for they had not been "stolen".[3] Yet if the adulterer had instead assisted her in the original taking of the goods, he could have been convicted of a larceny of them;[4] for then he would have taken them out of the actual possession of the husband himself. But since the Married Women's Property Act, 1882,[5] husband and wife are criminally liable for stealing each other's property, if (*a*) they were not living together[6] at the date of the offence, or if (*b*) the property was appropriated with a view to their ceasing to live together. But when they once again are living together no prosecution can take place. Thus a wife, so long as she has no intention of ceasing to cohabit with her husband, retains even under the Act of 1916 her immunity for committing thefts of his property.[7] And even if she were to abscond from him

[1] *Per* Erle, C.J., in *Reg.* v. *Smith* (1853), 6 Cox 554. In 1915 (*Rex* v. *Rasmeni*), in Johannesburg, a handcuffed thief ran away from the arrestors; and on being re-arrested, was prosecuted for theft of the handcuffs. The court held that there was no voluntary "taking" of them by him. Cf. p. 240 *post*.

[2] *Rex* v. *Harrison* (1756), 1 Leach 47 (K. S. C. 274); Statham, *Corone* 39.

[3] *Reg.* v. *Streeter*, [1900] 2 Q. B. 601 (K. S. C. 367).

[4] *Reg.* v. *Featherstone* (1854), Dearsly 369 (K. S. C. 274).

[5] Replaced now by s. 36 of the Larceny Act, 1916.

[6] They may "live together" though geographically apart; 14 Cr. App. R. 19.

[7] *Rex* v. *Creamer*, [1919] 1 K. B. 564. Hence her paramour, receiving it from her *then*, does not receive "stolen" goods.

temporarily and to take away with her some of his property, but in the expectation of ultimately returning to him and bringing it back with her, then she would commit no larceny. For she would not satisfy the final clause of the definition of the word *Stealing*; since she does not intend to deprive him of the property "permanently".

But the necessity of protecting masters against the dishonesty of their servants soon caused the judges to make an extension of the legal conception of changes of possession. It came to be held[1] that it was sufficient if, without any change in the actual holding of an article, there were a change in what, by a mere fiction of law, was regarded as equivalent to possession—*i.e.* a merely "constructive" possession. Thus, where a butler has his master's plate in his keeping, or a shepherd is in charge of his master's sheep, the *legal* possession remains with the master; and similarly the landlord of an inn retains the legal possession of the silver forks which his customers are handling at the dinner table. In all such cases—where one person has physical possession and yet the legal possession is "constructively" in some one else—the former person is not said in law to have a "possession", but only "charge" or "custody".[2] If, however, he proceeds to appropriate the thing—*e.g.* if the shepherd sells a lamb out of the flock—he thereby converts his custody into a "possession" (*i.e.* into a "legal", though not a *lawful*, possession). Accordingly by thus converting to his own use the thing entrusted to him, and thereby ceasing to hold it on that trust, the servant is regarded in law as creating a new possession, and thereby construc-

[1] Y. B. 21 Hen. 7, Hil. pl. 21 (K. S. C. 216).

[2] In *Rex* v. *Harding* (1929), 21 Cr. App. R. 166; 46 T. L. R. 105 a conviction was upheld for robbing a servant of her master's mackintosh. The Court of Criminal Appeal held that the servant had a special property in the mackintosh so that she could be robbed of it. See p. 224 *post.* For a criticism of this case see 46 L. Q. R. 135.

tively "taking" the thing, so as to become as truly guilty of larceny as if he had never had it in his custody at all.

Many other cases, too, besides that of master and servant, may be found, in which the legal possession is divorced from the physical possession, and in which accordingly it would be a constructive "taking", and therefore a larceny, for the custodian to appropriate the article to himself, though he thus actually holds it. One such case arises whenever the owner of a portmanteau delivers it to a lad to carry for him to his hotel, but accompanies the lad on his way and has no intention of relinquishing the full control over the portmanteau. Similarly where at a railway booking-office a lady handed a sovereign to a man to get her ticket for her (he being nearer than she to the office window), it was held that in point of law she still retained possession of the sovereign; consequently, when the man ran off with it, he became guilty of larceny.[1] So, again, a cabman does not get legal possession of his passengers' luggage when he puts it on the top of his cab; hence if the passengers, on quitting the cab, left a portmanteau behind, it would be a larceny, even at common law, for him to appropriate it.[2]

Recurring to the particular case of servants, it may be convenient to note here that when it is not by the master himself, but by some third person, that chattels are entrusted to a servant, they are held to be not in the servant's mere custody, but in his full legal possession. Such chattels do not—in *criminal* law (see *post*, p. 264)—pass into the possession of the master until they are actually delivered to him; as by the money being placed in his till. Accordingly, if the servant appropriates them whilst they are only on the way towards such a delivery, he does not commit larceny. Indeed until 1799 such an appropriation did not constitute any crime at all. But in

[1] *Reg.* v. *Thompson* (1862), L. and C. 225.
[2] *Reg.* v. *Thurborn* (1849), 1 Den. 387 (K. S. C. 276). Cf. p. 244 *post*.

that year a statute was passed making such conduct felonious.[1] It constitutes the crime of Embezzlement, which we shall hereafter deal with in detail.[2] A dishonest servant commits embezzlement in the case of things which he has received *for* his master; though larceny in the case of those which he has received *from* his master.[3]

§ 3. The Carrying Away

Grasping a thing is sufficient to confer possession of it, *i.e.* to constitute a "taking"; but it does not amount to an "asportation", *i.e.* to a carrying away. Thus where *A* stopped *B*, who was carrying goods, and bade him lay them down, which *B* did, but *A* was arrested before he could touch them, it was held that *A* had not committed larceny; for there had been no carrying away. But removal, the slightest removal of anything from the place which it occupies, will suffice; and this, even though the thief at once abandon the thing.[4] Thus there is a sufficient asportation in taking plate out of a chest and laying it on the floor;[5] or in shifting a bale from the back of a cart to the front; or in pulling a lady's ear-ring from her ear, even though the ear-ring be caught in her hair and remain in it.[6] But as the Act adds,[7] in the case of a thing *attached*, there cannot be a sufficient removal unless it has been completely detached; *e.g.* not unless the string which ties the scissors to the counter has been cut through. The test seems to be—Has every atom left the place in which that particular atom was before? So there may thus be a sufficient carrying away even though part of the thing still occupies the place which some other part of it previously did; *e.g.* by half-drawing a sword from its scab-

[1] 39 Geo. 3, c. 85. [2] *Post*, p. 264.
[3] But see p. 217 *post*.
[4] Larceny Act, 1916, s. 1 (2) ii.
[5] *Rex* v. *Simson* (1664), Kelyng 31 (K. S. C. 219).
[6] *Rex* v. *Lapier* (1784), 1 Leach 320 (K. S. C. 222).
[7] Larceny Act, 1916, s. 1 (2) ii.

bard, or lifting a bag part-way out of the boot of a coach,[1] or pulling a pocket-book not quite out of a man's pocket.[2]

§ 4. Appropriation by a Bailee

Where the proprietor of an article temporarily entrusts not merely the physical but also the legal possession of it to another person, *e.g.* to a carrier, a "Bailment" arises. The temporary possessor, or bailee, was at common law not indictable for larceny,[3] for as he (unlike a "custodian") had possession—legal as well as actual—of the article, it was impossible for him to "take" it.[4] Here, again, it was the necessities of domestic life that first compelled an extension of the law. In the case of its being to one of his own servants that the proprietor of an article thus entrusted the legal possession of it, an appropriation by that servant was made criminal by statute so early as Henry VIII's reign.[5] But, in regard to all other bailees, the common-law rule remained in force for some three hundred years longer. The judges had, however, so far back as the reign of Edward IV,[6] engrafted upon it the subtle distinction that if any bailee dishonestly severed into separate parts the article bailed to him—*e.g.* by drawing a pint of beer from the cask he was carrying—he thereby put an end to that possession of the Thing, as a unity, which he held under the bailment. Accordingly a subsequent appropriation by him of any of the parts thus separated—as by

[1] *Rex* v. *Walsh* (1824), 1 Moody 14 (K. S. C. 220).

[2] *Rex* v. *Taylor*, [1911] 1 K. B. 674.

[3] See Pollock and Wright, *Possession in the Common Law*, pp. 160–171.

[4] Contrast the wider sweep of the Roman law of Furtum, *Dig.* XLVII, 2. 52. 7.

[5] 21 Hen. 8, c. 7.

[6] *The Carrier's Case* (1473), Y. B. 13 Ed. 4, f. 9, Pasch. pl. 5 (K. S. C. 223). Stephen looks upon the decision in this case as an extraordinary one; and thinks it obvious that it was a compromise intended to propitiate the Chancellor, and perhaps the King (*History of Criminal Law*, III, 139).

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his drinking the pint of beer—would amount to a "taking" of that part, and so would be larceny. This rule as to "breaking bulk" brought within the reach of punishment many cases of dishonest appropriation. And in 1691 Parliament interposed, to extend the law of larceny to lodgers who stole the furniture of the rooms that had been let to them.[1] But it was not till 1857 that any general provision was made for dealing comprehensively with misappropriation by bailees. The statute of that year[2] has since been replaced by a clause in the Larceny Act of 1916,[3] which provides that it shall be larceny for a bailee, or a part-owner, fraudulently to convert anything that is capable of being "stolen", to the use of himself, or of any person but the owner; notwithstanding that he has lawful possession of the thing. Wide as these words seem to be, they are held[4] by judicial decision to apply only to those bailments under which it is the bailee's duty to deliver up at last (whether to the original owner or to some one else) the identical article bailed and not merely an equivalent for it. In the case by which the principle was established, *Reg.* v. *Hassall* (1861)[4], the prisoner was treasurer of a money club, and had authority to lend to its members sums out of the club-money in his hands. He misappropriated part of this fund. It was held that he was not a bailee within the Act; since he was under no obligation to pay over to anybody the specific coins which had been paid to him. Accordingly a land-agent usually cannot be indicted under *this* clause[5] for stealing the rent he has collected. Nor can the auctioneer who sells an article for you and then absconds with its price. Before the sale he

[1] 3 Will. and M. c. 9, s. 5; see now the Larceny Act, 1916, s. 16.

[2] 20 and 21 Vict. c. 54, s. 17.

[3] s. 1 (1).

[4] L. and C. 58 (K. S. C. 227). See *Reg.* v. *Richmond* (1873), 12 Cox 497, for a case where the bailee was convicted though having power to divest the bailor's ownership by sale to another person.

[5] But see *another* clause—s. 20 (1) iv— *post*, p. 271.

was a bailee of the article, and was bound to dispose of it according to your directions. But after the sale he does not become a similar bailee of the money which he has received for it, inasmuch as he is not bound to deliver to you the identical coins.

But the tendency is to restrict rather than to enlarge the principle of this immunity. Thus it has been held that there was a duty to deliver over the specific coins received, in some cases where at first sight it might have been supposed that the parties had not created any such obligation. Thus in *Reg.* v. *Aden* (1873),[1] a bargeman, who had been entrusted with £24 to buy a barge-load of coals, and who appropriated this money, was convicted of larceny under the statute; apparently on the ground that it was his duty to pay for the coals with the actual coins which the prosecutor had given him. And, similarly, in *Reg.* v. *De Banks* (1884),[2] where the prisoner sold a horse for the prosecutor and appropriated the purchase-money he received, there was held to be evidence of his holding this money under such a bailment as would come within the statute. (There is nothing unreasonable in making such a bailment, even of a "fungible" thing like money. It has even been said, and by judges so eminent as Lord Wensleydale and the late Mr Justice Willes, that *whenever* a servant receives money for his master from anyone he is bound to hand over the very same coins that he received.[3]) But[4] whilst Aden or De Banks was a mere bailee of a fixed sum which he had only to hand over, Hassall's club-money was left in his hands as a fund which he had to deal with, so that he was a trustee of it, with complex duties to discharge.

It should be noticed that the idea of bailment is not

[1] 12 Cox 512.
[2] 13 Q. B. D. 29.
[3] L. and C. 62. Cf. K. S. C. 177.
[4] See *Reg.* v. *Governor of Holloway Prison* (1897), 18 Cox 631 (K. S. C. 229).

confined to cases where the article has been in the bailor's own possession before it was delivered to the bailee.[1] Thus if a vendor of goods deliver them to a carrier for conveyance to the purchaser, it is the latter that is regarded in law as the bailor; for the vendor, who actually handed them over to the bailee, is regarded as having done so only as an agent for the purchaser. It must also be noticed that bailment requires nothing more than simply a delivery upon a trust. Hence, though there is usually also a contract, express or implied, to fulfil this trust, there may quite well be a bailment even where no such contract can exist, as when goods are delivered to some person who is incapable of contracting. Accordingly, if an infant hires furniture, though no valid contract of hiring may arise,[2] he nevertheless becomes a bailee. Consequently, if he proceeds to sell the furniture, he will be guilty of larceny.[3]

Before a bailee can be convicted of larceny, it must be clearly shewn that he has really converted to his own use the article entrusted to him. Only some act of conversion that is quite inconsistent with the bailment can amount to a sufficient appropriation. In the case of a bailment of silver forks for use, melting them down would of course always be evidence of a conversion; and so would selling them, or dishonestly refusing to return them when asked for.[4] But as to pawning, a distinction must be drawn. If the bailee can shew that when he pawned the goods he honestly intended to redeem them subsequently (which might very well be made out by instances of his previous similar conduct), and can also give proof of there having been a full prospect of his getting money enough to carry out this intention, the pawning will not amount to a

[1] See *Reg.* v. *Bunkall* (1864), L. and C. 371 (K. S. C. 231).
[2] Anson, *Law of Contract*, 17th ed., Part II, ch. v.
[3] *Reg.* v. *Macdonald* (1885), 15 Q. B. D. 323.
[4] *Rex* v. *Wakeman* (1912), 8 Cr. App. R. 18.

conversion.[1] But if he had merely a vague intention to redeem the goods at some future time in case he should happen to become able to do so, then he clearly acted in a manner quite inconsistent with his duties as bailee, and so became guilty of larceny.[2] When once a bailment has come to an end, and the article bailed has returned into the possession of its proprietor, no contracts subsequently made about it by the ex-bailee—such, for instance, as a bargain by him to sell it—can amount to a conversion.[3] This seems obvious enough; but a student may be apt to overlook it by failing to trace the changes in the legal possession.

It is desirable to notice that there does not exist, as seems sometimes to be supposed, a specific offence entitled "larceny by a bailee". The statute[4] places Conversion by a bailee on the same footing as a stealing by Taking; so that an indictment for it need not even contain the word "bailee".

§ 5. The Ownership

Things which do not belong to any determinate possessor[5] cannot be the subjects of larceny. One conspicuous example of such things is a human corpse, and accordingly the "resurrection men"—who, in the days before the Anatomy Act,[6] used to violate churchyards in order to supply the dissecting-rooms with "subjects"—committed no larceny in taking the bodies. (It was otherwise if they

[1] As where a solicitor, to whom a valuable watch was intrusted by a client, pawned it simply to secure its safe custody; C. C. C. Sess. Pap. CXLV, 420. But it may be a petty finable offence of "Unlawful Pawning"; 35 and 36 Vict. c. 93, s. 33. And the loss of control is an actionable breach of his contract.

[2] *Reg.* v. *Medland* (1851), 5 Cox 292 (K. S. C. 236). Cf. p. 241 *post*.

[3] *Reg.* v. *Jones* (1842), C. and M. 611 (K. S. C. 237).

[4] *Ante*, p. 209.

[5] With such a possession as would support an action of trespass; 2 Den. 451.

[6] 2 and 3 Will. 4, c. 75.

carried off a coffin or grave-clothes; for these remained the property of the executors who had bought them.) But a consequent question, of much practical importance though still unsettled,[1] is whether the rule of law must further be taken to be that "once a corpse, always a corpse"; for, if so, the protection of criminal law will not extend even to skeletons and similar anatomical preparations on which great labour has been expended,[2] or to ethnological collections of skulls or mummies brought to this country at great cost.

Even an article that has an owner may come to be intentionally abandoned by him,[3] and of such "derelict" articles there can be no larceny.[4] Thus abandoned wrecks,[5] and treasure-trove that has no longer any owner, are incapable of being stolen,[6] until after they have been taken possession of by the Crown, or by some person to whom the Crown has granted the franchise of taking them.[7]

Animals *ferae*[8] *naturae*, straying at large, form the most

[1] See the conflicting judgments in *Doodward* v. *Spence* (1908), 9 New South Wales Rep. 107. From the decision, *recognising* ownership, the Judicial Committee refused leave to appeal.

[2] Stephen, *Digest of Criminal Law*, 7th ed., Art. 407. But any metal inserted, *e.g.* wiring, would of course be larcenable. Cf. a dog's collar, *post*, p. 230.

[3] As in the case of coal dropped from overloaded carts or barges. Cf. [1894] A. C. at p. 532.

[4] 2 Bl. Comm. 9; *Reg.* v. *Peters* (1843), 1 C. and K. 245; *Reg.* v. *Reed* (1842), C. and M. 307; Justinian's *Digest*, XLVII, 2. 43. 9.

[5] Whales cast ashore are "wreck".

[6] 22 Lib. Ass. 95, 99.

[7] A curious question arises as to the rations supplied to a seaman but not actually consumed by him. Ridley, J., held that the supplying does not forthwith make them his; so he may commit larceny by saving them to sell or give away. Cf. 35 T. L. R. 381. For the safety of the ship "a man can't be allowed to starve himself in order to have an unconsumed surplus"; C. C. C. Sess. Pap. CLIII, 561. Cf. the Army Order of Sept. 1915, making rations "the property of the State until consumed". See 13 Cr. App. R. 22.

[8] *Ferae*, here, is of course an adjective. Yet people talk about "hunting our *ferae naturae*"; and both Sir Walter Scott (*Antiquary*, ch. XXII) and Sir W. H. Rattigan (*Jurisprudence*, p. 138) have fallen into like error.

important of all the classes of things which have no owner. Even the (so-called) property *per privilegium*, which the lord who has a chartered park or forest is regarded by law as having over certain of the wild creatures in it, is not a sufficient ownership to sustain an indictment for larceny;[1] for it is not so much an ownership as a peculiar right to obtain ownership. For the general principle of law is that all true ownership of living things depends upon actual control over them. Domestic animals (such as horses, oxen, sheep), or domestic fowls (such as hens, ducks, geese), usually have a settled home, and so come under the control of its occupier; and consequently are larcenable. If they are so, their eggs and other produce will equally be larcenable; and this even when the produce is stolen directly from the living animals themselves (as by milking cows, or plucking wool from the backs of sheep), before the true owner has ever had possession of it as a separate thing. But over animals that are of a *fera natura* there is usually no control, and therefore no ownership. Ownership over them whilst uncontrolled, if it were to exist, could exist only in the owner of the land where at any moment they were; and it would be futile to recognise any such mutable ownership, which the animal itself might vary from hour to hour.[2] But a power of control may of course be created; either *per industriam*, by their being killed, or caught, or tamed,[3] or *propter impotentiam*, by their being too young to be able to get away. Consequently larceny may be committed of pheasants which have been shot, or deer which have been

[1] 7 Coke Rep. 17b.

[2] Rather on this account, probably, than on that of their being (as Prof. Christian maintains) part of the realty (see p. 225 *post*), it is not larceny for anglers to take earthworms out of another man's land; though it is larceny to take them after he has collected them into a pot for sale; Christian's *Game Laws*, p. 79. It is larceny to take oysters from an oyster-bed actually owned by another person; oysters having neither will nor power to stray from it. Cf. the Sea Fisheries Act, 1868, s. 51.

[3] *Rex* v. *Rough* (1779), 2 East P. C. 607 (K. S. C. 250).

so enclosed in a park that they may be taken at pleasure;[1] or of fish in a tank, or even at large in a mere pond, though not when at large in a running stream.[2] Again, young partridges reared under a barndoor fowl and not yet old enough to leave her protection,[3] are the subjects of a true ownership, and so are larcenable.[4]

The degree of physical control which is necessary to establish ownership will vary with the habits of the particular species concerned. Creatures may be subjects of ownership although they are not closely confined but are allowed to wander away from home, provided they have a settled habit of returning thither; and this will be so although they are not shut up even at night.[5] Peacocks, ducks and geese readily acquire this *animus revertendi*; unlike pheasants and partridges. This rule, that the taking of ownerless things[6] cannot be a larceny, still holds good; but the modern statute-law has created many offences of dishonesty which it has not erected into larcenies. And thus deer-stealing,[7] the taking of hares or rabbits in warrens in the night-time,[8] and the taking of fish from private waters,[9] have been made offences; but they vary greatly in their degrees of heinousness as well as in their punishments.[10]

It is important to notice that larceny requires not only an ownership, but an ownership which already existed before the act of taking. A proprietorship that was created

[1] Hale P. C. 511.

[2] *Ibid.* At Cambridge in 1627, before Harvey, J., two men were convicted of larceny for taking fish *out of a net* lying in the river.

[3] *Reg.* v. *Shickle* (1868), 1 C. C. R. 159 (K. S. C. 251). But the young, or the eggs, in a *wild* bird's nest are not in the landowner's Possession; and so, though his, are not larcenable; *Rex* v. *Stride*, [1908] 1 K. B. 617; over-ruling Lambard, fo. 274. Cf. *Reg.* v. *Clinton* (1869), 4 Ir. C. L. 6, as to seaweed washed ashore.

[4] Y. B. 18 Edw. 4, fo. 8, pl. 7 (K. S. C. 249). Cf. 7 Coke 17.

[5] *Reg.* v. *Cheafor* (1851), 2 Den. 361.

[6] Larceny Act, 1916, s. 1 (3). Cf. *The Case of Peacocks* (1526), Y.B. 18 Hen. VIII, fol. 11 (K. S. C. 250).

[7] 24 and 25 Vict. c. 96, ss. 12–16.

[8] *Ibid.* s. 17. [9] *Ibid.* s. 24. [10] *Post*, p. 253.

only by that very act will not suffice. Thus, although rabbits or wild pigeons, on being killed by a trespasser, become the property of the owner of the land where they are killed,[1] yet if this trespasser who kills them should proceed to carry them away, he will not[2] commit larceny thereby. For the ownership which he infringes did not exist before he killed the creatures. (The Larceny Act, 1916, s. 1 (3) *b*, preserves this common-law doctrine that "The carcase of a creature wild by nature, and not reduced into possession while living, shall not be capable of being stolen by the person who has killed such creature; unless, after killing it, he has abandoned possession of the carcase".) But if, after killing them he should go away and leave them on the land, with the idea of abandoning them altogether, he would thereby cease to be their possessor, and they would pass into the legal possession of the owner of the soil.[3] So if the trespasser should afterwards change his mind and come back and seize them again, this would be an entirely new act of taking. And, as the things had now got an owner, it would be a larceny. Where a man, employed to trap rabbits, put some into a bag in order to appropriate them, and a keeper (suspecting him) nicked them during his absence, for purposes of identification, it was held that the nicking was not sufficient to reduce them into the possession of the keeper or of his master. Hence the trapper did not become guilty of larceny by carrying them away, even when thus nicked.[4]

But though there can be no larceny of things which have no owner at all, there may be a larceny although the owner is unknown and undiscoverable; as in the case of brass plates being stolen from very old coffins in a vault. It is well, however, to bear in mind Sir Matthew Hale's caution never to convict any person of having stolen

[1] *Blades* v. *Higgs* (1865), 11 H. L. C. 621.
[2] *Reg.* v. *Townley* (1871), 1 C. C. R. 315 (K. S. C. 255); p. 226 *post*.
[3] Cf. *Reg.* v. *Foley* (1899), 26 Ir. C. L. 299 (K. S. C. 241).
[4] *Reg.* v. *Petch* (1878), 14 Cox 116.

from a supposed but unknown owner, merely because he has been found in possession of property under suspicious circumstances and will not give an account of how he came by it.[1] Even if a tramp is found to have six gold watches in his pocket, he ought not to be treated as a thief until some definite proof can be obtained of their having actually been stolen somewhere. His possession is *primâ facie* evidence of ownership (*post*, p. 390); and his silence, or even his giving an unsatisfactory account, does not rebut this evidence so strongly as to justify a conviction for larceny. See p. 402 *post*.

But though there can only be a larceny where the thing (at the time of being stolen) already "belonged" to some other person, it is not necessary that this person should be a sole owner, or even a full owner. (*a*) He may, for instance, be merely a joint-owner with the thief himself. At common law, as every co-owner is lawfully entitled to the possession of the whole thing, he could not commit larceny by taking it. But now, by the Larceny Act, 1916, s. 1 (1), a part-owner may be guilty of stealing a thing, "notwithstanding that he has lawful possession thereof"; cf. s. 40 (3). (*b*) And by it—s. 1 (2) iii—the person stolen from may be one who is even less than a co-owner, merely some "person having possession or control of, or a special property[2] in", the thing stolen; *e.g.* a mere bailee (or even a thief who himself had stolen it; see 10 Cushing 397).

Consequently, paradoxical as it may seem, a man may commit larceny by stealing his own property. For when an owner of goods has delivered them to anyone on such a bailment as (like those of pawn and of hire) entitles the bailee to exclude him from possession, that owner may become guilty of larceny, even at common law, if he carries them off from this bailee with any intention to defraud him. He might, for instance, aim at defrauding

[1] Hale 2 P. C. 290 (K. S. C. 467).
[2] See note 2, p. 212 *ante*.

him by making him chargeable for the loss; or by depriving him of an interest which he had in retaining his possession, such as the lien of a cobbler upon the boots which he has mended, for the cost of the mending. Possibly it will suffice even though the intention was to defraud (not the bailee but) some other person; as where the owner of goods, which are in a bonded warehouse, surreptitiously takes them out, in order to cheat the Crown of the customs-duty payable on them.[1] An old illustration was that[2] of a man who sent his servant on a journey in charge of some valuables, and then disguised himself as a highwayman and robbed the servant of these things, in order to claim their value from the inhabitants of the Hundred (under its ancient liability to make good the loss sustained by a crime of violence committed within its boundaries). But Mr Justice Wright[3] questioned whether the owner of a thing can commit any larceny of it by taking it away from a mere bailee *at will*, such as his own messenger would be.

§ 6. The Subject-Matter

Some of the very early Roman lawyers had thought there might be *furtum fundi locive*, *i.e.* that land was legally capable of being stolen. But, even before the time of Gaius, all the jurists came to abandon this view. No one ever held it in England. For, since a larceny could only be committed by carrying a thing away, this clearly made it essential that the thing should be movable. Moreover, just as we have seen that some other person's ownership over the thing must exist before the act of theft, and not merely be created by it, so this movableness of the thing must also have existed before the theft. A

[1] *Rex* v. *Wilkinson and Marsden* (1821), R. and R. 470 (K. S. C. 253).
[2] 2 East P. C. 654. (K. S. C. 260.)
[3] Pollock and Wright, *Possession in the Common Law*, pp. 165, 228. Cf. Bishop's *Criminal Law of U.S.A.*, 8th ed., II, § 790.

thing therefore was not larcenable if it first became movable by the very act of the taking. Thus it is no theft at all to take mould from a garden or sand from a pit; or to pull down a wall[1] and carry away the bricks. So it was no larceny to strip woodwork or other fixtures from a house, or to cut down a tree;[2] but these acts have now been made specific statutory offences.[3] Hence if a man demolishes some one else's house and sells the materials, he may be proceeded against in respect of the fixtures. The Larceny Act, 1916, s. 1 (3) *a*, preserves the rule that (with some exceptions as to fixtures, growing plants, and mineral ores) "anything attached to or forming part of the realty shall not be capable of being stolen by the person who severs the same from the realty, unless, after severance, he has abandoned possession thereof". For, even at common law, there would be a larceny if, after the severance had once been fully completed, the thing were abandoned by the thief but he afterwards changed his mind and returned and carried it away. On this point *Townley's Case* (1871)[4] may again be referred to, as shewing how a poacher who shot rabbits and hid them in a ditch, and then went away, nevertheless retained "possession", during that interval of personal absence, by mere continuousness of intention. It will be instructive to a student to compare this decision with the case of *Reg.* v. *Foley* (1899).[5] In the latter case a trespasser mowed some grass, but left it where it fell; then, after two days, he returned and took it away. It was held by the Irish Court for Crown Cases Reserved that, even if he had a continuous intention, there was not a continuous possession; and, therefore, that his ultimate removal of the

[1] But this is a crime of Malicious Damage; *ante*, p. 191.

[2] *The Forester's Case* (1338), Y. B. (Rolls Ser.) 11 and 12 Edw. 3, 641 (K. S. C. 238). Cf. *Reg.* v. *Pinchbeck* (1896), C. C. C. Sess. Pap. CXXIII, 205 (K. S. C. 355).

[3] Larceny Act, 1916, s. 8. Often *felonies*. See p. 253 *post*.

[4] 1 C. C. R. 315 (K. S. C. 255). *Ante*, p. 223.

[5] 26 Ir. C. L. 299 (K. S. C. 241).

grass constituted a larceny. If this case be regarded as at variance with that of Townley, the latter is of course the one to be followed by English courts. But the two may be reconciled if it be thought right to lay stress on the distinction that Foley, before leaving the hay, had not performed any unequivocal act of taking possession of it; such as Townley did perform by hiding the rabbits.

It seems strange that land, by far the most important form of wealth in the middle ages, should have been left unprotected by even our early criminal law.[1] The omission, however, as Sir James Stephen[2] points out, is rendered more intelligible by the fact that in ordinary cases it is nearly impossible to misappropriate land without resorting to some act which itself is criminal, such as personation or forgery.[3] But a dislike to capital punishment was probably the reason why the judges went still further, and excluded from the scope of larceny even things that really were movable and had only a technical connection with the land; as when they held it to be no crime to carry off dung which had been spread upon a field.[4] Moreover, even standing corn and similar growing crops, although the law of property gives them to a deceased owner's executors as chattels personal, were held in criminal law to savour so far of the realty as not to be larcenable.[5] Yet, on the other hand, some things which do not thus go to the executor, but to the heir, are larcenable; *e.g.* some species of heirlooms. It has similarly been held in an American case[6] that though, by a very

[1] Hence water in a pond —often carried off copiously by roadmen for steam-rollers— is not larcenable; but it would become so when severed, as by being pumped into a cart. In 1900 the East London Waterworks prosecuted a man for stealing 900,000 gallons of their water.

[2] *History of Criminal Law*, III, 126.

[3] Though not when a visitor to Dartmoor carries off stones from a hut-circle to decorate his front-garden.

[4] *Carver* v. *Pierce* (1648), Style 66 (K. S. C. 238).

[5] 3 Coke *Inst.* 109.

[6] *Hoskins* v. *Tarrance* (1840), 5 Blackford 417 (K. S. C. 239).

reasonable rule of law, the keys of a house always pass along with it on any alienation (whether by death or by conveyance), this legal identification of them with the realty does not go so far as to prevent its being a larceny to steal them.

In general, however, the rule of immobility extends to all things which any legal fiction identifies with the land,[1] even though they be physically movable. It was the case, for instance, with title deeds;[2] they would not pass under a grant of "all my goods and chattels": so they were not larcenable. And a sealed-up box, inclosing such deeds, was once held to be so identified with them as itself to become not larcenable.[3] (An additional reason has been given for this non-larcenability of title deeds; namely, that their value is so indefinite that it was impossible to say whether or not they were worth more than 12*d.*; cf. p. 249 *post.* For a still better reason—Identification with the right they evidence—see p. 230 *post.*) But *now* under s. 7 (1) of the Larceny Act, 1916, it has been made a statutory felony to steal documents of title to land;[4] thus abolishing the fiction.

It may here be convenient, if not strictly relevant, to mention that, even at common law, gas is larcenable;[5] and that it is a statutory felony[6] to "maliciously or fraudulently abstract, cause to be wasted or diverted, consume, or use, any electricity".[7]

[1] Thus a villein was so identified; and consequently, though saleable, he was not larcenable; 3 Coke *Inst.* 109.

[2] 1 Hale P. C. 510; Stephen, *History of Criminal Law*, III, 138.

[3] Y. B. 10 Ed. 4, fo. 14, pl. 9, 10; Dalton, c. 156, s. 8.

[4] As it also is one to *destroy* them; 24 and 25 Vict. c. 96, s. 28.

[5] *Reg.* v. *Firth* (1869), 1 C. C. R. 172.

[6] Larceny Act, 1916, s. 10.

[7] A man was accordingly convicted who had put a wire into his land and tapped (in order to light his house) the waste electricity which had been allowed to run into the earth at neighbouring works. But might he not have urged that it was derelict (p. 219 *ante*)?

§ 7. The Value

A thing is not stealable, at law, unless it[1] "has value". "De minimis non curat lex." Otherwise it would, as Lord Macaulay says, be a crime to dip your pen in another man's inkstand, or to pick up acorns in his garden to throw at a bird.[2] But the exact measure of this value has never been fixed. Its indefiniteness gave scope for the humane ingenuity of the judges. Hence many things in which a legal property existed, and which were of such appraisable importance that damages could have been recovered in a civil action for taking them away, were held to be below the minimum of value that was necessary to support a conviction for the felony of larceny. A vivid illustration is afforded by the fact that at one time it was doubted whether even diamonds and other precious stones, if unset, had any such intrinsic worth as to be larcenable, "because they be not of price with all men; howsoever some do hold them dear and precious".[3] It became clearly settled that the law of larceny affords no protection for such animals as serve neither for draught nor for food.[4] Hence clearly there was no crime in stealing cats, ferrets, monkeys, nightingales, parrots, or canaries. The principle was applied even to dogs; for "a man's two best friends—his wife and his dog—were singularly disregarded by the old common law".[5] (Yet, for taking a dog, damages could be recovered in a civil action even in very early days,[6] and it was never denied

[1] Larceny Act, 1916, s. 1 (3).

[2] Note N, to his Indian Penal Code.

[3] Hales, J., A.D. 1553; cited by Lambard, *Eirenarcha*, p. 275. Lambard himself enumerates as larcenable "horses, mares, colts, oxen, kine, sheep, lambs, swine, pigs, hens, geese", etc. (p. 273). He does not mention goats.

[4] 1 Hale P. C. 512.

[5] Ingham's *Law of Animals*, p. 57.

[6] Y. B. 12 Hen. 8, pl. 3. Manwood (*Forest Laws*, p. 99, A.D. 1598) speaks of even mortgages and pledges of dogs, as if quite frequent. Yet the civil action has been refused in America, in deference to the old rule of larceny; see 75 Georgia 444.

that stealing a dog's collar, or even stealing the dressed skin of a dead dog, would amount to larceny.[1]) Bees, however, though themselves inedible, were a source of food, and consequently were held[2] to be larcenable; and the law similarly protected the hawk when tamed, "in respect of the nobleness of its nature, and its use for princes and great men".[3] A statutory protection, however, has been given in modern times to every animal or bird that is ordinarily kept for domestic purposes, or even kept in confinement.[4]

The rule which made value essential to larcenability was extended artificially by a fiction which identified the documentary evidence of any right with the right itself, so that if the subject of the right could not be stolen the document could not be. "The accessory must follow its principal." We have already noticed one application of this rule, the case of the title deeds of real property. The same rule was applied to documents which were evidence of the right to any mere chose in action,[5] *e.g.* such instruments as a promissory note, or even a contract for the sale of a quantity of unascertained goods; their character as pieces of paper was "absorbed" (Dearsly 334). But a document of title to specific goods, which themselves were larcenable, was itself larcenable; *e.g.* a pawnbroker's duplicate.[6]

Now, however, under the Larceny Act, 1916, s. 46 (1), "*all* deeds and instruments relating to or evidencing the title or right to any property" [real or personal] "or giving a right to recover or receive any money or goods" are capable of being stolen. And the stealing will be a

[1] See p. 254 *post*.

[2] *Hannam* v. *Mockett* (1824), 2 B. and C. at p. 944. A swarm from my hive remains mine until I abandon the intention to pursue it.

[3] 1 Hale P. C. 512.

[4] *Post*, p. 254. The individual must be so kept; the species need not.

[5] Dalton, 501. But note also p. 253 *post*.

[6] *Reg.* v. *Morrison* (1859), Bell 158.

Larceny: sometimes Ordinary, sometimes Aggravated. The reason why the thief of title deeds could not be indicted for simply stealing so much parchment was certainly not the mere smallness of the intrinsic value of the parchment or paper; for an indictment for the larceny of merely "a piece of paper" is good, and counts so expressed are habitually inserted in indictments for stealing post-office letters. Accordingly convictions have taken place for the larceny of proof-sheets,[1] of cancelled bank-notes,[2] of a worthless cheque,[3] and of a small slip with memoranda pencilled on it.[4] Indeed the principle is now distinctly laid down that although, to be the subject of a Stealing, a thing must be of value to its owner, if not to other people, yet this need not amount to the value of the smallest coin known to the law, or of even "the hundredth part of a farthing".[5] In *Reg.* v. *Clarence* (1889),[6] Mr Justice Hawkins went so far as to say, though only incidentally, that stealing a single pin would be larceny.

To have omitted from the definition of Stealing all reference to the element of Value would have been to make the Act of 1916 alter some established points of law. But it must frankly be admitted that the word, thus

[1] A proof-sheet containing secret information (*e.g.* a telegraphic cipher code, or the forthcoming annual report of the Directors of a Company) might have very great pecuniary value to certain persons. See in C. C. C. Sess. Pap. XLIX, 179, a trial for stealing from the Colonial Office a despatch, whose premature publication by the thief rendered futile (Morley's *Gladstone*, Bk. IV, ch. X) Mr Gladstone's mission as Lord High Commissioner to the Ionian Islands. Still greater political confusion was caused in 1878 when a Foreign Office copyist disclosed to the *Globe* the secret Anglo-Russian agreement which Lord Salisbury had signed. Still the copyist had not "taken" the documents but had merely copied one and memorised the other. This was no offence, as the Official Secrets Acts (p. 325 *post*) had not been passed then (*Annual Register*, 1878, p. 67).

[2] *Rex* v. *Clark* (1810), R. and R. 181. A telegram; C. C. C. Sess. Pap. CLIII, 451. [3] *Reg.* v. *Perry* (1845), 1 C. and K. 725 (K. S. C. 245).

[4] *Rex* v. *Bingley* (1833), 5 C. and P. 602. That the owner carried it in his pocket affords evidence of its being of some value to him.

[5] *Reg.* v. *Morris* (1840), 9 C. and P. 349, *per* Parke, B.

[6] 22 Q. B. D. 23, 52.

retained in the definition, must be understood in some sense which is neither a natural nor even a precise one.[1]

§ 8. The Claim of Right

If property is taken by legal right, obviously no wrong, either civil or criminal, is committed by taking it. But in criminal law immunity is carried still further. An act of taking will not amount to Stealing unless it be committed not only without a legal right, but without even any appearance (or, in the old phrase, "colour"[2]) of a legal right. So the ordinary *mens rea*, quite compatible with an honest ignorance of law,[3] does not suffice to constitute guilt in cases of Stealing. For any "claim of right, made in good faith",[4] if at all reasonable will suffice to deprive the taker's act of any larcenous character; *e.g.* a mistake of Law as to the rights of a Finder or of a Poacher.[5] It is a question of fact, for the jury, whether the goods were taken with such a belief or not. But there is high authority for saying that "If there be in the prisoner any fair pretence of property or right, or if it be brought into doubt at all, the court will direct an acquittal".[6] The best evidence that there was actually a sincere claim of right is that the goods were taken quite openly.[7] A

[1] Bishop (II, § 57, 9) treats the rule as quite obsolete in America.

[2] Under the *colour* of commending him
I have access my own love to prefer.
Two Gentlemen of Verona, IV, 2.

[3] *Ante*, p. 78.

[4] Larceny Act, 1916, s. 1 (1). Cf. p. 192 *ante* as to malicious damage.

[5] C. and M. 306; 3 C. and P. 409. It was held in New South Wales (*Rex* v. *Nundah* (1915), 16 N. S. W.) 482 that the claim, if honest, need not even be reasonable. But in the United States the belief, during the Civil War, that a person whose property had been appropriated by a rebel could legally reimburse himself by taking the property of any other rebel, was held to be too unreasonable an error of law to afford a defence, *Lancaster* v. *The State* (1863), 3 Coldwell 339.

[6] East, *Pleas of the Crown*, 659.

[7] *Rex* v. *Curtiss* (1925), 18 Cr. App. R. 174; *Causey* v. *The State* (1887), 79 Georgia 564 (K. S. C. 281).

surreptitious taking, or a subsequent denial of the taking, or a concealment of the goods, suggests a felonious intent.

The following instances may be mentioned in which the carrying off of some one else's goods will be unpunishable, on account of their being appropriated under a *bonâ fide* claim of right.

(1) Where something is seized by a landlord in a distress for rent; even though he be mistaken in thinking that any rent is due, or even though the article seized be one which is privileged by law from being distrained on.

(2) Where corn is taken by a gleaner, honestly and openly, in a locality where gleaning is customary.[1]

(3) Where the taker believes that the owner has abandoned the thing; or that what he is taking is his own property;[2] or that it is something which he has a right to take,[3] whether as an equivalent for his own property[4] or with a view to mere temporary detention (*e.g.* by way of lien).

§ 9. Absence of Owner's Consent

The Act of 1916, s. 1 (1), preserves the rule[5] that a thing is not stolen unless taken "without the consent of the owner", or of his duly authorised agent. Upon this point a question of practical importance often arises in consequence of the plans laid by the police for the detection of a suspected thief. If, for mere purposes of detection, the owner of goods acquiesces in a thief's carrying them off, does such a consent suffice to prevent the thief's act from being a larceny? We have seen (p. 199) that, in

[1] Russell on Crimes, 8th ed., p. 1174.

[2] *Rex* v. *Hall* (1828), 3 C. and P. 409 (K. S. C. 280); cf. 3 Cr. App. R. 92.

[3] Even claims under a reprehensible practice, if it be commonly prevalent, may suffice; *e.g.* where sergeants, in weighing out the regimental meat, used to appropriate a certain percentage of it, *Rex* v. *Daniels* (1915), 11 Cr. App. R. 101.

[4] *Reg.* v. *Boden* (1844), 1 C. and K. 395 (K. S. C. 282).

[5] *Rex* v. *Macdaniel* (1755), Foster 121 (K. S. C. 259).

burglary, an entry permitted, after an *unsuccessful* attempt to deceive, does not amount to a constructive breaking. Similarly in larceny, if the owner desired that the thief should actually remove his goods, or, still more, if he had employed someone to suggest to the thief the perpetration of the theft, his action would constitute a sufficient consent to render the taking no larceny, although his sole object was to secure the detection of the offender. Yet if he went no further than merely to facilitate the commission of the theft (*e.g.* by allowing one of his servants to assist the thief), such conduct would no more amount to a consent than if a man, knowing of the intention of burglars to break into his house, were to leave one of the bolts on the front door unfastened.

But the owner's consent must of course be a true consent—a free and a full one.[1] Thus it can afford no defence where it is obtained from him by Intimidation. In such a case his will is overborne by compulsion; as where the keepers of an auction-room forced a woman to pay for some lots which she had not bid for, by threatening that she should not be allowed to leave the room until she had so paid.[2] Much more frequent than intimidation, however, is Fraud; which may be equally effective in removing all exemptive character from an apparent permission. Consent obtained by fraud may be no consent at all. Hence wherever an owner's consent to the taking of his goods is obtained *animo furandi*, and the deception vitiates the consent, the taker is accordingly guilty of "larceny by a trick".[3] It should be noticed that here he has a guilty intention at the time when he receives the thing from the owner. If he had received it innocently, and had not conceived until afterwards the idea of appro-

[1] Larceny Act, 1916, s. 1 (2) i (*a*) and (*b*).

[2] *Reg.* v. *McGrath* (1869), 1 C. C. R. 205 (K. S. C. 262). Contrast 4 F. and F. 50. See *Rex* v. *Hilliard* (1914), 9 Cr. App. R. 171, on theft by drugging.

[3] A common offence; but often puzzling, even to experts.

priating it, his conduct would not be larceny (unless he were a bailee, see p. 215).

In some cases an actual "trick" is carried out, some false artifice[1] or misrepresentation, like those involved in the use of false weights, or in the practices of ring-dropping[2] and of "ringing the changes".[3] But it is not essential that there should be any such *active* fraud. It is enough if the offender obtains the thing from the owner, fully intending to appropriate it, and knowing at the same time that the owner does not intend him to appropriate it. It is thus abundantly clear that if the owner only consents to give up the mere possession of the thing (*e.g.* to lend a horse for a ride), the fact that this consent was obtained by fraud will prevent its constituting any defence for the larceny of subsequently appropriating the thing.[4]

But if the owner had consented to give up not only his Possession but also his Property in the thing, then—even though there may have been such fraud as to vitiate the transaction, still more if there were merely the owner's own mistake—may not a valid possession have passed in spite of the error, and a larceny consequently have been rendered impossible? This question involves various alternative possibilities, which we must consider separately.

(*a*) It is usually by active Fraud on the part of the

[1] *E.g.* cardsharping; for the victim meant his money to pass only if won by fair playing.

[2] *Rex* v. *Patch* (1782), 1 Leach 238.

[3] *E.g.* change a florin for sixpences, and then the sixpences into pence, and carry off both the pence and the florin, *Reg.* v. *McKale* (1868), 1 C. C. R. 125.

[4] It has, however, been pointed out that this rule of Criminal Law draws an artificial distinction between a contract of bailment and other contracts. If true possession was obtained, the offence committed by subsequent appropriation would be that of larceny by a bailee. If a secret intent to steal makes void, as is held by Criminal Law, the contract to transfer possession, logically it should make void a contract to transfer property, but this is not the law (see p. 236 *post*). See C. J. Hamson, *The Effect of a Secret Fraudulent Intent*, 51, L. Q. R. 653.

thief, and not by a mere spontaneous blunder of the owner himself, that the latter is led to give a defective consent to a transfer of his ownership. But such a fraud may take either of two forms. If it be merely such as, in property law, gives the alienor only a right to rescind the alienation, and does not prevent a legal ownership[1] (though only a voidable one) from passing meanwhile to the alienee, then the alienee's crime will not be that of larceny, but only the misdemeanor of obtaining by false pretences.[2] If, however, the fraud related to some circumstance so fundamental[3] that, notwithstanding the owner's intention to alienate, no right of property (not even a voidable one) passed to the author of the fraud, the latter will have committed a larceny. Similarly, there will be a larceny if the owner's intention was not to make an immediate and absolute alienation but only a deferred or a conditional one; as where a stranger purports to buy a horse in a fair for ready money, but mounts it and rides off without paying the price.[4] Such a transaction may at first sight seem to resemble the misdemeanor of a fraudulent obtaining of ownership,[5] rather than the felony of larcenously taking away possession from a continuing owner. But the latter view of it has prevailed; for the owner, it is said, must have intended only a conditional alienation, by which the property would not vest absolutely in the recipient until the price was paid. This argument, however, does of course involve a conjectural

[1] Or even merely a power to confer ownership; [1911] 1 K. B. at p. 479.

[2] See p. 277 *post*. Cf. *Rex* v. *Fisher* (1910), 103 L. T. 320; 5 Cr. App. R. 102.

[3] Anson, *Law of Contract*, 17th ed., ch. vi. Cf. 2 C. C. R. at p. 45; *Rex* v. *Tideswell*, [1905] 2 K. B. 273. Such errors may relate to the Person (*Cundy* v. *Lindsay* (1878), 3 App. Ca. 459); or the Subject-matter (*Couturier* v. *Hastie* (1852), 5 H. L. C. 673); or the Nature of the transaction (*e.g.* welshing, *Reg.* v. *Buckmaster* (1888), 20 Q. B. D. 182) (K. S. C. 561).

[4] *Reg.* v. *Russell*, [1892] 2 Q. B. 313 (K. S. C. 349). Cf. *Rex* v. *Jones* (1910), 4 Cr. App. R. 17, and *Rex* v. *Stephens* (1910), 4 Cr. App. R. 53.

[5] See chap. xv *post*.

assumption as to the owner's state of mind with regard to a contingency that possibly never occurred to his mind at all. A further reason, perhaps more satisfactory, is that inasmuch as there was no *consensus voluntatum*, no "meeting of two minds in one and the same intention"[1]—the prisoner never having any genuine intention to contract—the arrangement (whatever its conditionality or unconditionality) was wholly void in law, and therefore could confer on the prisoner no rights whatever; though he himself would be "estopped" from asserting its invalidity. It is often a matter of extreme difficulty to determine whether the offence committed is Larceny by a Trick or obtaining by False Pretences.[2] The difficulty is made greater by reason of the fact that many cases decided in criminal courts to be larceny by a trick would more logically have been held to be cases of obtaining by false pretences. It is impossible to reconcile many of the decisions in criminal cases with any logical rules as to consent[3] and with civil cases deciding the question whether or not property passed. The difficulty is well illustrated by two civil cases. In *Cundy* v. *Lindsay* (1878),[4] a buyer by imitating the signature of a well-known firm obtained goods on credit and it was held that there was no contract and that no property in the goods passed. The belief of the contracting seller depended wholly upon identity of character.[5] The consideration of the person with whom he was willing to contract was an element in the contract which the seller was willing to make. In *Phillips* v. *Brooks*, [1919] 2 K. B. 243, a buyer present in his own person obtained goods in exchange for a cheque signed in a well-known name. It was held that there was a contract and that property passed, for the

[1] Sir F. Pollock. [2] See chap. xv *post*.
[3] See C. J. Hamson in 51 L. Q. R. 653. [4] 3 App. Cas. 459.
[5] See *per* Lord Haldane in *Lake* v. *Simmons*, [1927] A.C. 487 at pp. 501, 502.

seller, though believing the buyer to be the person he pretended to be, yet intended to sell to the person, whoever he was, who came into the shop and paid the price. The misrepresentation was only as to payment. There was a consensus with the person identified by sight and hearing.[1] Upon an indictment for Larceny a prisoner may be convicted of obtaining by False Pretences, and a prisoner indicted for False Pretences is not entitled to be acquitted because the facts prove Larceny. The distinction between the two crimes is still, however, of importance, for the judge must, where the facts necessitate it, explain to the jury the difference between the two offences (*Rex* v. *Fisher*[2] (1926), cf. *Rex* v. *Collins* (1922))[3], and, moreover, upon a conviction for stealing, property stolen reverts to the true owner by reason of the conviction, but not upon a conviction for obtaining by False Pretences, Larceny Act, 1916 (6 and 7 Geo. 5, c. 50, s. 45). Nor is the distinction between the two crimes a technicality of the criminal law; it applies to civil law as well.[4] As was pointed out by Lord Sumner in *Lake* v. *Simmons*, [1927] A. C. 487 at p. 509, "the distinction between a real consent, obtained by deceit, and an unreal consent, extracted by a trick, is equally applicable to civil disputes". In the same speech (p. 503), Lord Sumner said that "'Larceny by a Trick' is a short way of saying that the actual delivery *de manu in manum*, though it wore the outward appearance of consent, was in that respect illusory, because, owing to the deception, his mind [*i.e.* the mind of the person defrauded] did not go consensually with his physical action".

(*b*) Occasionally, however, a man's own spontaneous Mistake leads him to wish to make over all his rights in some chattel. If that mistake amounts to a Fundamental error (see p. 236), and the recipient knowingly and

[1] See *per* Lord Haldane in *Lake* v. *Simmons*, [1927] A. C. 487 at pp. 501, 502.
[2] 19 Cr. App. R. 166.
[3] 17 Cr. App. R. 42; 128 L. T. 31.
[4] Cf. note 5, p. 262 *post*.

dishonestly avails himself of it and appropriates the thing, does he commit larceny? This question was discussed very fully in *Reg.* v. *Middleton* (1873).[1] A post-office clerk, when about to pay out money to a savings-bank depositor, consulted by mistake the wrong letter of advice; and consequently handed over to the depositor a far larger sum than really stood to his credit. The man took the money, knowing full well that it was paid to him by mistake. On being indicted for larceny, he was convicted; and the conviction was upheld by eleven judges against four. Eight[2] of these eleven judges held that, even here, the clerk's mistake was one sufficient to prevent both the property and even the possession from passing;[3] and regarded the prisoner's taking of the coins as felonious. They insisted that a mere inoperative intention on the part of an owner to pass the property—inoperative in itself, and known to the thief to be inoperative—could not be enough to prevent the appropriation from constituting a larceny. On the other hand, seven judges thought that an owner's consent to pass not only possession but also property might, even when too defective to pass a perfect title, still suffice to prevent the taking of possession from being a larceny; in spite of there being mistake, or fraud, of such a nature as to prevent the consent from being operative. (But three of these seven, it may be added, upheld nevertheless the conviction of Middleton; on the ground that the full authority of an owner had not been delegated to the post-office clerk.)[4]

But, now, the Larceny Act, 1916, s. 1 (2), i, by a general provision that Stealing shall include the taking of a thing

[1] 2 C. C. R. 38 (K. S. C. 266).

[2] For Pigott, B., seems to have "quite acceded to" the legal doctrine of the seven others, though advancing a further view of the particular facts.

[3] Sir Frederick Pollock thinks that this doctrine had already been conclusively established in the earlier case of *Hardman* v. *Booth* (1863), 1 H. and C. 803; which, however, was not cited in *Reg.* v. *Middleton*. See Pollock and Wright, *Possession in the Common Law*, p. 112.

[4] See p. 279 *post*.

"under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained", seems to establish the doctrine of the eight judges.

To this discussion of the effect of an owner's consent in giving a "colour of right" and so preventing a taking from being larcenous, we may add that where the taking is by consent of the owner's agent or apparent agent, as where a cook gives scraps of food to a beggar, the same principles will apply. And a wife will usually have sufficient appearance of being her husband's agent for this purpose.[1] But her consent to the taking of his goods is no defence where they are taken by her adulterer.[2] It may reasonably be conjectured that where (under the Married Women's Property Act, 1882) property belongs to a wife, the consent of her husband would similarly be held to afford a sufficient "colour of right" to excuse a taking.

§ 10. The Intent

The Act of 1916 requires "intent, at the time of the taking, *permanently* to deprive the owner" of his chattel. The mere fact of taking possession surreptitiously of another man's goods raises a presumption of that criminal intent. But there is no larceny when a thing is taken quite unintentionally; as when a guest, playing at bagatelle, puts a ball in his pocket, and goes away forgetting it. And even an actual intention to take away the owner's possession from him, but only *temporarily*, will not suffice;[3] as when a schoolboy takes out of his master's desk a "crib" wherewith to prepare a lesson. Similarly a

[1] *Rex* v. *Harrison* (1756), 1 Leach 47 (K. S. C. 274).

[2] *Reg.* v. *Featherstone* (1854), Dearsly 369 (K. S. C. 274).

[3] By the Road Traffic Act, 1930, it is made an offence to take and drive away a motor-vehicle without the consent of the owner or other lawful authority. It is, however, a defence to shew a reasonable belief in the existence of lawful authority or that the owner would have given his consent if asked, 20 and 21 Geo. 5, c. 43, s. 28.

husband who takes his wife's diary merely that he may produce it as evidence against her on his petition for a divorce, does not commit a larceny. To seize your debtor's property wrongfully, but merely for the purpose of inconveniencing him by detaining it until he pays your debts, is thus no larceny but only a tort. So again, it is no larceny for the finder of an article to refuse to deliver it up when first asked for, if he is delaying merely in hopes of a reward being offered. To take a key merely for unlocking a safe, even though it be with the object of stealing the contents, is no larceny.[1] And thus a boy may steal a ride without stealing the donkey.[2] He does of course commit a trespass; but he does nothing that amounts, in the law of tort, to a "conversion". Nor will even his turning the animal loose, when he has finished his ride, necessarily constitute a conversion. But if he dismissed it at some place so remote that it would be unlikely to find its way back to its owner, he would usually be guilty of a conversion, and of a larceny. For the abandoning it with a reckless disregard as to whether or not it will be recovered by the owner, is evidence of an intention to deprive him of it altogether.[3]

It has already been seen (*ante*, p. 218) that, where goods are bailed, only an act of conversion by the bailee quite inconsistent with the bailment can amount to an appropriation. Equally must there, in the case of all other larcenies, be an intention to appropriate the thing in a manner wholly inconsistent with the rightful possessor's interest in it. (But in them such an intention may be sufficiently manifested by many acts which it would

[1] C. C. C. Sess. Pap. LXVII, 66. So, when in May 1914 at the porch of the Central Criminal Court a banker's ledger was taken, by deceit, from a witness; but only for temporary detention, to prevent its being used as evidence in a pending trial.

[2] *Rex* v. *Crump* (1825), 1 C. and P. 658 (K. S. C. 284).

[3] Cf. *Rex* v. *Oliver*, Transvaal [1921] 120; *Rex* v. *Laforte*, Cape [1922] 487 as to motor-cars. Even an intention to repay the value will not excuse a *permanent* appropriation.

have been quite permissible for a bailee to do, though they shew gross dishonesty in the case of anyone who has no right to be in possession of the thing at all.) There is no sufficient appropriation if a servant takes his master's goods merely for the purpose of bringing them back and then defrauding him by a pretence of having meanwhile done work upon them and earned wages thereby[1]. And similarly, it is no larceny for a man, who is only temporarily in need of money, to carry off another person's overcoat and pawn it, with a full intention of redeeming it and returning it, and with a full likelihood of being able to carry out this intention.[2] But a man must be taken to intend the natural consequences of his conduct; and therefore if, when he pawned the overcoat, he had not an immediate prospect of being able to redeem it, the mere hope and desire on his part of restoring the coat, if he should ever become able to do so, will not suffice to negative a larcenous intent.[3] An intention of appropriation does not cease to be criminal because the owner is unknown, or even quite untraceable (see p. 223).

It should be observed that the mere intention thus to injure the owner suffices, even though the thief have no intention to benefit himself by the theft. It thus is not essential in English law, as it was in Roman law,[4] that the theft should be committed *lucri causâ*. Accordingly where a servant, in order to suppress inquiries as to her character, took a letter and destroyed it, she was convicted of a larceny of it.[5] Similarly if, at the termination of a drunken

[1] *Reg.* v. *Holloway* (1848), 1 Den. 370 (K. S. C. 285).

[2] But it will be an offence of "Unlawful Pawning"; cf. p. 219 n. *ante*.

[3] *Reg.* v. *Trebilcock* (1858), D. and B. 453.

[4] *Digest*, XLVII, 2. 1. 3. In 1904 a cook on a Rhine steamer angrily threw some pans overboard. The Cologne court acquitted her both (1) of damaging them, for they lie in the river intact, and (2) of stealing them, for she sought no *lucrum*. But Scottish, French and Roman-Dutch law have abandoned *lucri causâ*.

[5] *Reg.* v. *Jones* (1847), 1 Den. 188. The Larceny Act, 1916, follows this common-law doctrine.

fight, one of the combatants should, in his ill-temper, pick up the hat which his antagonist has dropped, and fling it into a river, he would commit larceny. Had he, however, flung it merely into a field, there would be no evidence of any intention to deprive the owner of it permanently.

There is, however, one exceptional case in which a thief's intention merely to deprive the owner of his ownership, without any intention of also benefiting himself by his theft, will not suffice for larceny. For by 26 and 27 Vict. c. 103 (a statute passed in consequence of a case that excited a momentary agitation), it has been made no longer a larceny for servants to give to their master's animals, against his orders, food that belongs to him; and it is, instead, made a petty offence, punishable on summary conviction.

By far the most difficult question that arises in respect of the *animus furandi* is that of Time. At what moment must the guilty intention exist, in order to render an appropriation larcenous? The answer must differ, accordingly as the accused person's original possession was a lawful one or not.

If it were lawful, then no dishonest intention that arises only subsequently could amount at common law to a larceny[1] (but it has, as we have seen (p. 216 *ante*), been provided by the Act of 1916 that *bailees*—though their original taking of possession is of course a lawful one——may be convicted of larceny if they, however long after receiving possession, convert to their own use the article bailed).

If, however, the original taking of possession were in any way unlawful, then any subsequent determination to appropriate the thing will operate retrospectively, and will convert that taking into a larceny. Even if the original taking were no more than a trespass (*e.g.* taking the wrong umbrella by mistake, or borrowing a neigh-

[1] *Rex* v. *Holloway* (1833), 5 C. and P. 525 (K. S. C. 288).

bour's plough for an afternoon's work without his leave), a subsequent intent to appropriate the thing so taken will thus relate back, and render the act a larceny. Thus where the prisoner drove off amongst his own lambs by honest mistake a lamb belonging to the prosecutor, but, after he had discovered the error, proceeded to sell the lamb, he was convicted of larceny.[1]

Let us apply these two principles to the very common case of the finding of lost articles.[2] If the owner has intentionally abandoned all right to them, of course the finder may appropriate them, and thereby become true owner.[3] But even where there has been no such abandonment, and consequently the finder does not become owner of the thing which he has found, he will not commit any crime by appropriating it, unless, at the very time of the finding, he both

(i) "believes
  (α) that the owner can be discovered by taking reasonable steps" (Larceny Act, 1916, s. 1 (2), i); and
  (β) that that owner had not intentionally abandoned the thing,[4]

and yet also (ii) forthwith resolves to appropriate it.

In determining whether or not a finder has had reasonable grounds to believe that the owner could be discovered, it will be important to take into account the place where the thing was found, and also its own nature, and, again, the value of any identificatory marks upon it. Thus in the case of cheques, bills of exchange, promissory notes, and other securities that carry the owner's name upon them,

[1] *Reg.* v. *Riley* (1853), Dearsly 149 (K. S. C. 289).

[2] See Pollock and Wright, *Possession in the Common Law*, pp. 171–187. If the finder take possession with no intention of restoring them to the owner, he commits a Trespass; if he make any use of them, he commits a Conversion; if he take them with intent to appropriate them, it may be a Larceny.

[3] *Ante*, p. 220.

[4] *Reg.* v. *Thurborn* (1849), 1 Den. 387 (K. S. C. 276).

a finder could scarcely think it impossible to trace out the owner, even though it were in a crowded thoroughfare that he picked up the papers. Similarly in the case of articles left in a cab, the driver will generally have a clue to the owner from knowing where he picked up, or set down, his passengers.[1] And where property has been accidentally[2] left by a passenger in a railway train, it has always been held to be larceny for a servant of the railway company to appropriate it instead of taking it to the lost-property office.[3]

Every finder, it has always been clearly held, has a "special property", *i.e.* a right to possession; so that he could maintain against any stranger the old actions of trover, detinue, or trespass.[4] But it must be noted that he has not—as some bailees have—a right of possession against the owner himself. Where, however, a third person dishonestly takes an article from a finder, he may be convicted of larceny on a count laying the property in the finder.[5]

Cases of finding present, however, much less difficulty than those of mutual error, *i.e.* where a wrong article has been both given, and accepted, in mistake for something else which both parties believed they were dealing with. Simple as is our twofold rule as to the time of the *animus furandi*, it is not easy to apply it in these cases; because of the difficulty of deciding which was the moment when, in contemplation of law, the technical possession shifted, and the thing accordingly was "taken". When walking together in the evening, *A* asks *B* to lend him a shilling; and *B* gives him a coin which both of them, owing to the

[1] And, if *no* clue, he ought to deliver the articles to the cab-owner; as *he* is "Possessor" of the cab and its contents. Cf. p. 213 *ante*. See 6 Edw. 7, c. 32, s. 4, as to the special duty of finders of stray *dogs*.

[2] Contrast the newspapers *intentionally* abandoned there by him.

[3] Cf. *Reg.* v. *Pierce* (1852), 6 Cox 117; contrast a mere coin found on an open moor, 18 Bombay 212.

[4] Pollock and Wright, *Possession in the Common Law*, p. 187.

[5] *Reg.* v. *Swinson* (1900), 64 J. P. 73.

darkness, suppose to be a shilling.[1] But, after they have separated, *A* discovers the coin to be a sovereign; and thereupon resolves nevertheless to spend it. When, in point of law, did *A* "take" this sovereign into his possession? If it were when the coin was actually handed to him, then (as he had at that time no guilty intent) he "took" it innocently; and therefore no subsequent appropriation of it can make him guilty of larceny. But, on the other hand, if the law does not regard him as having taken possession of it until he came really to know what it was, then (as he simultaneously formed the intention of appropriating it) he will be guilty of larceny. The whole question therefore resolves itself into this, What mental element is necessary for legal possession? "Delivery and receipt", said Lord Coleridge, C.J., "are acts into which mental intention enters. There is not in law, any more than in common sense, a delivery and receipt, unless the giver and receiver intend respectively to give and to receive what *is* given and received." Yet there still remains difficulty in determining what precise extent of concurrence between their intention and the facts is necessary. Thus in *Ashwell's Case* (1885)[2] (where the circumstances which we have above described arose) although all the fourteen judges were agreed[3] in adhering to the rule that "if the original taking is innocent, no subsequent appropriation can be a crime", yet seven of them were for upholding his conviction for larceny, whilst seven[4] were for quashing it. The rule of the Court being "praesumitur pro negante", the conviction stood affirmed,

[1] Or a sovereign is put into an organ-grinder's cap, by mistake for a penny. In Dublin, in one single year (1902), sixteen gold coins, that had been given to cabmen in mistake for silver ones, were handed by them to the police.

[2] 16 Q. B. D. 190 (K. S. C. 292).

[3] As was stated in *Reg.* v. *Flowers* (1885), 16 Q. B. D. 643.

[4] Whose view Lord Loreburn approved, in the Committee on the Larceny Bill, p. 21.

and the law must be regarded as so established. In the similar and later case of *Reg.* v. *Hehir*,[1] [1895] 2 I. R. 709, the Irish Court for Crown Cases Reserved was divided almost equally closely; four judges being in favour of the conviction, but the remaining five in favour of quashing it. It must be noted that in both these difficult cases the mutual error went so far as to be a mistake about the species of the article, and not merely about its marketable value. Had the error concerned value alone, it certainly would not have prevented the possession from passing at the moment of the physical delivery. As was said by Madden, J.:[2] "*A* may deliver to *B*, in discharge of a trifling obligation, an old battered copy of Shakespeare printed in 1623, both innocently believing at the time that, being old, full of errors and misprints and badly spelled, it would only fetch a couple of shillings at an auction. Suppose *B* to sell it to a collector for several hundreds of pounds,[3] and to appropriate the proceeds, he would not be guilty of larceny, inasmuch as there was an intelligent delivery of the chattel, as such, though under a mistake as to its value." But in the view of those judges who upheld the convictions of Ashwell and Hehir, a mistake as to the species of a *coin* is not a question of mere value but one of identity. Now in contracts for the sale of chattels, any mistake of identity undoubtedly avoids the contract; since there is no *consensus ad idem*, and therefore[4] the property does not pass. Yet even then it does not follow that legal possession may not pass. True, there are two civil cases[5] in which it was held that the delivery of a bureau (whether on sale or on bailment) is *not* a delivery

[1] K. S. C. 300.

[2] K. S. C. 301.

[3] A well-known Cambridgeshire antiquary sold in 1906 for £2500 a book which he had bought in a cottage for 2*s.* 6*d.*

[4] *Raffles* v. *Wichelhaus* (1864), 2 H. and C. 906.

[5] *Cartwright* v. *Green* (1802), 8 Vesey 405; *Merry* v. *Green* (1841), 7 M. and W. 623.

of its unknown contents (*e.g.* money lying in some secret drawer); and accordingly that these are not "received" by the deliveree until he knows of their existence. These cases go so far as to shew that a person does not always "receive" a thing by its merely coming into his physical possession. But, inasmuch as the parties dealing with the bureaux were ignorant of the very existence of the money, these cases fall short of *Ashwell's Case*, where both parties well knew that it was with a coin that they were dealing.[1]

We therefore can only say that, if a chattel is given and received "intelligently", the possession will certainly pass; and beyond this we must not go. For it is not yet possible to lay down authoritatively *what* exactly it is that must be understood with due intelligence by the parties.

Where the mutual mistake relates to the person for whom a letter is intended, it has more than once been held[2] that if a postman mis-delivers a letter, and then the recipient, on opening it and finding it not to be meant for him, nevertheless appropriates some article which was enclosed in it, he commits no larceny. For there was no *animus furandi* at the time when the letter came into his hands; and the delivery of a letter, unlike that of a bureau, clearly is always intended to include delivery of all its contents. Thus a letter addressed to a Mrs Fisher in

[1] In *Reg.* v. *Ashwell* those who maintained that knowledge of the true nature of the thing was essential also held that the taker had at first merely an excusable "detention"; and accordingly, if he had paid away the coin before discovering its nature, he would have been protected from any claim by the owner for its proper value. But an intermediate view has since been suggested by Mr Justice Wright (*Possession in the Common Law*, p. 210), viz. that the mistake did not thus invalidate the acceptance, but that it did invalidate the delivery; so that, though a new (and an excusable) possession did arise, it was a trespassory one, and accordingly the subsequent *animus furandi* related back and made the taker guilty of larceny.

[2] *Rex* v. *Mucklow* (1827), 1 Moody 160; *Reg.* v. *Davies* (1856), Dearsly 640; see Pollock and Wright, *Possession in the Common Law*, p. 113, as to the authority of these cases being still maintainable, whatever view be taken of the subsequent conflict of opinion in *Reg.* v. *Ashwell*.

one house was delivered to a Mr Fish living in another; and, on opening it, he found that it contained a cheque. This he proceeded to endorse (in the name of Fisher) and to cash. On an indictment for stealing this cheque, he was acquitted; the court holding that the legal "receipt" both of the letter and of the cheque took place at the actual moment when the envelope reached Fish, although he then mistakenly supposed it to be a letter for himself.[1]

§ 11. The Punishment

As regarded its punishment, larceny presented some anomaly at common law; for, though a felony, it was not invariably a capital offence.[2] A distinction was made, according to the pecuniary value of the thing stolen. If it were worth only twelve pence[3] or less, the offence was merely a "Petty" larceny; and, although a felony, was not punishable with death. If the thing were worth more than 12*d.*, the crime was a "Grand" larceny;[4] and at least as early as the time of Edward I—probably indeed by the legislation of the stern "Lion of Justice", Henry I[5]—it became punishable capitally. The phrases "Petty" and "Grand" have become obsolete since the abolition in 1827 of the distinction between them.[6] But larceny still admitted a division into two forms: the Simple and the Aggravated.

Simple larceny—as now defined by the Larceny Act, 1916—is, as we saw (*ante*, p. 210), declared therein to be

[1] C. C. C. Sess. Pap. cxxxi, 212. Fish might, however, have been indicted under 7 Will. 4 & 1 Vict., c. 36, s. 31 (now 8 Ed. 7, c. 48, s. 53), for the statutory misdemeanor of fraudulently retaining a post-letter which ought to have been delivered to some other person.

[2] *Ante*, p. 208.

[3] See the Laws of Athelstane (v. 1). Under Edward I the 12*d.* was reckoned to be eight days' wages of a man.

[4] Cf. Bolland's *General Eyre*, p. 66.

[5] Pollock and Maitland, II, 496. "If two or three jointly steal goods to the value of twelvepence halfpenny, they shall *severally* have judgment of life and limb"; *Eyre of Kent*, A.D. 1313, p. 90.

[6] 7 and 8 Geo. 4, c. 28, s. 2.

punishable either with penal servitude for not more than five years or less than three, or with not more than two years' imprisonment with or without hard labour.[1] If convicted on an indictment, the offender cannot be fined; but upon summary conviction by justices of the peace, he may be. A person convicted of simple larceny, after having been previously convicted of any felony whatever, may be sentenced to ten years' penal servitude.[2]

Aggravated larceny is of various kinds; punishable by various long periods of penal servitude, ranging from the offender's life down to seven years. The circumstances by which larceny may be aggravated are of four species:

(1) The place where it is committed; *e.g.* a ship,[3] dock,[3] wharf,[3] or wreck,[3] or (if the stolen property be worth not less than £5) a dwelling-house.[4] The maximum punishment in each of these five cases is fourteen years' penal servitude.

(2) The manner in which it is committed; *e.g.* by stealing from the person.[5] If the property is not only stolen from the person of someone but taken from him by force (snapping a watch-chain suffices); or if he is led to give it up by being put in fear of force being used; the offence obtains the name of Robbery.[6] The force need not be great.[7] Yet obtaining money from a solitary woman in a lonely place by a threat, not to use force, but merely to accuse her of being there for evil purposes, would not be

[1] Larceny Act, 1916, ss. 2, 37 (4). And a boy under sixteen may be whipped. [2] *Ibid.* s. 37 (1). [3] *Ibid.* s. 15. [4] *Ibid.* s. 13.

[5] *Ibid.* s. 14. *E.g.* pocket-picking.

[6] *Ibid.* s. 23 (2). Six times rarer now (proportionally) than fifty years ago. Is this a decadence? For Fortescue (L.C.J., 1442–1460) preferred the many English robbers to the many French thieves, since "there is more spirit and a better heart in a robber than in a thief" (*Monarchy*, c. 12).

[7] Catching hold of an arm suffices. The gentle application of a chloroformed rag, producing a mere momentary unconsciousness, was held sufficient by the Court of Criminal Appeal; since, "it was all the violence that was necessary for the purpose", *Rex* v. *Carney*, Dec. 18, 1922 (unreported). In fact *any* violence suffices, *Rex* v. *Harrison* (1930), 22 Cr. App. R. 82.

robbery; though it would, as we shall shortly see (p. 257), constitute a statutory felony. And even actual force, if it does not begin until after the taking, will not make a larceny become a robbery.[1]

The maximum punishment of these offences is again fourteen years' penal servitude. But for robberies that are further aggravated in certain specified ways (as by the robber's being armed, or having a companion, or using any personal violence), the maximum punishment rises to penal servitude for life;[2] and a flogging may be added, unless the offender be a woman. Even if no article be actually taken, and so no robbery be effected, the mere assault with intent to rob is a felony, and punishable with five years' penal servitude.[3]

(3) The person by whom it is committed. For a larceny by a clerk or servant or by one employed in the public service of His Majesty or in the police of any place whatsoever the maximum punishment is raised to fourteen years' penal servitude,[4] owing to the opportunities of dishonesty which are necessarily placed within the reach of all persons thus employed, and to the breach of trust which is involved in taking advantage of them. The discussion of the difficult question "Who is a clerk or servant?" may be deferred until the subject of Embezzlement is dealt with.[5]

(4) The subject-matter which is stolen. Thus the larceny of cattle, or of ten shillings' worth of textile goods exposed in process of manufacture,[6] is punishable with penal servitude for fourteen years. (But maliciously destroying such textile goods is punishable with penal servitude for life.[7]) To kill an animal with intent to steal the carcase or

[1] *Rex.* v. *Gnosil* (1824), 1 C. and P. 304, but under the Larceny Act, 1916 (s. 23 (1)), the use of personal violence immediately after a robbery involves the same punishment as the use of personal violence immediately before or at the time of such robbery.

[2] Larceny Act, 1916, s. 23. [3] *Ibid.* s. 23 (3). [4] *Ibid.* s. 17 (1).

[5] *Post*, p. 264. [6] Larceny Act, 1916, ss. 3, 9.

[7] 24 and 25 Vict. c. 97, s. 14 (p. 191 *ante*).

skin is a felony punishable with the same punishment as if the animal had been stolen, provided that stealing the animal would have amounted to felony.[1] Again, for stealing letters from a post-office, or from a postman, or for stealing a will,[2] the maximum punishment is penal servitude for life.[3] And yet, curiously enough, a more complex and apparently more heinous offence, viz. the stealing of a post-letter by a person who is himself an employé of the post-office, is punishable only with seven years' penal servitude[4] (unless the letter contain some chattel or money or valuable security, in which case the maximum punishment is penal servitude for life).

§ 12. Quasi-Larcenies

In the course of the foregoing account of larceny we have had occasion to mention various articles which, though movable, were not within the old law of larceny. It is important to add that by modern statutes, it has been made a crime to steal almost any of these. But such thefts are not always made "larcenies"; and some are not even made felonies, but only indictable misdemeanors or offences punishable on summary conviction. The Larceny Act, 1916, contains several instances of these statute-made thefts. But its omission (see p. 210 *ante*) to define Larceny prevents our ascertaining which of them are larcenies.[5] But such thefts are construed by all the other common law rules about larceny, *e.g.* rules as to what will constitute a taking[6] or a carrying away, or an intent to steal. It may consequently be convenient if, for want of any recognised name, we call them for the moment "Quasi-Larcenies", or, in Lord Loreburn's phrase, "Auxiliary Larcenies".

[1] See p. 229 *ante*. [2] Larceny Act, 1916, s. 6. [3] *Ibid.* s. 12.

[4] *Ibid.* s. 18. This lessening of punishment was perhaps due to the influence of the ancient rule that mere embezzlement was no crime.

[5] See 7 C. and P. 667 n.; cf. 8 C. and P. 294. The marginal note to s. 5 of the Larceny Act, 1916, creates further confusion as to this word.

[6] But see *Farey* v. *Welch*, [1929] 1 K. B. 388 and n. 4, p. 254 *post*.

The cases of hares, and of fish, have already been mentioned. We may add some still more common instances.

(1) The theft of any valuable security[1] is larceny, and punishable in the same manner as if the thief had stolen a chattel of like value. Similarly punishable is the fraudulent destruction or obliteration of a valuable security.[2]

(2) To steal trees of the value of £1[3] or more, if growing in a park or garden or of the value of more than £5 in any place whatsoever or of the value of one shilling after two previous summary convictions of such offence, or to steal fixtures[4] or the title deeds of land[5] or certain Court documents is a felony punishable (like simple larceny) with five years' penal servitude.

(3) To steal wild deer in *inclosed* land (24 and 25 Vict. c. 96, s. 13), and to steal mineral ore from the mine,[6] are felonies, but punishable with no higher penalty than two years' imprisonment, with or without hard labour.

(4) And it is a petty offence punishable, on summary conviction, with (for a *first* commission of the crime) six months' imprisonment with or without hard labour, to steal[7] any plant, fruit or other vegetable production growing in a garden or orchard,[8] or any *cultivated* root or

[1] Larceny Act, 1916, s. 46 (1).

[2] Larceny Act, 1861, s. 27.

[3] Larceny Act, 1916, s. 8 (2).

[4] *Ibid.* s. 8 (1). The stealing of chattels or fixtures by tenants and lodgers is punishable with seven years' penal servitude if the value exceeds £5, and with two years' imprisonment if the value is less than £5, *ibid.* s. 16.

[5] *Ibid.* s. 7.

[6] *Ibid.* s. 11.

[7] These offences are distinct from simple larceny. Where the facts shew larceny at common law there can be no conviction under section 36 of the Larceny Act, 1861, *Rex* v. *Friend* (1930), 22 Cr. App. R. 130, where the jury were directed that it was immaterial whether fruit was growing or severed at the material time and the conviction was quashed.

[8] 24 and 25 Vict. c. 96, s. 36.

plant—*fruit* is not included—growing elsewhere,[1] or to steal a dog,[2] or indeed to steal any bird, beast or other animal ordinarily[3] kept in confinement (*e.g.* a canary) or for any domestic purpose (*e.g.* a cat) and not larcenable at common law.[4]

It is a misdemeanor punishable with eighteen months' imprisonment to steal a dog after being previously summarily convicted for dog-stealing; or corruptly to take any money or reward to aid in the recovery of a stolen dog; or knowingly to possess a stolen dog or its skin after a previous summary conviction of such offence (Larceny Act, 1916, s. 5).

§ 13. Extortion by Menaces

With extortion by threats of violence (Robbery) we have already dealt (*ante*, p. 250). In this section we are concerned with a group of offences defined in three sections of the Larceny Act, 1916 (ss. 29 to 31), which involve extortion by menaces of a somewhat different character. These crimes,[5] which are popularly termed "Blackmail", though the word is quite untechnical and perilously vague, are: (*a*) To utter, knowing the contents thereof, a letter or writing demanding of any person with menaces, and without any reasonable or probable cause,

[1] 24 and 25 Vict. c. 96, s. 37. [2] *Ibid.* s. 18.

[3] It suffices that the individual has been so kept; though those of its species are not confined ordinarily.

[4] *Ibid.* s. 21. Cf. p. 230 *ante*. Section 23 punishes the unlawful and wilful killing, wounding or taking of any house dove or pigeon under such circumstances as shall not amount to larceny at common law. Belief that the bird was a wild one is no defence to a charge of shooting a pigeon, *Horton* v. *Gwynne*, [1921] 2 K. B. 661, *Cotterill* v. *Penn* (1935), 51 T. L. R. 459. Where the accused fires because of actual though not merely apprehended danger to crops, he is not guilty of an offence, *Taylor* v. *Newman* (1863), 4 B. and S. 89, *Horton* v. *Gwynne*, *supra*. For the meaning of "take" see *Farey* v. *Welch*, [1929] 1 K. B. 388. For a discussion of these scarcely reconcilable cases see "The Eclipse of *Mens Rea*", W. T. S. Stallybrass, 52 L. Q. R. 60.

[5] In such cases it has universally been allowed of late that the prosecutor should, for the purposes of the trial, be anonymous.

any property or valuable thing is a felony punishable with penal servitude for life.[1] It is for the jury to decide whether there was reasonable or probable cause for the demand, and the belief of the accused affords no defence.[2] This section of the Larceny Act has given rise to an unusual difference of judicial opinion. In *Rex* v. *Denyer*, [1926] 2 K. B. 258,[3] the stop list superintendent of a trade protection society was convicted of this felony for uttering a letter threatening to place upon the stop list of the society the name of a trader who had sold goods at prices lower than the protected prices of the trade, unless he paid a sum of money to the indemnity fund of the society. The Court of Appeal had held in the civil case of *Ware and De Freville Ltd.* v. *Motor Trade Association*, [1921] 3 K. B. 40, that there was nothing illegal in placing the name of a trader upon a stop list in order to protect prices, but the Court of Criminal Appeal upheld Denyer's conviction, and the Lord Chief Justice said that there was not the remotest nexus or relationship between the right to put a name upon a stop list and the right to demand a sum of money as the price of abstaining from that course. Relying upon this decision an attempt was made in a subsequent civil action, *Hardie and Lane Ltd.* v. *Chilton and Others*, [1928] 2 K. B. 306,[4] to recover money that had been paid to the same society in order to avoid inclusion in the stop list. Avory, J., who was himself a member of the Court which upheld the conviction in *Rex* v. *Denyer*, allowed the claim, but the Court of Appeal over-ruled his decision and expressed the opinion that *Rex* v. *Denyer* was wrongly decided. Scrutton, L.J., said that "the most obvious reasonable and probable cause appears to be where you have a legal right to do the thing which you threaten to do, assuming that the obtaining a valuable thing thereby does not involve any criminal act, as an

[1] Larceny Act, 1916, s. 29 (1).
[2] *Rex* v. *Dymond*, [1920] 2 K. B. 260.
[3] K. S. C. 562.
[4] K. S. C. 565.

agreement not to prosecute or not to inform the authorities of a felony".[1] The Court of Criminal Appeal has, however, stated that unless and until the decision in *Rex* v. *Denyer* is reversed by the House of Lords it is binding and will be enforced for the purposes of the administration of the criminal law.[2] Sir Herbert Stephen in a letter to *The Times* of April 20, 1928, points out that the words of Scrutton, L.J., divorced from their context might excuse many cases of undoubted blackmail. A man may have a legal right to shew a letter to a third person, but yet have no right to demand money as the price of abstaining from so doing. It does not seem possible to say more than that in each case provided that there is any evidence of a want of reasonable and probable cause the question must be decided by the jury with relation to all the circumstances. It is the demand of money that must be reasonable, but the right to do the thing threatened will generally throw some light on the reasonableness of the demand, though it is not conclusive of the question.[3]

(*b*) (i) To utter, knowing the contents thereof, any letter or writing accusing or threatening to accuse any other person (whether living or dead) of any crime,[4] with intent to extort[5] or to gain thereby any property or valuable thing from any person; and (ii) with intent to extort[5] or to gain any property or valuable thing from any person to accuse or threaten to accuse either that person or any other person (whether living or dead) of any crime;[4] are felonies punishable with penal servitude for life.[6]

[1] [1928] 2 K. B. at p. 319.

[2] 44 T. L. R. 479, *Thorne* v. *Motor Trade Association* is now under appeal to the House of Lords on this point: *Weekly Notes*, May 23, 1936, p. 166.

[3] On this controversy see "Blackmail and Consideration in Contracts" by Prof. A. L. Goodhart in *Essays in Jurisprudence and the Common Law*, ch. IX.

[4] As defined by the section, Larceny Act, 1916, s. 29.

[5] It seems that there can be an intent to extort, if there is a threat, even though there is an honest belief that a debt is due. The Recorder of London, *The Times*, Dec. 20, 1932.

[6] Larceny Act, 1916, s. 29 (1).

(*c*) Every person who with intent to defraud or injure any other person—(i) by any unlawful violence to or restraint of the person of another, or (ii) by accusing or threatening to accuse any person (whether living or dead) of any crime[1] or of any felony, compels or induces any person to execute, make, accept, endorse, alter, or destroy the whole or any part of any valuable security, or to write, impress, or alter the name of any person, company, firm or co-partnership, or the seal of any body corporate, company or society upon or to any paper or parchment in order that it may be afterwards made or converted into or used or dealt with as a valuable security, is guilty of felony punishable with penal servitude for life.[2]

(*d*) To demand with menaces or by force anything capable of being stolen with intent to steal the same is a felony punishable with penal servitude for five years.[3] The demand if successful must amount to stealing.

(*e*) Every person who with intent (*a*) to extort[4] any valuable thing from any person, or (*b*) to induce any person to confer or procure for any person any appointment or office of profit or trust, (i) publishes or threatens to publish, or (ii) directly or indirectly proposes to abstain from or offers to prevent the printing or publishing of any matter or thing touching any other person (whether living or dead) is guilty of a misdemeanor punishable with imprisonment for not more than two years.[5]

For the purposes of all these crimes it is immaterial whether any menaces or threats be of violence, injury, or accusation to be caused or made by the offender or by any other person.[6]

To constitute a menace a threat need not be one of injury to person or property. It is sufficient that it should produce in an ordinary man such a degree of fear

[1] As defined by the section, Larceny Act, 1916, s. 29.
[2] Larceny Act, 1916, s. 29 (1).
[3] *Ibid.* s. 30.
[4] See note 5, p. 256 *ante.*
[5] Larceny Act, 1916, s. 31.
[6] *Ibid.* s. 29 (4).

or alarm as would unsettle his mind, and this definition will be construed liberally.[1]

§ 14. Restitution of Possession

The only remaining topic to be considered in connexion with larceny, is that of the Restitution of the stolen property. The thief, as we have said, aims at depriving the true owner of all the benefits of his ownership. But of the ownership itself he cannot deprive him. It is important for the student to avoid the misapprehensions on this point which are apt to arise from the ambiguity of the word "property". That term may mean[2] either the physical object which is owned (*e.g.* "This umbrella is part of my *property*"), or the legal right which the owner has over it (*e.g.* "The finder of a lost umbrella acquires a special *property* in it"). It is only in the former sense that we can ever speak of "lost property" or of "stolen property". For property in the second sense (*i.e.* the intangible right of ownership) cannot be stolen or mislaid. A theft, then, leaves unaltered the ownership in the goods stolen:[3] so that the owner is still entitled to seize upon the thing, or to bring a civil action to recover it from the thief. There is an apparent exception to this where the thief has gone on to destroy the thing, or even to alter its essence irrecoverably by making out of it an entirely new kind of thing. In the latter case, as when *A* takes *B*'s barley and makes it into malt, or *B*'s planks and builds a summer-house with them, he acquires title, by *Specificatio*,[4] in the new thing thus created. For, just as if *A* had burned the planks, or had fed pigs with the barley, *B*'s ownership is utterly gone;[5] and, consequently, his civil remedy is an

[1] *Rex* v. *Boyle and Marchant*, [1914] 3 K. B. 339.

[2] Austin's *Jurisprudence*, Lect. xlvii.

[3] It is usually said that even the *possession* remains, constructively, in the owner (1 Hale P. C. 507); but see Pollock and Wright, p. 157, as to whether this should not be understood only as the *right to* possession.

[4] See Justinian, *Inst.* II, 1, 25–29. [5] Y. B. 5 Hen. 7, fo. 15, pl. 6.

action for damages alone. Yet even here there is no real exception to the principle we laid down. For it was not by the theft, but by further conduct, posterior to the theft, that *B*'s ownership was extinguished.[1]

Since a thief does not become owner, he cannot confer ownership upon anyone else; for *non dat qui non habet.* Hence the original owner may sue the thief, or anyone to whom the thief has given or sold the stolen article, in a civil action to recover it or its value. Moreover, to save owners the trouble and expense of this fresh litigation, it has been enacted that an order for restitution[2] of stolen property may be made by the criminal court (even though it be a court of mere summary jurisdiction)[3] before which any person is convicted[4] under the Larceny Act, 1916, of larceny or embezzlement or conversion or theft in any form, or even false pretences.[5] But it should only cover

[1] If *A* had dealt with the materials in a less trenchant manner, so that the law would regard their identity as still continuing and as being still traceable—as where leather is made into shoes, cloth into a dress, or a log into planks (*Betts* v. *Lee* (1810), 5 Johnson, New York, 348)—ownership would not have been changed; and *B* might lawfully have seized the whole of the manufactured product.

Indeed, *A*'s misconduct will sometimes have even the result of actually enriching *B*. For if, by a *Confusio*, *A* mingles *B*'s goods with his own, and not in a mere separable combination (like a heap of chairs) but so as to become mixed undistinguishably (as in a heap of corn), then the law confers upon *B* the ownership of the whole mass. *B* therefore becomes entitled to carry off even that part which, before the theft, did not belong to him at all (Popham 38, mixing hay). Similarly, in *Accessio*, if *A* take *B*'s dressing-gown and embroider it with his own thread, *B*, as owner of the "principal", can retake the garment and, along with it, the "accessory" embroidery (1 Hale P. C. 513). Nor does the English law require him in any of these cases to pay compensation for the advantage he obtains. Roman law did. See Prof. Buckland's *Textbook*, pp. 210–211.

It should be added, however, that in those cases of *Confusio* where the commingled articles are identical not only in kind but even in mere quality and value, it is doubtful whether the general rule would not be modified, by making *A* and *B* joint owners of the total mass (see 15 Vesey 442).

[2] Larceny Act, 1916, s. 45 (1), (2). [3] 42 and 43 Vict. c. 49, s. 27.

[4] But *before* conviction no such order can be made. Hence until then the police must exercise discretion about handing to the owner any goods they have rescued from a thief; *e.g.* about posting to the addressees the letters he has stolen from a pillar-box.

[5] But see p. 290 *post.*

such stolen property as has been mentioned in the indictment and has been produced and identified at the trial.[1]

But it must now be added that upon this general principle, *non dat qui non habet*, the common law soon engrafted two exceptions, which the necessities of trade had shewn to be indispensable for the security of purchasers. One depends upon a peculiarity in the stolen property itself; the other upon a peculiarity in the place where the purchaser buys it. A man who, in all ignorance of the theft, gives the thief valuable consideration in exchange for the stolen property, may, in spite of its having been stolen, acquire a good title to it, if either (i) this stolen property consisted of money or of a negotiable security, or if (ii) it was transferred to him in a "market overt".

(i) To secure the free circulation of current coin,[2] the law treats as indefeasible the title to money which is paid away (*a*) for value and (*b*) to an innocent recipient, and this even though the particular coins may chance to be still identifiable. Yet even money can be claimed back by its original owner from a beggar to whom the thief has generously flung it; or from a companion to whom he has paid it in discharge of a bet; or, again, from shopkeepers who have sold goods to him for it, but in full knowledge that he had no lawful right to the coins he was paying them. And it has recently been held that if the coins were dealt with, not as currency but as chattels, the privilege does not apply. Thus, where a stolen Jubilee £5 piece had been acquired, by an innocent purchaser for value, as a curiosity, the original owner was held to be

[1] It ought to be made only in very clear cases; for the dispossessed third party has no power of appeal (except in a case where the conviction itself is appealed against).

[2] "Nec secta...de denariis foret acceptanda, propter eorum consimilitudinem qui sunt ejusdem fabrice per totum regnum"; *Eyre of Kent*, I, 78, A.D. 1313. Hence experienced thieves prefer to steal money or bills rather than chattels; for coin is hard to identify, and bills fetch a better price than chattels because the receiver gets a safer title.

entitled to recover it or its worth.[1] The distinction is perhaps to be regretted; as making a *bonâ fide* receiver's title depend upon a question so uncertain, even possibly to himself, as that of his intentions about his future treatment of the coin.

Similarly a good title is acquired by anyone who takes *bonâ fide* and for value a negotiable instrument (*e.g.* a bill of exchange or a promissory note).[2] Hence the honest finder of a lost bill, though he obtains no title to it, can give a title.

(ii) Fairs and markets, moreover, brought together men from places so distant that, in mediæval days, the purchaser had little means of knowledge about the vendor he dealt with there, and consequently he needed the protection of some legal privilege.[3] Hence it became settled that even the most ordinary chattels might be effectually alienated by a mere thief, if he sold them for value to a *bonâ fide* purchaser on a market day, in such a place as was a lawfully established market for the particular kind of goods concerned—*e.g.* cattle, or corn, or cloth. A sale by a tradesman in a shop in the City of London in which goods are publicly displayed is a sale in market overt except on Sundays and holidays; but this does not apply to a sale to another tradesman.[4] And the publicity and rarity of the privileged occasions made this exceptional rule work comparatively little injury in the way of encouraging thieves. But modern facilities of intercourse

[1] *Moss* v. *Hancock*, [1899] 2 Q. B. 110.

[2] The holder of a negotiable instrument is normally presumed to have taken it *bonâ fide* and for value, but this presumption does not apply where it is shown that before reaching the hands of the holder the instrument has been obtained by theft or fraud (Anson, *Law of Contract*, 17th, ed., ch. IX). It has been held in Australia that, in an action to recover stolen *money* from a thief's payee, the owner must prove that the payee's title is defective (*Freedman* v. *Black* (1911), 12 Commonwealth 105).

[3] Cf. Pollock and Maitland, II, 154, 164.

[4] *Ardath Tobacco Co. Ltd.* v. *Ocker* (1930), 47 T. L. R. 177.

have lessened the need for this protection; and, accordingly, modern legislation has restricted its completeness. For now, even when the ownership of goods has been divested by a sale in market overt, it will be revested in the old proprietor if the thief, or the guilty receiver, be convicted of the stealing or receiving;[1] a rule intended to stimulate owners to activity in prosecuting. (The Court which convicts may itself issue an order for restitution (p. 259 *ante*), and so save the trouble of a civil action.[2] Such an order does not create any new right; the mere conviction has upset the effect of the sale in market overt.[3]) But a conviction does not revest the ownership retrospectively. Accordingly, though the present holder must give up the article to the old owner, yet if the former were not the original purchaser in market overt, the owner will have no right of action in "trover" against that original purchaser, or against any intermediate holders.

Hence after a conviction for larceny (but usually not after one for false pretences[4]) the owner may sue for restitution, except in the case of money or a negotiable security.[5] And even in this excepted case, if the thief has spent the proceeds of the theft in buying some article, the owner of the money may seize that article, and the thief

[1] Larceny Act, 1916, s. 45 (1). This rule as to Larcenies does not extend to misdemeanors of False Pretences or of Fraudulent Conversion.

[2] But if notice be given of an appeal against the conviction, both the revesting and the restitution order are thereby suspended and, whether notice of appeal is given or not, the question of a restitution and revesting order is suspended for ten days unless the convicting Court otherwise orders, 7 Edw. 7, c. 23, s. 6.

[3] *Scattergood* v. *Sylvester* (1850), 15 Q. B. 506. [4] See p. 290 *post*.

[5] Under the Factors Act, 1889, however (52 and 53 Vict. c. 45), a mercantile agent in possession of goods with the consent of the owner is able, by a disposition to a *bonâ fide* purchaser, to give as good a title as the owner can give. Even though the mercantile agent has obtained the goods by larceny by a trick, he would probably for the purposes of this act be held to be in possession with the owner's consent, *Folkes* v. *King*, [1923] 1 K. B. 282 *per* Bankes and Scrutton, L.J.J.; *London Jewellers Ltd.* v. *Attenborough*, [1934] 2 K. B. 206, but see also *per* Atkin, L.J. in *Lake* v. *Simmons*, [1926] 2 K. B. 51, 72.

cannot recover it from him.[1] For an owner may "follow[2] his money" even into the subsequently purchased goods which represent it;[3] for in the Larceny Act,[4] 1916, the word "property" includes not only the property originally possessed, but also any property into or for which it has been converted or exchanged. An innocent purchaser,[5] against whom a restitution order is made, may ask the court to compensate him by returning him, out of any moneys that have been taken from the prisoner on his apprehension, the amount of the price which he had paid.[6]

It will be seen that the rules which we have explained do not include any provisions for cases (1) where a thief, though really guilty, has been acquitted, or (2) where further property is claimed as stolen but has not been included in the indictment, or (3) where stolen property has been recovered by the police, but the thief has not been arrested. Accordingly the Police Property Act, 1897 (60 and 61 Vict. c. 30), has given more extensive powers; by enabling Courts of Summary Jurisdiction to order the delivery of any property, which has come into the possession of the police "in connection with any criminal charge", to anyone who appears to be the owner. After six months from the date of such an order, this person will become indefeasible owner.[7]

[1] *Cattley* v. *Lowndes* (1885), 2 T. L. R. 136. Cf. 17 Q. B. D. at p. 601.

[2] But not as far as a *bonâ fide* receiver for value, see p. 260 *ante*.

[3] But after a conviction for the theft of a blank *cheque-form*, an order cannot be made for the restitution of the money which the thief obtained by forging thereon a *cheque* and cashing it; for there is no direct "representation".

[4] s. 46 (1). [5] *Ibid.* s. 45 (3).

[6] In the case of a Pawnbroker with whom the stolen goods have been pledged for not more than £10, the convicting court has still greater power of compensation; for it may make the restitution order *conditional* upon the owner's repaying the loan, or part of it, to the pawnbroker. (If the owner sued the pawnbroker in a civil court, no such condition could be imposed *there*.) The court will consider whether there has been carelessness on the part either of pawnbroker or of owner. But there is no such general power where the loan, on the individual pledge, exceeds ten pounds.

[7] The Police should always make an application to the Court where there are conflicting claims to property, *Betts* v. *The Receiver for the Metropolitan Police District*, [1932] 2 K. B. 595.

CHAPTER XIV

EMBEZZLEMENT

early as 1529 (21 Hen. 8, c. 7) the criminal liability of vants[1] was extended to cases in which their master had ivered (not into their mere custody but) into their full ·gal" possession any valuable goods to be kept by them bailees for him. The "imbezilment" of such goods by :m was made a felony. But where goods were received a servant into his legal possession on his master's :ount, not from that master himself but from some rd person, who wished to transfer the possession of :m (whether with or without the ownership) to the ster, the statute did not apply. In such a case the iveror has ceased to have any possession of the goods; ile, on the other hand, they have not yet reached the ssession of the master; and they thus are for the time ng in the servant's own possession. There they will ıtinue until he either actually delivers them to his ster, or constructively does so by consenting to hold :m as a mere "custodian". Until then, he accordingly ınot commit larceny of them. (Yet, somewhat in-ısistently, it is held by our civil courts that this ivery to a servant, by a stranger, gives the master such ossession, as against *third* parties, as entitles him to sue /one for damages who commits a trespass to the goods, :n whilst they are still in the servant's hands.[2]) Ac-dingly if a bank cashier, on receiving money at the ınter, does not put it into the till, but pockets it and :s it for his own purposes, he commits no larceny. It l not reached the possession of the bankers; he there-

[1] *Ante*, p. 215.

[2] Pollock and Wright, *Possession in the Common Law*, p. 130; 1 Hale P. C.

ore cannot legally be said to have "taken" it from them. Such a doctrine exposed employers to risks so great that mmediately upon its definite establishment in 1799 by he case of *Rex* v. *Bazeley*[1] Parliament took action. A tatute[2] was passed, which made it felony for any servant r clerk to embezzle money or goods thus received into is possession for his employer, although they had not eached the employer's own actual possession. (The words *mbezzle* (or *imbezil*) and *bezzle* had been in use since at east the fourteenth century, as meaning "to make away with"; usually connoting some degree of clandestinity.[3]) The enactment now in force as to this crime[4] provides hat:

"Every person who, being a clerk or servant, or person employed in the capacity of a clerk or servant, fraudulently embezzles the whole or any part of any chattel, money, or valuable security, delivered to, or received or taken into possession by, him for, or in the name, or on the account, of his master or employer. . .shall be guilty of felony".[5]

As he occupies a fiduciary position, he is liable to a higher punishment than that of simple larceny. He may be sentenced to penal servitude for any term not exceeding fourteen years and not less than three years; or to be imprisoned for any term not exceeding two years, with or without hard labour, and—if a male under the age of

[1] 2 Leach 835 (K. S. C. 305).

[2] 39 Geo. 3, c. 85. Stephen, *History of Criminal Law*, III, 152.

[3] The derivation is uncertain. Prof. Skeat suggests a connection with *mbecile*, and the idea of diminishing by a purloining; but Dr Murray races it to the French *besillier*, to ravage. The legal use of the term is lmost exclusively limited, at the present day, to the statutory felony xplained on this page. For its use in A.D. 1353, see K. S. C. p. 219.

[4] Larceny Act, 1916, s. 17.

[5] The same section makes it similarly a felony for any one employed in he public service or in the police to embezzle, or fraudulently apply, any hattel, money or valuable security that has been entrusted to, or received r taken into possession by, him in his employment. Embezzlement by fficers or servants of the Bank of England of bank notes or warrants is felony punishable with penal servitude for life (Larceny Act, 1916, . 19).

ixteen years—with or without being once privately whipped (Larceny Act, 1916, ss. 17, 37).

The crime of Embezzlement presents three points for ur consideration: (1) the persons who can commit the ffence; (2) the property on which it can be committed; nd (3) the mode of commission.

(1) As to the first of these, the question, Who is a clerk r a servant?—the latter term here including the former —often presents great difficulty in practice. If *A* is mployed by *B* to do work for him, he is not necessarily 's servant, but may be merely an agent, an "independent ontractor".[1] He will not be a "servant" unless the greement, between himself and *B*, puts him so completely nder *B*'s control that he must obey all lawful orders hat *B* may give him in connection with the employment;[2] *e.* *B* can tell him not only what to do, but even how to o it.[3] To ascertain whether or not the contract between he parties did create so complete a control, we must first nquire if its terms were embodied in a written document. f they were, it will be for the court to determine whether r not they established this full control. But if the ontract was an oral one, then it is by the jury that the uestion must be determined. In determining it, they ay have to take into consideration a variety of points, o one of which is of itself absolutely conclusive. Some- hing will depend on (*a*) the nature of the employment; hus a commercial traveller usually is a servant, whilst an nsurance collector or a debt collector usually is not.[4] gain, it is important to notice (*b*) the amount of time

[1] Cf. Pollock, *Law of Torts*, 13th ed., ch. III.

[2] *Reg.* v. *Negus* (1873), 2 C. C. R. 34 (K. S. C. 306).

[3] "You can bid your *cook* not to fry the potatoes but to mash them; ut your *dentist* you can't prevent from doing many disagreeable things hich he is sure to do" (Sir John Simon).

[4] As to taxicab-drivers, see *Smith* v. *G. M. C. C. Ltd.*, [1911] A. C. 188. n London they are usually not servants but pay the cab-owner a ercentage of the takings; dishonestly to pay less is a Fraudulent onversion, see p. 272 *post*.

which it was agreed should be devoted to the employment. That *A* was to give the whole of his time to *B* is strong evidence of his being a servant, though it is not conclusive. Yet, on the other hand, it is not essential; for a true servant may also work for himself, or even for other masters. He may even have been employed by the prosecutor for merely one solitary transaction; and, indeed, in principle, the relationship of master and servant is merely one of present fact, and may exist where there is no contract binding the servant to go on serving any longer than he likes.[1] Another matter for consideration is (*c*) the mode of payment. A periodical salary or wage is some evidence of the recipient's being a servant;[2] hence it is common for societies to pay their treasurers a nominal yearly sum, such as a shilling, to secure the protection of the law of embezzlement. Conversely, payment by commission, or by share of profits, tends to disprove the existence of any such relation as that of master and servant. But neither fact is at all conclusive.

(2) Passing to the property concerned, we must notice that the Larceny Act limits the offence to the appropriation of such articles as have been received by the prisoner "for, or in the name of, or on the account of, his master or employer". Thus a servant can commit an embezzlement only of things that he has received *as* servant. A shopman who sells such goods as he is authorised to sell—or a workman who executes for his master's customer, and with his master's tools, work which he is authorised to execute and receive payment for—will be guilty of embezzlement if he appropriates the money paid by the customer.[3] But a servant cannot embezzle anything which he obtained by doing an act that was outside his authority. Hence if a gentleman's coachman takes it on

[1] *Reg.* v. *Foulkes* (1875), 2 C. C. R. 150 (K. S. C. 309).
[2] *Reg.* v. *Negus*, note 2, p. 266 *ante*.
[3] *Rex* v. *Hoggins* (1809), R. and R. 145 (K. S. C. 314).

himself to ply for hire with his master's carriage, and spends in drink the coins so earned, he does not commit embezzlement of them.[1] Or if a woman, employed in a shop only to act as cashier, should take it upon herself to sell ribbons at the counter, and should appropriate the prices paid to her for them, she will not be guilty of any embezzlement of the money (though she will have committed a larceny of the ribbons themselves[2]). Similarly, if a servant forges a cheque in the name of his master, and cashes it, he does not receive the coins in his capacity of servant, and therefore does not commit embezzlement by making off with them.[3] It is not necessary that the person paying money to a servant should pay it on account of the master, or even that he should know of the master's existence. It is sufficient that the servant receives the money in his capacity as servant on account of his master.[4]

A servant, as we have already said, can only "embezzle" what he has received *for* his master. It is not an embezzlement, but a larceny, for him to appropriate money which he has received *from* his master; and this even though it did not come to him from the master directly, but only through the hands of some fellow-servant.[5] Yet if, through the same fellow-servant, he had received money remitted for their master by some stranger, he can commit embezzlement of this money; for it has not yet reached his master's possession, but is stopped by him whilst still on its way to the master.[6] But if once he had put this money into his master's till,[7] his subsequently taking it out again and appropriating it would be a larceny

[1] *Per* Blackburn, J., in *Reg.* v. *Cullum* (1873), 2 C. C. R. 28 (K. S. C. 311).
[2] *Reg.* v. *Wilson* (1839), 9 C. and P. 27 (K. S. C. 313).
[3] *Reg.* v. *Aitken* (1883), C. C. C. Sess. Pap. XCVII, 336 (K. S. C. 315).
[4] *Rex* v. *Grubb*, [1915] 2 K. B. 683.
[5] *Rex* v. *Murray* (1830), 1 Moody 276 (K. S. C. 318).
[6] *Reg.* v. *Masters* (1848), 1 Den. 332 (K. S. C. 319).
[7] Cf. *Rex* v. *Sullens* (1826), 1 Moody 129 (K. S. C. 320).

and not an embezzlement. So would the conduct of a person who should remove a load of straw after once he had delivered it on his master's premises[1] or even had merely put it into a cart, or a barge, that belonged to (or was possessed by) his master.

These illustrations shew vividly how fine a line often has to be drawn in determining whether it is a larceny or an embezzlement of which a servant has been guilty. The doctrine of possession is so subtle and technical that it frequently is hard to say for which of the two offences a man should be indicted; and failures of justice used often to arise in consequence. But they are now rare; as the absolute necessity of accuracy on this point is removed, so far as the indictment is concerned. The Larceny Act, 1916, provides, by s. 44 (2), that if, on a charge of stealing, the actual crime committed prove to have been an embezzlement (or *vice versâ*), the jury may convict of the crime actually proved, instead of the crime originally charged. But this still leaves the difficult duty of saying which one *was* proved.

(3) Turning to the mode of committing the offence, we must note that, as embezzlement is committed without any change of possession, the fact of a "fraudulent" appropriation is often hard to prove. It may be shewn by absconding with the money,[2] or by denials of having ever received it, or by any really wilful omission to pay it over. But the mere fact of omission, as it may have been due to pure carelessness, does not suffice to shew an appropriation.[3] Still less does the mere fact of there being a deficiency in the servant's accounts; *i.e.* his not having actually credited to himself, in his books, disbursements sufficient to exhaust all the cash he has received. For he

[1] *Reg.* v. *Hayward* (1844), 1 C. and K. 518 (K. S. C. 321).

[2] *Rex* v. *Williams* (1836), 7 C. and P. 338 (K. S. C. 322).

[3] *Rex* v. *Jones* (1837), 7 C. and P. 833 (K. S. C. 322). So, besides proving non-payment, there should also be proved non-entry in his accounts.

may merely have lost it by negligence; and negligence, however gross, is not a criminal dishonesty.[1] And even if he has spent it, there is nothing to shew that he did not spend it on his master's account. Moreover, when it is proved that there must have been some really dishonest appropriation, this proof will not be enough so long as the theft is only shewn to have produced a "general deficiency".[2] There must further be evidence that the particular amount specified in the indictment was appropriated, and at the particular date and place also there specified. For otherwise the prisoner would have no means of securing himself the protection of the plea of *autrefois convict* or *autrefois acquit*,[3] in case of his being prosecuted a second time for this same charge.

It is easy to understand that dishonest clerks often escape on indictments for embezzlement, because of the difficulty of thus proving an actual appropriation; even where it is clear that money has been received by them, and detained without their making any entry or other acknowledgment of the receipt. Hence in 1875, by a measure introduced by Sir John Lubbock but commonly known as Lopes' Act,[4] it was made a misdemeanor, punishable with seven years' penal servitude, for a clerk or servant wilfully, and with intent to defraud, to alter, or make a false entry[5] in, or omit a material particular from, any account of his master. An indictment for this offence of false accounting is often useful where a clerk to whom a customer has paid money is suspected of stealing it, but no more can be actually proved than that he has never credited the customer with the amount. If, however, his books do shew correctly the sum which he ought

[1] *Lanier* v. *Rex* (1914), 24 Cox 53.

[2] *Reg.* v. *Lloyd Jones* (1838), 8 C. and P. 288, and cf. note 5, p. 271 *post*.

[3] *Post*, p. 561.

[4] 38 and 39 Vict. c. 24.

[5] *E.g.* even tilting a taximeter-flag, so as to make the meter cease to record, *Rex* v. *Solomons*, [1909] 2 K. B. 980.

to have in hand, the fact of his not really having that amount, ready to hand over, does not render the entry a "false" one within this statute.

Servants and clerks are far from being the only persons whose fiduciary position gives them opportunities for committing acts of dishonesty which, in the common law, were treated as deprived of legal criminality by those very circumstances of trust which aggravate their moral heinousness. We have already alluded[1] to the case of an employer's being defrauded by some agent whose engagement has not placed him under such a control as would render him a "servant", and so bring him within the law of embezzlement. And a trustee, since he has possession, and even legal ownership, of the things he holds for his *cestui que trust*, could not by appropriating them commit any offence against the common law. It altogether ignored the existence of Trusts, even for civil purposes; not regarding a breach of trust as creating any debt, still less any crime.

Happily, in recent times, a much-needed extension of the criminal law has been effected in these respects. Thus, as to appropriation by agents, some limited provisions were initiated so far back as 1811; and have been expanded into a comprehensive form in the Larceny Act, 1916.[2] This statute renders it a misdemeanor for any person fraudulently[3] to convert[4] to his own use, or to that of any other person, any property—or the proceeds of any property—which he (whether solely or jointly with some other person):

(1) has been entrusted with[5] in order that it, or any part

[1] *Ante*, p. 266.

[2] s. 20 (1) iv. It covers realty as well as personalty.

[3] *I.e.* wilfully and knowingly; cf. p. 275 note 6.

[4] Mere non-payment will not suffice.

[5] He may be so "entrusted" even though the owner of the property does not know of his existence and has no intention of entrusting the property to him. It is enough that he *becomes* entrusted with it,

of it, or any proceeds of it, may be retained by him in safe custody,[1] or may be applied or paid or delivered by him for any purpose or to any person;[2] or

(2) has received for, or on account of, any other person.[3]

Fraud is necessary. Pure carelessness, however gross, will not render an agent indictable; *e.g.* leaving the article in a railway carriage; or a commercial traveller's mistaking the amount he is entitled to deduct for journeying expenses. The maximum punishment of this misdemeanor is higher than that of simple larceny; being penal servitude for seven years; but a fine is possible.[4] This section does not extend to mortgages of either real or personal property. Nor does it extend to trustees "under any express trust created by a deed or will". Most equitable owners must thus rely upon other clauses;[5] under which a trustee of either real or personal property is punishable with seven years' penal servitude, if, with intent to defraud, he converts or appropriates to any other purpose than that of his trust, any property which has been given to him on an express trust *created in writing*. This extension of the criminal law to the protection of

Rex v. *Morter* (1927), 20 Cr. App. R. 53. The indictment must not relate to a general deficiency extending over a period, unless there was a duty on a specific date to hand over a lump sum received, *Rex* v. *Sheaf* (1925), 89 J. P. 207.

[1] *E.g.* furniture under a "hire and purchase" agreement.

[2] *E.g.* a lodger is sent by his landlady with £1 to pay her rates; or an estate-agent collects a tenant's rent; or a stockbroker receives from a client £100 to buy Consols with; or the weekly money for the alms folk is given to the almoner of the almshouse; or a commission-agent receives to sell.

[3] See p. 267 *ante* and cf. note 5, p. 271 *ante*.

[4] The statute, by s. 20 (1) ii, similarly punishes the misdemeanor of any director or member or officer of a corporate body fraudulently misappropriating any of the corporate property. It would apply even to a director who held all the shares in the company. False accounting and false statements by directors and officers of companies are punishable under the Larceny Act, 1861 (24 and 25 Vict. c. 96), ss. 82 to 84; see *Rex* v. *Kylsant* (*Lord*), [1932] 1 K. B. 442; *Rex* v. *Bishirgian* (1936), 52 T. L. R. 361.

[5] Larceny Act, 1916, ss. 21, 46 (1); following the Larceny Act, 1861.

mere equitable ownership was originally an experiment so novel that it had to be restricted closely. Hence no trustee[1] can be thus prosecuted without the leave of the Attorney-General, and if proceedings have already been begun in any civil court in respect of the breach of trust, the person who has taken them must obtain the leave of that court before beginning a criminal prosecution. Moreover, the criminal liability thus created is not to prejudice any agreement which the trustee may have entered into for making good the loss caused by his dishonesty.[2] So that even a bargain by him to make restitution in consideration of not being prosecuted, would appear to be rendered enforceable, in spite of the ordinary rules as to contracts that are against public policy, and also unindictable, in spite of the ordinary rule against "compounding" a misdemeanor.[3] A remarkable clause in the Larceny Act of 1861 (s. 85), applying not only to trustees but also to agents and many other similar fiduciary misdemeanants, exempts them from criminal prosecution if the misdemeanor was first disclosed by them in the course of civil proceedings instituted against them by the person defrauded; but removes their privilege as to refusing to incriminate themselves when examined in these civil proceedings. Similarly, the offenders' disclosures in Bankruptcy proceedings are inadmissible as evidence against them on prosecutions for this peculiar group of misdemeanors (4 and 5 Geo. 5, c. 59, s. 166); cf. s. 43 (3) of the Larceny Act, 1916.

It is a misdemeanor punishable with seven years' penal servitude for a factor or agent fraudulently to obtain advances upon goods or documents of title to goods entrusted to him for the purpose of sale or otherwise.[4]

[1] s. 21 (*a*) and (*b*).
[2] Larceny Act, 1861, s. 86.
[3] See p. 321 *post*.
[4] Larceny Act, 1916, s. 22.

The Forms of Theft

It may be convenient, at this stage, to summarise the chief results which, step by step, we have arrived at, in discussing the historical development of the English law of theft. Four leading classes of cases must be carefully distinguished:

1. The owner gives up no rights at all; and the article is taken entirely without his consent. This clearly is Larceny.

2. The owner gives up physical possession (*i.e.* "custody"), though retaining legal possession; and then the custodian appropriates. This is Larceny, even at common law.

3. The owner gives up both physical and legal possession; and then the possessor appropriates. Here:

   (i) If only possession is obtained *animo furandi*, then there is Larceny by a trick (see p. 235 *ante*).

   (ii) If possession were obtained *bonâ fide*, then the subsequent appropriation is no crime at common law.

   But by statute, even if possession were obtained *bonâ fide*, yet if it had been obtained

   (*a*) by a clerk or servant, receiving for his master from a *third* person, appropriation by him is an Embezzlement;

   (*b*) by a bailee who is to deliver up the specific article, appropriation by him is a Larceny, under statute;

   (*c*) by an agent who comes within the Larceny Act, 1916, appropriation by him is a misdemeanor of Fraudulent Conversion.

4. The owner gives up not only physical and legal possession, but also ownership. This cannot be a Larceny

(either at common law or by statute), or an Embezzlement. But it may be the misdemeanor of an "Obtaining by false pretences",[1] or of Fraudulent Conversion.[2]

Our account of the closely allied offences of common law larceny, statutory larceny, "quasi-larceny", and embezzlement, will have enabled the student to appreciate the late Mr Justice Wright's criticism that "The English law of criminal misappropriation has been... extended piecemeal, by fictions and by special legislation; ...and the resulting mass is at once heterogeneous and incomplete."[3] The valuable consolidating Act of 1916[4] is, we may hope, a basis for a really scientific reform such as was long ago attempted in the Parliamentary efforts of 1878–1880 to enact a Criminal Code. This code proposed to abandon the term Larceny and to replace it by that of "Theft"; which it defined[5] as being—"Fraudulently, and without colour of right, taking or...converting[6] to the use of any person anything capable of being stolen, with intent to deprive the owner permanently thereof, or to deprive any person having any special property or interest therein permanently of such property or interest". And things capable of being stolen were made to include "all

[1] See p. 277 *post*.

[2] *Ante*, p. 271.

[3] *Draft Criminal Code for Jamaica*, p. 110.

[4] Which it was proposed to supplement by a like consolidation of the law relating to those minor thefts that are punishable only summarily.

[5] See Stephen, *History of Criminal Law*, III, pp. 162–168. It is instructive to compare with this the definitions of Continental codes. *Italian Penal Code* of 1890, s. 402: "To possess oneself of a movable thing belonging to another person, for the purpose of deriving advantage from it, and take it away from the place where it is, without that person's consent." *German Penal Code* of 1870, s. 242: "To take away a movable thing which is not the taker's own, from some other person, with the intention of illegally appropriating it." Still briefer, though earlier, is the French definition (*Code Pénal*, s. 379), "Whoever has fraudulently taken away a thing which does not belong to him is guilty of theft."

[6] Fraudulent Conversion was defined by Stephen, J., as "A conversion with no claim of right, and with the intention to deprive the owner of his property permanently"; 16 Cox 234.

tame animals, all confined wild animals, and all inanimate things which either are, or may be made, movable (except things growing out of the earth and not worth more than a shilling)". No carrying away was to be required; and no change of possession; and the very act of rendering the thing movable might suffice to constitute a Theft.

CHAPTER XV

FALSE PRETENCES

THE common law, as we have seen, treated Dishonesty as a felonious crime only when it took the form of an actual wrong to the owner's Possession.[1] But it also regarded dishonesty as sufficiently affecting the public to be made criminal, though only in the degree of misdemeanor, whenever an owner had been induced to alienate his goods or money to some knave by using any permanent Thing that was calculated to deceive, not merely him, but people in general. The protection of public trade seemed to require this restraint upon the use of false weights, measures, hall-marks, or even dice. But it was no offence to get a man to pay money, or give away property, by a false Act, like shuffling genuine cards unfairly, or telling him some lie. When *A* got money from *B* by pretending that *C* had sent him for it, Chief Justice Holt grimly asked, "Shall we indict one man for making a fool of another?" and bade the prosecutor to have recourse to a civil action.[2] But a statutory provision for the punishment of mere private cheating was made in 1757; and is followed in the Larceny Act of 1916, under which it is an indictable misdemeanor to obtain from any person by any false pretence any chattel, money, or valuable security, with intent to defraud.[3]

Under this enactment five points arise for our consideration: (1) the Right obtained, (2) the Thing which is the subject-matter of that right, (3) the Pretence, (4) its Effect, and (5) the Intent.

[1] *Ante*, p. 210.

[2] *Reg.* v. *Jones* (1703), 2 Ld. Raym. 1013. Cf. *Rex* v. *Wheatley* (1760), 1 W. Bl. 273 (K. S. C. 2).

[3] s. 32 (1).

(1) *The Right.* The offence before us is committed when persons get goods dishonestly by fraudulently inducing the owner to make over to them at once the immediate ownership in those goods. Indeed it is now established[1] that it is sufficient if the deliveror, without giving ownership, gives a power to pass the ownership. For a purchaser, buying under this power, will buy by authority of the owner.

We have already seen that for such persons the law of larceny provides no punishment. Sometimes, however, where frauds of this kind are attempted, they do unexpectedly turn out to be larcenies, because of some legal difficulty which has prevented the ownership from actually passing. One such difficulty may be that the deceit, which has been practised, related to facts so fundamental to the intended alienation that error as to them will render the transaction absolutely null and void, and thus prevent the supposed alienation from effecting any transfer of ownership at all. In such cases the carrying-off of the goods will, as we have seen,[2] amount to "larceny by a trick". But wherever the alienation is not thus utterly void from the outset, there will be no larceny except in those cases where the owner intended merely to give possession, and the taker intended to steal.[3] And, in the great majority of cases of fraudulent obtaining, the fraud does not relate to a fundamental fact, but to some merely extraneous one, errors as to which do not render the transaction void but only voidable.[4] Ownership therefore passes in such cases, notwithstanding the false

[1] *Folkes* v. *King*, [1923] 1 K. B. 282; *Whitehorn Brothers* v. *Davison*, [1911] 1 K. B. 463. *Lowther* v. *Harris*, [1927] 1 K. B. 393; *London Jewellers Ltd.* v. *Attenborough*, [1934] 2 K. B. 206. Contrast *Heap* v. *Motorists A. A.*, [1923] 1 K. B. 577; power merely to pass to a specified person who does not exist.

[2] p. 236 *ante*.

[3] p. 235 *ante*.

[4] Anson, *Law of Contract*, 17th ed., ch., VI. Pollock and Wright, *Possession in the Common Law*, p. 100.

pretence; though the defrauded owner has a right to rescind the alienation and to cause the property to revest in him. Yet, even should he do so, this revesting will have no retrospective operation on the thief's criminal liability; and thus will not convert his conduct into a larcenous taking.[1] Moreover even this right to rescind and revest will be extinguished if, before it has been exercised, the thief should dispose of the goods for valuable consideration to some innocent[2] purchaser; and, against such a purchaser, even an ultimate conviction of the offender will not suffice to revive the original owner's rights.[3]

Another cause which may similarly defeat an intended alienation, and prevent ownership from passing, is that the person who attempted to alienate had not the legal power to do so. Thus if a man tries to obtain the property in goods by a fraud practised, not upon the owner himself, but upon his servant, and if that servant had only a limited authority to dispose of these goods, and one too limited to cover the transaction in question, then the carrying them off will be a larceny.[4] Hence, as a postmaster receives from London specific instructions for all "money orders" (unlike mere "postal orders") which he ought to cash, the money he pays on a forged money order is taken from him by a larceny. But, on the other hand, money paid by him on a forged "postal order" (with regard to which he receives no specific instructions), would become the property of the payee, and accordingly would be obtained by false pretences, and not by a larceny. (The general extent of the authority of Post Office servants to part with the moneys of the Postmaster-General has not yet been precisely settled; *e.g.* it is uncertain whether it covers payments made by them by

[1] *Per* Wills, J., in *Reg.* v. *Clarence* (1889), 22 Q. B. D. at p. 27.

[2] And the purchaser will not have to prove his innocence; the owner must disprove it.

[3] Sale of Goods Act, 1893 (56 and 57 Vict. c. 71), s. 24 (2).

[4] *Reg.* v. *Stewart* (1845), 1 Cox 174.

spontaneous mistake.[1]) And as every bank cashier has a full and general authority to part with the money entrusted to him by his employer for the purposes of business, it follows that any coins paid by him in cashing a forged cheque become the property of the recipient. The latter, therefore, obtains them by false pretences and does not commit larceny.

It is not essential that the right obtained should be that of a full ownership. It consequently appears to be sufficient for this offence that the victim is deprived of his whole[2] indefeasible interest in the thing, even though he be no more than a bailee.[3] Hence the owner himself may be convicted of obtaining the thing from his bailee by false pretences.[4] But apparently the offence cannot be committed by obtaining a bare right, without delivery (either actual or constructive). But manual possession is unnecessary; transfer of control suffices; cf. p. 291. Yet there is no decision, or even dictum, that would support an indictment for obtaining by false pretences when there has been no delivery. But so long as there has been a delivery, it is not necessary that it should have been made to the same person who made the false pretence. For s. 32 of the Larceny Act, 1916, makes it sufficient if the prisoner's pretence has caused a delivery or payment either to himself or "to any other person", whether for the prisoner's own use or anyone else's.

But in false pretences, just as in larceny, there must be an intention to deprive the injured owner of his whole interest (or of a right to divest that whole interest), and not merely to deprive him of the temporary use of his interest. Thus to obtain by fraud the loan of a horse for a

[1] *Reg.* v. *Middleton* (1873), 2 C. C. R. 38 (K. S. C. 266); see p. 239 *ante*.

[2] Obtaining an *un*divided share with him does not suffice; D. and B. 348.

[3] Cf. p. 224 *ante*.

[4] *Reg.* v. *Martin* (1838), 8 A. and E. at pp. 485, 488.

day's ride does not come within the statute.[1] Objection has consequently been taken to the ruling in *Reg.* v. *Boulton* (1849)[2]—where a conviction was upheld for obtaining a railway ticket by false pretences—on the ground that the railway ticket is to be restored to the Company when the journey is over, and therefore that a full criminal "obtaining" of the property in it never took place. But surely a person who, on abandoning his idea of making the journey, destroys his ticket, does not infringe any right of the railway company. If so, their only right must be a merely contractual one, against him alone (viz. a right that, *if* he should actually take the journey, he will give up the ticket to them); and not a right of ownership in the ticket itself.

(2) *The Thing.* What we have just said suffices to shew that the legal distinction between larceny and a mere obtaining by false pretences is often hard to trace. The two offences being so closely akin, it is not surprising that the technicalities of the older one—as, for instance, with regard to the subject-matters capable of being stolen—should have affected even the more modern of the two. Thus an indictment for obtaining by false pretences will not lie unless the thing obtained were either (1) money or (2) a valuable security, or else (3) such a chattel as was a subject of larceny at common law.[3] Thus the offence does not include a fraudulent obtaining of real property, or of anything "savouring" of the realty,[4] or of those chattels which are considered as of insufficient value for

[1] *Reg.* v. *Kilham* (1870), 1 C. C. R. 261 (K. S. C. 347). Cf. p. 241 *ante*. A so-called "loan" of money is not a *commodatum* but a *mutuum*, and so does pass the entire ownership.

[2] 1 Den. 508; approved in *Rex* v. *Chapman* (1910), 4 Cr. App. R. 276.

[3] *Ante*, pp. 227, 229.

[4] *Reg.* v. *Pinchbeck* (1896), C. C. C. Sess. Pap. CXXIII, 205 (K. S. C. 355); *Reg.* v. *Robinson* (1859), Bell 35 (K. S. C. 357). By the Law of Property Act, 1925, s. 183 it is a misdemeanor for a vendor with intent to defraud to conceal from a purchaser instruments of title or to falsify a pedigree.

larceny (*e.g.* dogs); yet a railway ticket, in spite of its being evidence of a mere chose in action (*ante* p. 230), may be the subject of an indictment for obtaining it by false pretences.[1] So, again, if what was obtained by the false pretence were not a Thing at all, but only the enjoyment of lodgings[2] or an Act of service, the offence is not committed; as where a man secures a ride in a train by saying, "I am a season-ticket holder." It may, however, be noted that under the London Cab Act, 1896,[3] it is a specific petty offence, punishable on summary conviction, to hire a cab *in London* with intent to avoid payment of the lawful fare. And the Larceny Act, 1916, by s. 32, makes it an indictable misdemeanor to procure by false pretences the execution of any valuable security.

(3) *The Pretence.* The false representation may operate either by fear of detriment or by hope of benefit. It may be made expressly in words (either written[4] or spoken); but it is quite sufficient that it can be even implied from them, or from mere silent conduct.[5] But the words or the conduct must be fairly capable of conveying the false meaning; and must moreover have been intended[6] to convey it. (Yet in a *commercial* court it would be no defence to say "I never meant that construction to be put on my words.") Thus for a mere huckster to give an order for goods to an extent so great that only a man in a very large way of business could require them, may amount to a false pretence; and so may the packing up of goods made by yourself in wrappers closely resembling those

[1] *Reg.* v. *Boulton*, *ante*, p. 281.

[2] *Rex* v. *Bagley* (1923), 17 Cr. App. R. 162.

[3] 59 and 60 Vict. c. 27.

[4] Even *written* words must be construed by the jury, not the judge.

[5] For representation by omissions see *Rex* v. *Kylsant* (*Lord*), [1932] 1 K. B. 442; *Rex* v. *Bishirgian* (1936), 52 T. L. R. 361.

[6] As where a hawker of rings announces them as "all marked" meaning his hearers to understand "hall-marked". Or where a man at Tottenham, who had served three terms of penal servitude, set up as a builder, and (with literal truth yet with intentional deceit) headed his letter-paper: "Employed fourteen years in Government work."

used by some well-known firm of manufacturers.[1] Again, without any deceptive words at all, the mere act of wearing a cap and gown, in a University town, may be enough to constitute a representation that you are a member of its University.[2] Similarly, quite apart from the use of any words asserting the genuineness of the article, there would be a false representation in passing a note of a wound-up bank; or, again, in offering for sale a sparrow painted as a canary (such as the late Lord Justice Mathew described to be a "gaol-bird").[3]

The pretence must relate to some fact that is either past or present. A statement purely affecting the future will not suffice. For all future events are obviously matters of conjecture, upon which every person should exercise his own judgment. If the buyer says, "Send me the meat and I will pay to-morrow", it is for the butcher to determine whether he will part with the meat on the strength of this promise. If, therefore, the customer fails to fulfil his promise, the butcher cannot prosecute him for obtaining the meat by false pretences, but can only sue him in a civil action to recover the price of it. In like manner, to borrow money under the pretence that you will use it in paying your rent, is not an obtaining by such a false pretence as will come within the statute. This distinction between Present and Future is, however, now being undermined by the principle that representations, which do not expressly mention anything but the future, may nevertheless imply a representation about the present; viz. a representation that the existing state of affairs is such that, in the ordinary course of events, the future occur-

[1] To use a false name in order to defraud by denying your identity is indictable; but not if used merely to *conceal* identity, *e.g.* a trade name or stage name.

[2] *Rex* v. *Barnard* (1837), 7 C. and P. 784 (K. S. C. 333).

[3] Or in offering, for sale, stolen goods, *Re Pinter* (1891), 17 Cox 497. Cf. 17 C. B., N. S. 723. But none in merely overcharging, where there is no fixed price, 13 Cr. App. R. 170.

rence mentioned will take place. Thus it has been held that sending the half of a bank-note, along with an order for goods, is not merely a promise that on a subsequent occasion the other half shall be sent, but implies also a representation that at the present time the sender already possesses that other half.[1] Similarly the familiar act of drawing a cheque—a document which on the face of it is only a command of a future act—is held[2] to imply at least three statements about the present:

(1) That the drawer has an account with that bank;

(2) That he has authority to draw on it for that amount;

(3) That the cheque, as drawn, is a valid order for the payment of that amount (*i.e.* that the present state of affairs is such that, in the ordinary course of events, the cheque will on its future presentment be duly honoured).

It may be well to point out, however, that it does not imply any representation that the drawer now has money in this bank to the amount drawn for; inasmuch as he may well have authority to overdraw, or may intend to pay in (before the cheque can be presented) sufficient money to meet it.

It has sometimes been suggested that when a man orders a meal at a restaurant he impliedly makes a representation as to his present ability, and present intention, to pay for it. But to treat every order for goods as if it impliedly contained the words, "I can pay", would render it dangerously easy for disappointed creditors to call in the law of False Pretences to the assistance

[1] *Reg.* v. *Murphy* (1876), 10 Ir. C. L. 508 (K. S. C. 338). "I will deliver the article" *may* thus involve representations that "I am now in a position to be then able to deliver it", and that "I now intend to deliver it". Cf. [1896] A. C. at p. 284.

[2] *Reg.* v. *Hazelton* (1874), 2 C. C. R. 134 (K. S. C. 336). The doctrine probably applies even to *post-dated* cheques.

of the law of Debt. Accordingly it is now settled[1] that the penniless man, who orders and eats a meal at a restaurant, does not thereby make any implied false statement about the present. But though his deceit relates only to the future, it is enough to constitute an "obtaining credit by fraud in incurring a liability" (which is a specific statutory misdemeanor under the Debtors Act, 1869[2]); although the credit given by the innkeeper was to last only until the end of the meal.

Where it is by the joint operation of several representations, that the prisoner has induced the owner to part with his property, the offence may be committed, even although some of them were mere promises about the future, if any one representation was as to a present fact. In other words, it is sufficient that the false representation of present fact was essential to the transaction; even though it alone would not have been enough to induce the owner to part with his property. Thus if a married man represents himself as unmarried, and proposes marriage to a woman, and thereupon obtains money from her for the pretended purpose of furnishing their house, he may be convicted of obtaining this money by false pretences.[3]

Again, even in the case of statements which clearly relate only to the present, it is often hard to say whether they are statements as to actual Facts or merely as to matters of Opinion; as in the case of a vendor's exaggerated eulogies of his wares. For in English law, as in Roman,[4] the license of trade has established as to "dealers' talk" the lax rule that "Simplex commendatio non obligat". In all bargaining there is usually a conflict

[1] *Reg.* v. *Jones*, [1898] 1 Q. B. 119.

[2] 32 and 33 Vict. c. 62, s. 13. Its maximum punishment is only a year's imprisonment, with hard labour. This enactment is useful where there is either (1) a "fraud" which is not a "false pretence", *e.g.* by mere reticence, as in *Reg.* v. *Jones*, or (2) "credit" not on alienation, but on a bailment, or for services, or for lodgings.

[3] *Reg.* v. *Jennison* (1862), L. and C. 157 (K. S. C. 324).

[4] Justinian's *Digest*, IV, 3. 37; cf. Benjamin on Sale, 7th ed., p. 464.

between the two parties, in commercial skill and general experience; and it would be perilous to employ the criminal law to regulate this conflict. For a man to represent himself as having "a good business", when he carries on no business at all, is clearly a false statement of a definite Fact. But a similar representation made by a man who has a business, however poor a one, will generally be a mere matter of Opinion.[1] A seller's misrepresentation of the weight of a sack of corn will concern mere matter of opinion, if the sale is for a lump sum; but will concern a fact so fundamental as to render it indictable, if the sale is by weight.[2] In the same way, to falsely represent an article as being silver—or to represent a chain as being of 15 carat gold, when it is really only 6 carat[3]—is a false pretence of fact; the real article being different in *substance* from the pretended article. Yet to represent plated spoons as being "equal to Elkington's A", has been held to be only exaggerated praise, a mere puffing; inasmuch as the person deceived did get plated spoons, differing only in *value* from what he had been led to expect.[4]

It seems[5] that even mere states of mind are to be regarded as "Facts" within the definition of the offence; so that an indictment will lie against a man for obtaining goods by a false statement of his present intention to do

[1] *Reg.* v. *Williamson* (1869), 11 Cox 328. Yet contrast *Reg.* v. *Cooper* (1877), 2 Q. B. D. 510 (K. S. C. 333).

[2] *Reg.* v. *Ridgway* (1862), 3 F. and F. 838.

[3] *Reg.* v. *Ardley* (1871), 1 C. C. R. 301 (K. S. C. 331).

[4] *Reg.* v. *Bryan* (1857), D. and B. 265 (K. S. C. 328).

[5] Cf. *Rex* v. *Bancroft* (1909), 3 Cr. App. R. 16. In *Hunt* v. *Battersby* (*The Times*, April 16, 1920) a railway servant obtained "falsely stating that it was for his wife" a privilege-ticket to which he was entitled for his wife but not for any one else. A Divisional Court held that there was a criminal false pretence. Lord Reading, L.C.J., said that the man had "the *intention* in his mind, at that time, to use the ticket for a person other than his wife. It was a false statement that he *wanted* the ticket for his wife". Avory, J., said "The false pretence was a pretence that the man bonâ fide *required* the ticket for his wife. Leaving out any intention, that was the false pretence of an existing fact."

a given future act. In *Reg.* v. *Gordon* (1889),[1] Mr Justice Wills inclined to think that such a merely mental fact would suffice. This accords with the celebrated dictum of Lord Bowen that "the state of a man's mind is just as much a fact as the state of his digestion".[2] But if such expressions of Intention are to be recognised as sufficient pretences, it will often be hard to distinguish between them and mere Promises, which (as we have seen[3]) are not sufficient.

(4) *The Effect.* The change of ownership must not merely have been preceded by a false pretence, but also have been actually *caused* by it, wholly or at any rate[4] in material part. The counsel for the crown should not omit to put an express question as to this.[5] When a shopkeeper is actually delivering goods on credit to *A*, no offence is created if *A* should *then* say falsely, "I am the Earl of *Z*".[6] Nor if the buyer of a sham gem relied, not on the seller's false assurance but on the (incorrect) report of a jeweller whom he consulted. Similarly, if a false representation had been actually made by the prisoner to the prosecutor's agents, but the agents never communicated it to the principal before he parted with his goods (so that it was not by it that he was led to act), there must be an acquittal. The same principle applies wherever the pretence did not in fact deceive the person to whom it was made; as in the frequent instances where, on the advice of the police, the recipients of a begging letter send money to the writer of it, in order to expose him. (In such cases, however, the prisoner may nevertheless be guilty of an Attempt to obtain by false pretences—which is (*ante*, p. 95) a common law misdemeanor.[7]) If, however, the

[1] 23 Q. B. D. 354 (K. S. C. 326).
[2] 29 Ch. D. 483; cf. *Angus* v. *Clifford*, [1891] 2 Ch. at p. 470.
[3] *Ante*, p. 283. [4] *Reg.* v. *West* (1858), D. and B. 575.
[5] For the actuation should be proved by direct evidence, not by mere inference from business-ways, *Rex* v. *Dargue* (1911), 6 Cr. App. R. 261.
[6] Cf. *Reg.* v. *Martin* (1859), 1 F. and F. 501 (K. S. C. 339).
[7] *Rex* v. *Light* (1915), 11 Cr. App. R. 111.

person was in fact actuated by the false pretence, it does not matter how credulous or how careless he may have been in accepting it; as where the defrauder professed to have the magical power of bringing back a missing person "over hedges and ditches".[1]

Even, however, where there is a causal connection between the pretence and the obtaining, the law will refuse to take cognisance of this causation if it be too remote.[2] But mere lapse of time does not necessarily amount to remoteness. And if the delivery of the article obtained was the object and aim of the false pretence,[3] there will be a sufficiently direct connection between the pretence and the obtaining, even though what was obtained immediately by the false pretence was not the delivery but merely a contract, the ultimate execution of which produced the delivery.[4] And this, even though the thing delivered was not in existence at the time of the pretence.[5] In the case of races, if a competitor, by making a false statement of his previous performances, obtain an undue allowance in a handicap, and thereby win a prize, such a false pretence will not be too remote from the obtaining of the prize to be indictable.[6] Had he not won the prize, the running the race would still have been indictable as an attempt to obtain the prize by false pretences; though merely entering for the race, without running, would probably have been too remote an act to constitute even an attempt.

(5) *The Intent.* It is not enough that the false pretence did obtain the thing, it must have been made with the purpose of obtaining, and of obtaining by Defrauding[7]

[1] *Reg.* v. *Giles* (1865), L. and C. 502. [2] Cf. *ante*, p. 92.

[3] Even if there was no express request for the article, the jury may still find that there was an implied one.

[4] *Rex* v. *Moreton* (1914), 8 Cr. App. R. 214.

[5] *Reg.* v. *Martin* (1867), 1 C. C. R. 56 (K. S. C. 344).

[6] *Reg.* v. *Button*, [1900] 2 Q. B. 597 (K. S. C. 342).

[7] *Rex* v. *Weeks* (1928), 20 Cr. App. R. 188; but as to direction to jury see *Rex* v. *Moss* (1931), 23 Cr. App. R. 132.

(*e.g.* not simply to rescue your own chattel from a wrongful possessor, or to get it as a joke and then promptly return it, or to hold it as security for a genuine debt). And it must moreover have been made, not by honest mistake, but with knowledge of (or *perhaps*[1] recklessness about) its falsity;[2] *e.g.* not merely by carelessly signing a paper without reading it. The offender's mere intention ultimately to make good the loss *if* he can, does not displace Fraud.[3]

Although the statutory offence of obtaining by false pretences is, as we have seen, only a misdemeanor, it is punishable as severely as petty larceny: viz. with penal servitude for not more than five years or less than three, or imprisonment, with or without hard labour, for not more than two years or (unlike larceny) with a fine.[4] After the famous Tichborne case, an Act was passed (37 and 38 Vict. c. 36) making false *personation*, for the purpose of obtaining either personal or real property (whether the property be actually obtained or not), a felony, punishable with penal servitude for life. An applicant for a policy of life insurance has been known to send for the medical examination another and healthier man to personate him.

On an indictment for false pretences, a prisoner may now be convicted—and convicted of that very misdemeanor—even though his offence be shewn to have really constituted a larceny; whilst on an indictment for larceny

[1] No criminal court has, as yet, decided this: but see 9 A. C. at p. 203, and 14 A. C. at p. 374. In a civil action of Deceit recklessness does suffice; see L. R. 4 H. L. at p. 79, and 14 A. C. at p. 368. Cf. *Rex* v. *Bishirgian* (1936), 52 T. L. R. 361.

[2] Such knowledge is *primâ facie* evidence of intent to defraud.

[3] Even if it be likely that he ultimately *will* be able, *Rex* v. *Carpenter* (1911), 76 J. P. 158; 22 Cox 618. See *Reg.* v. *Naylor* (1865), 1 C. C. R. 4; cf. *Rex* v. *Parker* (1916), 25 Cox 145. Lord Darling has expressed the opinion that an indictment would lie for defrauding even an intending criminal; as by selling him, for a poison, a harmless drug, *Reg.* v. *Brown* (1899), 63 J. P. 790.

[4] Larceny Act, 1916, ss. 32, 37 (4), 37 (5 *a*).

he may be convicted of false pretences.[1] The subtle distinctions between the two crimes have thus lost much of their practical importance.

A restitution order[2] may be had against the actual offender, or his *malâ fide* sub-purchaser, by any prosecutor who has actually become again the owner, *i.e.* who has legally rescinded the transfer. But the Sale of Goods Act, 1893 (56 and 57 Vict. c. 71, s. 24), provides that conviction for frauds not amounting to larceny shall not[3] by itself produce such a revesting as to defeat intermediate *bonâ fide* sales. Hence the courts are chary of granting restitution orders in cases of false pretences, for fear there may have been such a sale. Where, however, the former owner may lawfully disaffirm the transaction, a restitution order may be made.[4]

THE RECEIVING OF STOLEN PROPERTY

Having now completed our view of the various crimes by which an owner may be dishonestly deprived of his chattels, we may supplement it by an account of a crime that is likely to be committed in the course of the subsequent disposition of that property.

At common law the receiving of stolen goods with knowledge that they had been stolen was a mere misdemeanor. It was necessary that a larceny of the goods should have been committed; yet the receiver was not indictable as an accessory after the fact to this larceny (unless the receiving in some way assisted the thief's escape from justice), because it was not the thief, but only the goods, that he received. Subsequently, however, by

[1] *Post*, p. 554; but not where the indictment is for attempted larceny, 21 Cr. App. R. 172. See also 16 Cr. App. R. 53.

[2] *Ante*, p. 259.

[3] Cf. Larceny Act, 1916, s. 45 (2). But if, though the conviction were for False Pretences, the evidence established Larceny, the ownership does revest, *Rex* v. *George* (1901), 65 J. P. 729; so a restitution order can be made.

[4] *Rex* v. *George*, *supra*.

various statutes (whose provisions are now comprised in the Larceny Act, 1916[1]), the scope of the offence was greatly widened; by extending it to cases where the original act of dishonesty was a stealing or obtaining of the property "in any way whatsoever under circumstances which amounted to felony or misdemeanor". As to receiving the proceeds of a *non*-indictable theft, see the Act of 1861, *post*, p. 293.

The offence thus consists of "receiving[2] stolen goods, knowing them to have been stolen". This involves three points for consideration: (1) the receiving, (2) the thing received, (3) the guilty knowledge.

(1) There must have been some act of "receiving"; which involves a change of possession. It must therefore be shewn that the prisoner took the goods into his possession, actual or constructive. This cannot be the case so long as the original thief retains exclusive possession of them (though there may well be an amicable joint possession by a receiver and a thief together). But, as in all cases of possession, a person may "receive" without himself taking part in any physical act of receipt. Accordingly if stolen goods are delivered to the prisoner's servant, or wife, in his absence, but he afterwards does some act that implies an acceptance of the goods—as by removing them to some other part of his premises, or by striking a bargain about them with the thief[3]—he will then (though not till then) become himself a "receiver" of them. The mere fact that stolen jewels are in a man's house does not make his wife a constructive possessor of them; it is not as if she were wearing them.[4]

[1] s. 33 (1).

[2] For any purpose, even mere temporary custody or carrying. But an *innocent aim* excuses; *e.g.* to restore the goods to the owner, or to entrap the thief. As to goods stolen abroad, see p. 490 *post*.

[3] *Reg.* v. *Woodward* (1862), L. and C. 122 (K. S. C. 364); *Rex* v. *Pritchard* (1913), 9 Cr. App. R. 210.

[4] See C. C. C. Sess. Pap. CL, 295. The test of receipt is control, *Rex* v. *Gleed* (1916), 12 Cr. App. R. 32; *Rex* v. *Watson* (1916), 12 Cr. App. R. 62.

(2) It is also necessary that the goods received should have already been stolen,[1] antecedently to the act of receiving. Hence a man cannot become a receiver of stolen goods by himself committing the act of stealing them. Moreover, the character of being "stolen goods" is only a temporary one. For if, after being stolen, the goods happen to return into the possession (actual or even constructive) of their owner, such a return will deprive them of the character of stolen property; so that there will not be any crime in subsequently receiving them.[2] This rule often defeats measures which have been taken by an owner, after detecting a theft, in hopes of entrapping and punishing some expected receiver.

(3) Finally, the prisoner must have received the stolen goods with knowledge *then*[3] of their having been stolen (not knowledge obtained merely after taking possession). Such knowledge may be presumed, *primâ facie*, if he knew of circumstances so suspicious as to convince any reasonable man that the goods had been stolen—*e.g.* when an unlikely vendor offers them for an unlikely price at an unlikely hour.[4] His subsequent conduct may be evidence of such knowledge; *e.g.* his hiding the goods, or selling them surreptitiously and over-cheaply, or making no written entry of having bought them. It is a felony punishable with seven years' penal servitude to take money or a reward corruptly in relation to the recovery of property stolen or obtained or received in any way amounting to a felony or misdemeanor, unless the taker

[1] As to *proof* of the theft, see *Rex* v. *Sbarra* (1918), 13 Cr. App. R. 118.

[2] *Reg.* v. *Villensky*, [1892] 2 Q. B. 597 (K. S. C. 360).

[3] *Rex* v. *Johnson* (1911), 6 Cr. App. R. 218. Retaining is not Receiving.

[4] Actual *certainty* is not necessary, 1 F. and F. 665; [1892] A. C. 287. But negligence (or even recklessness) in not realising their having been stolen will not create guilt; he must have shut his eyes *wilfully* to facts from which ordinary men would realize it clearly; cf. 11 Cr. App. R. 2; and C. C. C. Sess. Pap. CXLVIII, 232. See pp. 391 and 425 *post* as to statutory evidence of Knowledge.

has used all due diligence to cause the offender to be brought to trial.[1]

As to the punishment of receivers, the main provisions of the Larceny Acts, 1861 and 1916, are as follow:

1. If the original stealing or obtaining was a felony, the receiver is guilty of a felony. The maximum punishment is fourteen years' penal servitude; a boy under sixteen may, in addition, be once privately whipped. (Sec. 33 (1) of the Larceny Act, 1916.)

2. If the original stealing or obtaining was a misdemeanor (*e.g.* if the goods had been obtained by false pretences), the receiving is a misdemeanor; and punishable with a maximum punishment of seven years' penal servitude. A boy under sixteen may, in addition, be once privately whipped. (Sec. 33 (1) of the Larceny Act, 1916.)

3. If the original stealing was, by the Larceny Act of 1861, a petty offence punishable on summary conviction (*e.g.* if the thing stolen were only a dog), the receiving is only a similar offence; and is punishable just as the stealing itself is. (Sec. 97 of the Larceny Act, 1861.)

BRIBERY AND CORRUPTION

It is a common law misdemeanor to bribe or offer to bribe a judge or for a judge to accept a bribe,[2] or to bribe or offer to bribe any public officer to omit to do his duty or act contrary to his duty.[3] To attempt to influence a juryman improperly constitutes the misdemeanor of embracery.[4] To sell or purchase, or receive or give any reward in respect of the sale or purchase of, a public office is a misdemeanor punishable with a fine and imprisonment, forfeiture of the office, and absolute disqualification for holding it again.[5]

[1] Larceny Act, 1916, s. 34. [2] 1 Hawk. P. C. 414, 415.
[3] *Rex* v. *Vaughan* (1769), Burr. 2494 and cf. *Rex* v. *Whitaker*, [1916] 3 K. B. 1283. [4] Stephen, *Digest of Criminal Law*, 7th ed., Art. 173. Winfield, *History of Conspiracy*, ch. VII. [5] 49 Geo. 3, c. 126.

The offering to or receiving by a member or officer of any local or public body[1] of a reward for doing or forbearing to do any act in connection with the work of such body is a misdemeanor punishable with two years' imprisonment and/or a fine of £500; or if the offer relates to a contract with any government department or public body with seven years' penal servitude. The offender is also liable to pay to the body whose member or officer he bribes or attempts to bribe the value of the reward. In addition he is liable to be adjudged disqualified for seven years from election or appointment to any public office and, if an officer or servant of a public body, is liable in the discretion of the Court to forfeit any rights or claims to compensation or pension. A second offence involves perpetual disqualification for public office and seven years' disqualification for voting at parliamentary or local government elections.[2] Where it is proved that any money or gift has been paid to or received by any person in the employment of the Crown or any public body from any person holding or seeking to obtain a contract, there is deemed to have been corruption, unless the contrary is proved.[3]

It is a misdemeanor punishable with two years' imprisonment and/or a fine of £500 to offer to an agent or for an agent to accept or attempt to obtain any gift or consideration as an inducement to do or forbear to do anything in relation to his principal's affairs or business, or for shewing or forbearing to shew favour or disfavour to any person in relation to his principal's affairs or business. An "agent" includes any person employed by or acting for another. It is similarly punishable knowingly to give to any agent or for an agent knowingly to use any receipt, account or other document in respect of which the principal is interested, and which contains any state-

[1] 6 and 7 Geo. 5, c. 64, s. 2.
[2] 52 and 53 Vict. c. 69, ss. 1–2.
[3] 6 and 7 Geo. 5, c. 64, s. 2.

ment which is false in any material particular and which is intended to mislead the principal.[1]

Corruption and Personation at elections are punishable under the Corrupt Practices Prevention Act, 1854,[2] the Corrupt and Illegal Practices Act, 1883[3] and other statutes.[4] Corruption in connection with the sale of honours is punishable under the Honours (Prevention of Abuses) Act, 1925.[5]

[1] 6 Edw. 7, c. 34, s. 1.
[2] 17 and 18 Vict. c. 102.
[3] 46 and 47 Vict. c. 51.
[4] See Stephen, *Digest of Criminal Law*, 7th ed., Arts. 174 *et seq.* For personation to obtain property see *ibid.* ch. XLIV and p. 289 *ante*.
[5] 15 and 16 Geo. 5, c. 72.

CHAPTER XVI

FORGERY

THE verb "to forge", which originally meant simply "to make", acquired early, even before the time of Shakespeare, the special sense of making deceitfully. (The cognate verb "to fabricate" has passed through a similar development.) Forgery, accordingly, is the offence of "making a false document in order that it may be used as genuine",[1] or, similarly, of counterfeiting certain seals or dies or the impressions of them; with an unlawful intent.

Though at first sight this might seem a crime not likely to be prevalent except in an age of commercial activity, yet it had already become quite a common offence in England as early as the fourteenth century. And it was not regarded as a heinous one. Thus a man who had forged a conveyance of lands in the name of a deceased person was merely fined 13*s.* 4*d.*[2] For the common law treated it only as a misdemeanor, punishable with fine and imprisonment. But, in proportion as the increase of education and the development of commerce multiplied the opportunities for committing acts of forgery, it became necessary to restrain heinous ones by more stringent penalties. Accordingly, by a succession of statutes, now consolidated in the Forgery Act, 1913 (3 and 4 Geo. 5, c. 27), many classes of instruments have been covered with a special protection, by making the forging of any of them a felony. Moreover, this statute re-enacts a comprehensive provision (s. 7), making it a felony

[1] 3 and 4 Geo. 5, c. 27, s. 1 (1); Stephen, *History of Criminal Law*, III, 180–186.

[2] *Eyre of Kent*, 1313–1314, vol. I, p. lxxi; cf. Y. B. 20 Edw. 3 (Rolls Series), vol. II, p. 1.

punishable with fourteen years' penal servitude, to *obtain money or property* (or even endeavour to obtain it) by "*any* forged instrument whatsoever", with intent to defraud. Accordingly to send even a false telegram, or tamper with a postmark, with the view of wrongfully obtaining money thereby, will be a felony.[1]

We must consider (1) the Document, (2) the Falsity, (3) the Making, (4) the Intent.

(1) The words "Document" or "Instrument" will[2] cover any writing the falsification whereof can prejudice any person.[3] Accordingly the forgery of very many instruments not comprised in the definitions of any of the numerous statutory felonies is punishable; for instance, certificates of Holy Orders, theatre tickets,[4] and ordinary unsealed written contracts. Thus not only deeds and similar important instruments are protected by the law of Forgery, but also mere letters of recommendation by which employment or other pecuniary advantage is sought, or certificates of identity for obtaining a passport.[5] A letter to a man who really owed money to the forger, falsely purporting to be written by his employer and urging him to pay the debt promptly, has been held a sufficient document.[6] And so is a mere letter to a gaoler, requesting leave to confer with a prisoner but falsely purporting to be written by his solicitor.[7] "It is immaterial in what language the document is expressed; or in what place, within *or without* the King's dominions, it is expressed to take effect".[8]

[1] *Reg.* v. *Riley*, [1896] 1 Q. B. 309 (K. S. C. 179).

[2] *Here* the two words are synonymous (*Rex* v. *Cade*, [1914] 2 K. B. 209); but "Instrument" is sometimes narrowed to such documents as affect legal rights. As to *inchoate* documents, see 7 Q. B. D. 79.

[3] *I.e.* by prejudicing him in any "business relation"; even though it be one not enforceable legally, *e.g.* a bet.

[4] C. C. C. Sess. Pap. LXXIII, 94. [5] C. C. C. Sess. Pap. c, 644.

[6] *Rex* v. *Parker* (1910), 74 J. P. 208.

[7] *Reg.* v. *Barrett* (1899), C. C. C. Sess. Pap. CXXX, 797.

[8] Forgery Act, 1913, s. 1 (3 *a*).

Yet a picture is not a document. Hence it is no forgery to put on a picture the false signature of some famous painter; for the painter's signature is a mere identificatory mark.[1] The imitation of any trademark, accordingly, was not a forgery, until specifically made a misdemeanor by statute.[2]

So, again, whilst it is forgery to fabricate a postage-stamp for actual use, or to eradicate from a used stamp the Post Office's cancelling marks, it is not a common-law forgery to make what purports to be an already-used stamp, for sale as a curiosity; but it is forgery by the Stamp Act.[3]

(2) A document is a "false" one if purporting to be made by someone who did not authorise its making; or if the time or place of making, where material, are falsely stated, or material alterations have been made therein; or if, though made in the name of an existing person, it is intended that it should pass as made by some other person.[4] Accordingly an instrument is not a forgery when it merely contains statements which are false, but only when it falsely purports to *be* itself that which it is not.[5] Hence a conveyance which contains false recitals, or exaggerates the price paid, is not rendered thereby a forgery. A telegram to a newspaper is forged if it is sent falsely in the official reporter's name; but not if it merely sends untrue news.[6] Thus a forgery is a document which not only tells a lie, but tells a lie about itself.

[1] *Reg.* v. *Closs* (1858), D. and B. 460 (K. S. C. 184). It would, however, be a common-law cheat and so indictable as a misdemeanor, see Archbold's *Criminal Pleading Evidence and Practice*. It is a common-law cheat to employ a deceitful practice which may directly affect the public. In the case of a mere private cheat damage must be done and the cheat completed, *Reg.* v. *Vreones*, [1891] 1 Q. B. 360.

[2] See, *now*, the Merchandise Marks Act, 1887 (50 and 51 Vict. c. 28).

[3] See 9 Cr. App. R. 195.

[4] For definition of falsity study Forgery Act, 1913, s. 1 (2).

[5] *Reg.* v. *Ritson* (1869), 1. C. C. R. 200 (K. S. C. 188).

[6] *Rex* v. *Horner* (1910), 74 J. P. 216.

Again, an instrument's mis-statement of the time or place of making it, will render it false *if* that time or place be material[1] to its operation (and, similarly, too, will the mis-statement of any distinguishing mark—like the number on a debenture—which identifies the instrument). So the fraudulent antedating of a cheque is forgery. And if a telegraph clerk, immediately on hearing the result of a race, despatches to a bookmaker a telegram backing the winning horse, and purporting to have been handed in at the post office before the race was run—*i.e.* in time to make a genuine bet—he commits a forgery.[2] Again, a person, to whom a merely limited authority to act as agent has been given, may commit forgery by exceeding this authority. Thus if a servant, to whom £2 are due for wages, receives from his employers a cheque in his own favour, duly signed but with the amount left blank, and is told to fill it up for the £2, he will become guilty of forgery if he fills it up for £3.[3] But it is otherwise if the agent has a general authority; or if, though he has merely a limited authority, he makes only such a document as comes within the limit. Accordingly if, when a blank signed cheque has been entrusted to a man, with authority to fill it up for an amount to be calculated by him, he fills it up for that amount correctly, but wrongfully goes on to cash it and to appropriate the proceeds, his crime is not a forgery.[3]

A document may tell a sufficient falsehood about itself even by mere implication. Thus falsity may be produced by making a document in the name of an imaginary or of a deceased person;[4] or even by making it in your own name but with the intention that it shall pass as made by some one else,[5] as where a man indorses a bill which was

[1] *E.g.* in a railway-ticket.
[2] *Reg.* v. *Riley*, [1896] 1 Q. B. 309 (K. S. C. 179).
[3] *Reg.* v. *Bateman* (1845), 1 Cox 186 (K. S. C. 191).
[4] *Rex* v. *Lewis* (1764), Foster 116 (K. S. C. 195); Forgery Act, 1913, s. 1 (2*b*).
[5] *Ibid.* s. 1 (2*c*).

remitted to some other person of his name, but by mistake came to him instead.[1] In all these cases there is a forgery; for one person makes a writing which represents itself as the act of some other person (real or fictitious). But when a man puts forward a document as emanating, not from any other person, but strictly from himself, it will not be rendered false by his adopting an assumed name in his signature to it, for it still is to him and no one else that credit is given.[2]

(3) The act of "making" a false document may be committed either (i) by affixing to it a seal or a stamp, or altering one that is already on it or (ii) by either writing, or erasing,[3] in the document itself, any material words or letters or figures, even though they do not constitute the whole of the document but only a part of it[4] (*e.g.* the signature, or even the crossing,[5] of a cheque). There may even be a forgery by a mere inactive omission, provided that the words omitted would have qualified the operation of those that remained; as where an amanuensis, when taking down a will from a testator's dictation, fraudulently omits a condition attached to one of the legacies.[6] And the offence of Forgery[7] "may be complete even if the document, when forged, is incomplete; or is not, or does not purport to be, such a document as would be binding in law"—*e.g.* an *unstamped* promissory note.

A man may be guilty of forging a document even though no part of it was actually written by him. Thus the written transcript of a telegraphic message, made out at the arrival office, is made by the hand of a purely innocent

[1] *Mead* v. *Young* (1790), 4 T. R. 28 (K. S. C. 197); *Rex* v. *Parkes* (1794), 2 Leach 775.

[2] Cf. p. 237 *ante*.

[3] *E.g.* rubbing out items in the bill at a teashop, before paying.

[4] Forgery Act, 1913, s. 1 (2*a*).

[5] *Ibid.* s. 1 (3*c*).

[6] Hawkins, P. C. p. 265.

[7] Forgery Act, 1913, s. 1 (3*b*).

agent,[1] the post office clerk; but the sender of the telegram is as much responsible for it as if he had written it with his own hand.[2] Yet it is not forgery merely to use fraud (however gross) to procure the execution of a document, *e.g.* to get a man to sign it by misrepresenting to him its contents.[3] Such conduct, however, is a statutory misdemeanor,[4] punishable with five years' penal servitude. And it may well be contended that in all those cases where the deceived person—as where he is blind or illiterate[5]—is entitled to repudiate the instrument as not his genuine act, the fraudulent author of this false document is guilty of Forgery, through an innocent agent.

If a document is not *itself* false in any way, the mere fact of putting it to a fraudulent use will not make it a forgery. Thus where wrappers were printed in imitation of those used by a well-known firm, but the goods of a less famous firm were packed in them for sale, the mere printing of these wrappers was held not to constitute a forgery.[6] (But the actual use of them in trade would involve the crime of an attempt to obtain money by false pretences.)

(4) It only remains to consider whether it is necessary that the forger should have had any specific form of *mens rea* in deceitfully making the false document. At common law it was necessary that he should intend not merely to deceive (*i.e.* to induce a man to believe that a thing is true which is false) but also to defraud[7] thereby—to pre-

[1] Cf. p. 97 *ante*.

[2] *Reg.* v. *Riley*, [1896] 1 Q. B. 309 (K. S. C. 179).

[3] *Rex* v. *Chadwick* (1829), 2 M. and R. 545.

[4] Larceny Act, 1916, s. 32 (2): fraudulently inducing by a false pretence the execution of a valuable security. All instruments of title, either to land or goods, are here included as "valuable securities"; see s. 46.

[5] But as to normal men the law is not clear. See *Howatson* v. *Webb*, [1908] 1 Ch. 1; *Carlisle Banking Co.* v. *Bragg*, [1911] 1 K. B. 489.

[6] *Reg.* v. *Smith* (1858), D. and B. 566 (K. S. C. 186).

[7] *Reg.* v. *Hodgson* (1856), D. and B. 3 (K. S. C. 202).

judice some one by inducing him to alter (or abstain from altering) his rights, though not necessarily to his actual pecuniary loss. But the statute law has specified many kinds of instruments which it makes it criminal to forge even for the purpose of merely deceiving, without any intention of defrauding. This, for instance, is the case with every *public* document[1] (*e.g.* a nomination paper or ballot paper for a Parliamentary or municipal election); and thus with marriage licences and the documents or registers of any court of justice;[2] with registers (or certificates) of births, baptisms, marriages, deaths, burials, or cremations;[3] and with documents that bear a royal seal or sign-manual.[4] It similarly is made an offence to forge a telegram[5]—*e.g.* to send one so signed as to purport to come from an existing[6] person other than the actual sender—even though the object in view be not to defraud, but merely to obtain the joy of hoaxing the recipient.

In most forgeries, however, an intention to defraud is necessary.[7] Thus there is a comprehensive provision[8] in the Forgery Act, 1913, s. 4 (1), that "Forgery of any document, which is not made felony... [by statute]... committed with intent *to defraud*, shall be a misdemeanor and punishable with imprisonment with or without hard labour for any term not exceeding two years" and a fine. And even of those forgeries that are statutory felonies

[1] Forgery Act, 1913, s. 4 (2). Two years' imprisonment with hard labour and a fine is the maximum punishment; except for those especially important ones which it is made felony to forge.

[2] *Ibid.* s. 3 (3). Felony: seven years' penal servitude.

[3] *Ibid.* s. 3 (2). Felony: fourteen years' penal servitude.

[4] *Ibid.* s. 3 (1). Felony: penal servitude for life.

[5] Twelve months' imprisonment.

[6] A merely imaginary name would not make it a forgery; nor would mere false news in the contents. See p. 298 *ante*.

[7] Hence where a servant lost the receipt given to him for the price of goods bought by him for his master, and therefore forged an accurate copy of it, the forgery was held by Lord Alverstone not to be indictable (Norwich Assizes, Jan. 1908).

[8] This provision practically supersedes the common-law crime.

the most common require an intent not merely to deceive but to defraud: as in the case of forging valuable securities or documents of title to land or to goods, or of forging deeds, wills, or bank-notes.[1]

By the Criminal Justice Act, 1925 (15 and 16 Geo. 5, c. 86), s. 38, it is made an offence, however innocent the intent, to make or cause to be made or to use any document so nearly resembling a bank note or currency note as to be calculated to deceive. By a remarkable provision the mere appearance of a person's name upon such a document is *primâ facie* evidence that that person caused the document to be made.

At common law, it was moreover necessary that the indictment should specify the particular person against whom this intention to defraud had been directed. But it is now[2] sufficient to allege in general terms an intention to defraud—or, where mere deceit makes the forgery criminal, to deceive—without stating in the indictment, or even shewing by the evidence, what particular person was to suffer.

But it is not necessary that the forger should have intended the defrauded person to incur an actual pecuniary detriment. Consequently a man may be fully guilty of having forged an acceptance, although he may from the outset have truly intended to "take it up" before it should fall due, or although the money which he aimed at getting by the forgery was only a sum that was legally due[3] to him. The mere existence, in the prisoner's mind, of this intent to defraud will suffice, though (*a*) no one was in fact defrauded, and though (*b*) no particular individual was aimed at in the prisoner's scheme,[4] and

[1] Forgery Act, 1913, s. 2 (1). Penal servitude for life. The notes of even private or foreign banks are included; s. 18 (1).

[2] Forgery Act, 1913, s. 17 (2).

[3] *Rex* v. *Smith* (1919), 14 Cr. App. R. 101.

[4] Forgery Act, 1913, s. 17 (2); *Rex* v. *Mazagora* (1815), R. and R. 291.

even though (*c*) there did not in fact exist[1] any one whom the scheme could have defrauded. Thus if the person, whose signature has been forged as the drawer of a cheque, has ceased to have any account at the particular bank, this will not deprive the forgery of its full criminality. But the fraudulent intent necessary will not exist unless the offender had reasonable grounds for supposing (however wrongly) that some one or other might possibly be defrauded. Thus it will be no forgery for a man, who is himself the sole payee of a bond, to alter it by lessening its amount.[2]

The offence of forgery consists, as we have seen, in "making" the instrument. But the "uttering" of it is also an offence; incurring whatever punishment a forgery of the particular document would have involved, and being a felony or a misdemeanor according as that forgery would be.[3] A person is regarded as "uttering" when he "uses, offers, publishes, delivers, disposes of, tenders in payment or in exchange . . . tenders in evidence, or puts off" a forgery, knowing it to be forged, and having the same intent (whether to defraud or to deceive) that the law requires, in the case of that particular thing, to constitute the offence of forging it.[4]

The punishments of forgeries, as we have seen, vary very greatly. All the various forgeries that have by statute been made felonies, have their respective maxima of punishment, ranging from penal servitude for life to penal servitude for seven years; whilst, instead of penal servitude, imprisonment may be imposed for any term not exceeding two years, with or without hard labour.[5]

[1] That such a person does exist, is *primâ facie* evidence of an intent to defraud. "Uttering" is still stronger evidence of it.

[2] *Blake* v. *Allen* (1600), Moore 619. Let us add that he loses more than may appear; for the bond thereby becomes wholly void.

[3] Forgery Act, 1913, s. 6 (1).

[4] *Ibid.* s. 6 (2).

[5] *Ibid.* s. 12 (1). The offender may, in addition, be bound over to be of good behaviour, s. 12 (2*b*).

But any forgery that is a mere misdemeanor, is punishable only by such imprisonment as just mentioned, and fine, and binding over; or by merely one of these.[1]

The Criminal Justice Act, 1925, s. 36, made the forging of a passport—and similarly the knowingly making any untrue statement for the purpose of procuring a passport (whether for the offender himself or for any other person) —a misdemeanor punishable with imprisonment for two years and/or a fine of £100.

It is a misdemeanor[2] with intent to deceive to forge or alter or use or lend to or allow to be used by any other person a licence or Certificate of insurance under the Road Traffic Act, 1930, or Road and Rail Traffic Act, 1933.[3] It is also a misdemeanor[2] to make or have in one's possession any document so closely resembling such a licence or certificate as to be calculated to deceive.[3]

[1] *Ibid.* s. 4, s. 12 (2 (*a*) (*c*)). There are a few statutory misdemeanors of Forgery which may be prosecuted either by indictment or even summarily at Petty Sessions. In the latter case their maximum punishments are reduced; *e.g.* forged trademarks, four months' imprisonment or £20 fine; forged telegrams, a £10 fine. See s. 19 (2) of the Forgery Act, 1913.

[2] Punishable on indictment with imprisonment for a term not exceeding two years and on summary conviction to imprisonment for a term not exceeding four months and/or to a fine not exceeding £100.

[3] Road Traffic Act, 1930, s. 112; Road and Rail Traffic Act, 1933, s. 34; Road Traffic Act, 1934, Sched. III.

CHAPTER XVII

OFFENCES AGAINST THE SAFETY OF THE STATE

PASSING from offences committed against Property to the offences against Public Rights, our account of these latter must commence with what the law ranks as the most heinous of all crimes—that of Treason[1]—"the atrocious crime of endeavouring to subvert by violence those institutions which have been ordained in order to secure the peace and happiness of society" (Chief Justice Marshall). Its name, derived from the French *trahir* and Latin *tradere*, denotes an act of perfidious "betrayal". The offence might, at common law, be committed either by a breach of the faith due to the King from his subjects (High treason), or even by a breach of that due to one of those subjects from his own inferiors (Petit treason). But a sufficiently grave breach of the latter form of allegiance could only be committed by the actual slaying of the superior; as when a feudal vassal murdered his lord, a priest his bishop, or a wife her husband. Since 1828 (9 Geo. 4, c. 31, s. 2), such homicides have ceased to differ from ordinary murders; so that high treason is now the only kind of treason known to our law.

An indictment for high treason was in mediæval times a most powerful weapon for the Crown to wield against its two great rivals, the church and the baronage. For a "clerk" who was accused of this crime could not claim benefit of clergy;[2] and if any feudal vassal was convicted of it, his lands passed to the Crown instead of to his immediate lord. Hence the King's judges, attentive to their

[1] See Pollock and Maitland, I, 498; Stephen, *History of Criminal Law*, II, 241.

[2] *Post*, p. 573. Pollock and Maitland, I, 429; II, 500.

master's interests, expanded the definition of high treason until it became a most comprehensive offence, including any kind of injury to the King's rights, *e.g.* even the hunting of deer in his forests. At last a reaction was provoked. In the reign of Edward III one John Gerberge of Royston laid hands on one William of Bottisford and would not release him until he made a payment of £90. This act of unlawful imprisonment was construed as an act of treason, on the plea of its being an "accroaching" (*i.e.* appropriating) of royal power. At this the barons forthwith took action;[1] and succeeded in confining the law of treason within definite limits by the enactment, in 1351, of the Statute of Treasons (25 Edw. 3, st. 5, c. 2). This measure is remarkable; both for the constitutional securities directly conferred by it,[2] and also from its affording, at so early a date, what is still almost[3] the only instance in which any statutory definition of an important crime has entirely superseded the common law with regard to it. It limited high treason to seven possible forms (two of which have since been reduced to felonies). The seven were:

1. Compassing[4] the death of the King, of his Queen, or of their eldest son and heir.

So far as these words go, the crime seems to consist in a mere state of mind. But an *actus reus* is made necessary by words in a subsequent part of the statute, which require the person accused to "be thereof proveably attainted of *open deed*".[5] It was for this incipient offence

[1] Stephen, *History of Criminal Law*, II, 246; 1 Hale, *Pleas of the Crown*, 80.

[2] "No people enjoy a free constitution unless adequate security is furnished by their laws against the discretion of judges in a matter so closely connected [as the law of treason is] with the relation between the Government and its subjects"; Hallam's *Constitutional History*, ch. xv, pp. 203–226 (a passage deserving careful study).

[3] Cf. p. 188 *ante* as to Arson.

[4] See Austin's *Jurisprudence*, Lect. xxi.

[5] These words do not occur in the statute until the conclusion of the fourth species of treason. But the judges, in construing the statute, did not limit them to that species; and ruled that, in indictments for any

of "compassing the death" of the King, that the regicides of Charles the First were indicted; the ultimate act of taking off his head being merely treated as one of the open deeds which made manifest that compassing.[1]

That in treason, just as in all other crimes, a *mens rea* will not constitute guilt without an *actus reus*, is vividly shewn by a Transatlantic decision that an American citizen who meant to join the hostile British forces, but found that he had by mistake attached himself to a party of the United States troops, could not be convicted of treason.[2]

An "open deed", or "overt act", has been defined by Alderson, B., as "any act, measure, course, or means whatever, done, taken, used, or assented to, for the purpose of effecting a traitorous intention;"[3] and, more tersely, by Lord Tenterden[4] as any act manifesting the criminal intention and tending towards the accomplishment of the criminal object. Thus even so commonplace an event as hiring a boat at a riverside wharf may amount to such an act.[5] And the collecting of information for the use of the King's enemies, though it never be actually sent to them, clearly amounts to one.[6] And even a conspiracy, though going no further than the oral conversation, constitutes a sufficient overt act.[7] But mere spoken words, however seditious and violent, are not as a general rule an overt act.[8] Yet they may become one if they are not simply "loose words, spoken without relation to any act or project", but help to carry forward, or are connected

form of treason, a definite overt act must be alleged. The first species, it being the only one which is purely mental, is the case in which this rule assumes its chief importance. See Foster's *Crown Law*, p. 220; and 1 Hale P. C. 108.

[1] 5 St. Tr. 982. [2] *Commonwealth* v. *Malin* (1790), 1 Dallas 33.

[3] 6 St. Tr. (N. S.) 1133.

[4] *Rex* v. *Thistlewood* (1820), 33 St. Tr. 681, 684.

[5] *Lord Preston's Case* (1691), 12 St. Tr. 646 (K. S. C. 377).

[6] *Rex* v. *Delamotte* (1781), 22 St. Tr. 808.

[7] See 7 St. Tr. (N. S.) 463. A conspiracy to depose the King is held to be an overt act of compassing his death.

[8] Foster 200; *Pyne's Case* (1628), Cro. Car. 117 (K. S. C. 377).

with conduct which carries forward, the intention which they express.[1] Thus words inciting some one to kill the King are an overt act of high treason. Indeed spoken words, uttered with an intent to confirm men in the prosecution of measures for a deposing of the King by force of arms, "are in their very nature and essence the clearest and most absolute overt acts of high treason".[2]

But the publication of *written* words, since they are in a more permanent form, and have usually been composed with more deliberation than mere spoken ones, may be a sufficient overt act of treason; even when it is unconnected with any plan for further conduct of a treasonable character. Yet, whilst published writing may clearly be thus an overt act, it is quite uncertain how far, if at all, the mere writing of a document, without ever publishing it, can be an overt act. In 1615, Edward Peacham[3] was convicted of treason on account of certain passages in a sermon found in his study, which had never been preached. But he was never executed; and died in prison. Algernon Sidney,[4] again, was similarly convicted of treason in 1683, on account of an old unpublished MS. treatise on Sovereignty found in his house. He was executed; but his conviction was subsequently reversed by Parliament. Hence neither of these two cases is of weight as a precedent. Had Sidney's papers been, on the other hand, plainly referable to some definite project of insurrection, they might of course have constituted an overt act.[5]

2. Violating the King's consort, their eldest daughter unmarried, or the wife of their eldest son and heir.

It seems illogical to bring in the daughter, since the wives of younger sons are omitted; hence all reference to

[1] *Rex* v. *Charnock* (1694), 2 Salk. 633 (K. S. C. 379).
[2] *Per* Lord Ellenborough in *Rex* v. *Despard* (1803), 28 St. Tr. at p. 487.
[3] (1615), 2 St. Tr. 869. Hallam, *Const. Hist.* ch. VI.
[4] 9 St. Tr. 818; Foster 198. See also *Lord Preston's Case* (1691), 12 St. Tr. 646 (K. S. C. 377).
[5] Cf. p. 325 *post*.

her was left out in the Draft Criminal Code of Lord Beaconsfield's administration (*post*, p. 620).

A sufficient "violating" may take place even by consent. And the executions, in Henry VIII's reign, of two queens, Anne Boleyn and Catherine Howard, serve to shew that the royal lady, who consents to her paramour's addresses, shares the full guilt of his treason.

3. Levying war against the King in his realm.

"War", here, is not limited to the true "war" of international law;[1] but will include any forcible disturbance that is produced by a considerable number of persons, and is directed at some purpose which is not of a private but of a "general" character, *e.g.* to release the prisoners in *all* the gaols. It is not essential that the offenders should be in military array or be armed with military weapons.[2] It is quite sufficient if there be assembled a large body of men who intend to debar the Government from the free exercise of its lawful powers and are ready to resist with violence any opposition.[3]

This kind of treason is therefore distinguishable from a mere riot by nothing but the "generality" of the object which is aimed at by those taking part in it. Thus the Edinburgh rioters in the Porteous case of 1736,[4] rendered familiar to English readers by Scott's *Heart of Midlothian*, were, after mature consideration, prosecuted only for riot, and not for treason; inasmuch as, though they sought to interfere with the Crown's prerogative of mercy, they resisted merely its being exercised in the particular case of the detested Captain Porteous, and not the general exercise of it. "It is neither the numbers concerned, nor the force employed, but the object which the people have in view, that determines the character of their crime;

[1] Oppenheim's *International Law*, 5th ed., Part II, 2. 1.

[2] *Reg.* v. *Dowling* (1848), 7 St. Tr. (N. S.) at p. 460; cf. 32 St. Tr. 3.

[3] Nor need the body be large; three men *with dynamite* have been held sufficient. C. C. C. Sess. Pap. XCVIII, 280.

[4] 17 St. Tr. 993; Lord Stanhope's *History of England*, ch. XVII.

which will be a riot or a treason, according as this object is of a private and local or of a public and general character".[1] Thus in *Damaree's Case* (1709),[2] in Queen Anne's reign, a riotous tumult with the object of demolishing all accessible Nonconformist meeting-houses was held to amount to a treason; on the ground that it was to be regarded as a public resistance to the Toleration Act (which had legalised such meetings) and an attempt to render it ineffectual by numbers and open force. Hence, although the rioters were strong partisans of the Queen and imagined themselves to be serving her interests and advancing her policy, they were, by construction of law, guilty of treason against her.

It will be noticed that the levying of war must be "in the realm"; so that enlisting men, even within the realm, to go to the aid of the King's enemies in military operations that are to be carried on abroad, will not be punishable under this section.[3] It is, however, punishable under both species 1 and 4.

4. Adhering to the King's enemies in his realm,[4] by giving to them aid and comfort[5] in the realm or elsewhere.[6] The words "giving aid and comfort to the King's enemies" are to be construed in apposition. They explain what is meant by "adhering to", so that a man may be adherent to the King's enemies in his realm by giving to them aid and comfort in his realm or he may be adherent to the King's enemies elsewhere by giving them aid and comfort elsewhere.[4]

[1] *Rex* v. *Hardie* (1821), 1 St. Tr. (N. S.) 624. Cf. *Reg.* v. *Frost* (1839), 4 St. Tr. (N. S.) 86 (K. S. C. 374).

[2] Foster 213; 15 St. Tr. 521 (K. S. C. 370).

[3] "Even the actual enlistment of men to serve against the Government, does not amount to levying of war. To constitute it, there must be an actual *assembling* of men for a treasonable purpose"; 4 Cranch 126.

[4] *Rex* v. *Lynch*, [1903] 1 K. B. 444; *Rex* v. *Casement*, [1917] 1 K. B. 98.

[5] *E.g.* by subscribing to their War Loan.

[6] As to aid rendered under Compulsion, *e.g.* when supplies are requisitioned by an occupying enemy's army, see p. 84 *ante*.

"Enemies", here (unlike "war" in section 3), is to be taken in the strict sense which international law puts upon the word; and accordingly includes none but true public belligerents.[1] Hence to assist mere rebels against the King, or pirates, does not constitute any offence under this section; though if the assistance were rendered within the realm it would be a sufficient "levying of war" under species 3.[2]

5. Slaying the Chancellor or the Treasurer or the King's justices, when in their places doing their offices.

6 and 7. The statute also contained two further sections, which made it treason to counterfeit the King's great seal or his privy seal, or his money; but these offences were reduced to felony by statutes passed in 1832.[3]

By statutes of Anne, which are still in force, two further species of treason have been created, viz.:

(*a*) To attempt to hinder the succession to the Crown of the person entitled thereto under the Act of Settlement;[4]

(*b*) To maintain in writing the invalidity of the line of succession to the Crown established by the Act of Settlement.[5]

To this summary of the statute law of treason, we must add an account of what is almost equally important—the extraordinary extension of its scope by the interpretations which the judges of the seventeenth and eighteenth centuries (from political sagacity rather than from logical necessity) placed upon the simple language of the ancient Parliament of Edward III.

The original idea of high treason was, as we have seen,

[1] Oppenheim's *International Law*, 5th ed., Part II, 2. 3.

[2] In Natal it was held in 1901 that by serving the Boer forces even as a cook, a man gave them "aid and comfort".

[3] 2 and 3 Wm. 4, c. 123; 2 Wm. 4, c. 34, s. 1.

[4] 1 Anne, st. 2, c. 21, s. 3.

[5] 6 Anne, c. 41, s. 1. To maintain the invalidity of the line of succession by spoken words is an offence of praemunire, see p. 323 *post*, 6 Anne, c. 41, s. 2.

that of a breach of the personal loyalty due to the lord paramount of the realm from each of his vassals. Thus an alien, who had never been even resident in our realm, could not commit treason; for clearly he was under no duty of allegiance. Hence when a charge of adultery was made, in Parliament, against the Queen of George IV, it was pointed out that it did not amount, as in the case of Henry VIII's wives, to a charge of participation in treason. For the acts alleged against Queen Caroline were supposed to have been committed abroad with a paramour (Signor Bergami) who was an alien and had never resided in British territory.

And this rule still remains in force. No alien falls within the law of treason unless, by coming into this realm under the King's permission (express or tacit), and so obtaining the benefit of the King's protection, he has placed himself under the consequent obligation of rendering him an allegiance, though only a local and a temporary one.[1] And even then, as his duty—unlike the lifelong obligation of the King's own subjects—is only temporary, it has sometimes been urged that it does not necessarily continue throughout the whole of his residence, but only for so long as the King's protection continues to be actually effective. Hence, when British territory, where a Boer had for ten years resided, passed into the military occupation of his own State's forces, and he thereupon took service with them, it was argued that the withdrawal of the British troops had dissolved his British allegiance and that his subsequent conduct was therefore

[1] 1 Bl. Comm. 457; Foster 183; *Rex* v. *Maclane* (1797), 26 St. Tr. 721. This temporary allegiance by domicile, insisted on in many South African trials, seems to be due (Forsyth's *Cases and Opinions*, p. 200) from every subject of a friendly State who enters our dominions, even though he avowedly come for hostile purposes alone. See *Rex* v. *Lynch*, [1903] 1 K. B. 444, for the converse case, that of the Englishman naturalised in a hostile State; his naturalisation, if effected during the war, would be, in itself, a treasonable "adherence". Cf. *Johnstone* v. *Pedlar*, [1921] 2 A. C. 262, for the rights of an alien.

no treason against the King. But the Judicial Committee[1] overruled this contention; pointing out that, so soon as the invaders were expelled, the King's courts gave redress for any wrongs sustained during the hostile occupation, and that the King's protection was therefore a continuous one. It would be intolerable if, immediately upon an enemy's taking possession of a country, the aliens resident within it could join him with impunity; a small invading force might thus become an army.

The historical development of our nation tended steadily, century after century, to make a consciousness of the importance of the stability of public order—rather than the feudal feeling of mere personal loyalty to a prince—become the binding force of the body-politic. This new conception of civic duty rendered necessary new provisions for its legal enforcement. The criminal law had to begin to take cognizance of politicians who, whilst devoted to the reigning King, were nevertheless disturbing the order of the realm;[2] though possibly only by assailing those institutions whereby the constitution had set a check upon the King's powers. It is a remarkable instance of the activity of judicial legislation that the important legal development, thus rendered necessary, was effected not by Parliament, but by the judges. They transformed the feudal conception of treason, as a breach of personal faith, into the modern one, which regards it as "armed resistance, made on political grounds, to the public order of the realm".[3] This new idea they evolved out of Edward III's statute by violent interpretations of the language of the 1st and 3rd sections. Thus a compassing of the death of the King was held to be sufficiently evidenced by the overt act of imprisoning him; because,

[1] *De Jager* v. *Att.-Gen. of Natal*, [1907] A. C. 326.

[2] "There are no crimes which produce vaster or more enduring suffering than those which sap the great pillars of Order" (W. E. H. Lecky).

[3] Stephen's *General View of the Criminal Law*, 1st ed., p. 36.

as Machiavelli had observed, "between the prisons and the graves of princes the distance is very small".[1] And an attempt to raise a rebellion against the King's power, in even a remote colony, was similarly held to shew a compassing of his death; though he were thousands of miles away from the scene of all the disturbances.[2] So, again, the overt act of inciting foreigners to invade the kingdom, *i.e.* of compassing the levying of war, an offence which the statute does not mention, was held to constitute an overt act towards compassing the King's death.[3] Similarly, as we have seen, a levying of war against any general class of the King's subjects was held—by a construction which Hallam[4] pronounces to be "repugnant to the understandings of mankind in general and of most lawyers"—to be a levying of war against the King himself; as in the case of riots for the purpose of pulling down all public houses or all inclosures of commons, or of forcing all the employers in a particular trade to raise the rate of wages.[5] Yet men may be breakers of the King's peace without being enemies to the King's government.

These interpretations were often violently artificial, almost setting the statute of Edward aside by their forced constructions, and accordingly they were viewed with jealousy by the public at large—a jealousy which found expression in the verdicts of jurymen.[6] Thus when, for his share in the No-Popery riots of 1780, Lord George Gordon was indicted for the treason of constructively "levying war",[7] the acquittal which he secured, whilst fully justified by the facts of the case, was facilitated by

[1] Foster 196.

[2] *Rex* v. *Maclane* (1797), 26 St. Tr. 721.

[3] But if their nation be at peace with us, it is not an adhering "to the King's enemies".

[4] *Constitutional History*, ch. xv.

[5] Foster 211.

[6] An excellent account of Constructive Treason will be found in chs. CLXXVI and CLXXX of Lord Campbell's *Lives of the Chancellors*.

[7] 21 St. Tr. 485.

the popular dislike to strained interpretations of the law.[1] Not long afterwards, Hardy, Horne Tooke and Thelwall were in 1794 indicted for a constructive compassing of the King's death.[2] The doctrine which was laid down at these trials, as to constructive treasons, was of an extreme character, carrying its "construction" of Edward III's statute to (in Hallam's opinion) "a length at which we lose sight of the plain meaning of words".[3] The verdicts of acquittal shewed that such judicial legislation would serve only to defeat its own end. Direct legislation had obviously become necessary. Accordingly the Parliament at once enacted, in 1795, a statute expressly recognising as treason the most important of the constructive treasons.[4]

After the Irish agitation of 1848, a further statute,[5] extending to Ireland, was passed; which reduced those constructive treasons dealt with in George III's statute (except some which really affected the person of the Sovereign) to mere felonies, so far as regarded the operation of the Act of 1795. They have no statutory name; but are commonly known as "treasonable felonies" or "treason-felonies". They include all deliberate expression, by overt act of any intention to depose the King, or to incite an invasion of the realm, or to levy war to constrain either House of Parliament to change its policy. The maximum punishment for them is penal servitude for life. This change in the punishment rendered it much easier to prosecute these crimes with success.[6] For juries, naturally, are extremely reluctant to convict persons of good character for offences which, however gravely injurious to the community, may involve no ethical guilt and yet are punished with death.

[1] Campbell's *Lives of the Chief Justices*, ch. xxxviii.
[2] 24 St. Tr. 199; 25 St. Tr. 1, 748.
[3] *Constitutional History*, ch. xv. [4] 36 Geo. 3, c. 7.
[5] 11 and 12 Vict. c. 12, ss. 6, 7. See 54 and 55 Vict. c. 67, abrogating the merely oral treason-felonies.
[6] So, too, did a change as to Evidence; *post*, p. 318.

But it is important to notice that these Acts of 1795 and 1848 left untouched the statute of Edward III and the judicial constructions of it; and that, consequently, it is still open to the Crown in such cases to proceed against the offender for a constructive treason instead of on the lighter charge of a treason-felony. That precisely the same action should thus occupy, simultaneously, two different grades in the scale of crime is indeed a singular juridical anomaly.

As treason was, of all crimes, that in which the Crown had the strongest direct interest in securing the conviction of an accused person, it was the one in which a public prosecutor or a subservient judge had most temptation to conduct the trial so as to press harshly upon the prisoner. The reigns of the Stuarts afforded so many instances of this harshness that, after the Revolution of 1688, the legislature introduced great innovations into the course of criminal procedure so far as trials for treason were concerned; and, as Erskine says, "met the headlong violence of angry Power by covering the accused all over with the armour of the Law". By 7 and 8 Will. 3, c. 3 it was provided that a prisoner accused of high treason should have a right to receive (1) a list of the intended jurors,[1] (2) a copy of the indictment, and to make defence (3) by counsel learned in the law, and (4) by witnesses. Another clause (re-enacting and strengthening an enactment of Edward VI[2]) made necessary (5) a technical minimum of proof; by providing that the prisoner should not be convicted unless either he volun-

[1] To which 7 Anne, c. 21, s. 14 adds a list of the intended Crown witnesses.

[2] 1 Edw. 6, c. 12, s. 22. Hence when a treason had been committed, but the Crown could obtain only a single witness, the only mode of punishing the offender was either to prosecute him for the mere misdemeanor of sedition—as in the case of Hampden (1684), who took part in the Rye House Plot (9 St. Tr. 1054), a grandson of the great opponent of illegal taxation—or to attaint him by an *ex post facto* Act of Parliament, as in the case of Fenwick (1696) (13 St. Tr. 538), who plotted the assassination of William III.

tarily confessed in open court or his guilt were established by *two* witnesses, deposing either to the same overt act, or at least to separate overt acts of the same kind of treason. And (6) it was provided that treason can only be prosecuted within three years from its commission; unless it be committed abroad, or consist of an actual plot to assassinate the Sovereign (not a mere technical "compassing the death"). (These rules—except Nos. (3) and (4)—have not been extended to treason-felony; an omission which is an additional reason for the greater facility of obtaining a conviction for that crime than for treason.)

Treason, like all felonies, was punished with death. But the execution of a traitor was accompanied with special circumstances of horror, to mark the supreme heinousness of his crime.[1] Instead of being taken in a cart to the scaffold, he was drawn to it on a hurdle,[2] hanged only partially, cut down alive[3] and then disembowelled, beheaded and quartered. The head and quarters were permanently exposed in some conspicuous place,[4] after being boiled in salt to prevent putrefaction, and in cummin seed to prevent birds pecking at them. But the form of sentence in treason was not quite invariable,[5] and the King often remitted everything excepting the beheading. In later times, even where there was no such remission, the executioner usually took it upon himself to make the strangulation fatal (technically an

[1] See Stephen, *History of Criminal Law*, I, 476–477; Pollock and Maitland, I, 499.

[2] He was so drawn; and *then* hanged. Avoid the popular sequence "hanged, drawn and quartered"; which suggests that "drawn" is here used in the culinary sense of disembowelling. The traitor was dragged prostrate to the scaffold, originally with nothing under him (as in the picture of A.D. 1242 in the library of C. C. Coll. Camb.). But in later years a hurdle was allowed.

[3] The regicide Harrison rose and struck the executioner *after* his body was opened. *Trials of the Regicides* (1660), 5 St. Tr. at p. 1237.

[4] Dr Pusey's mother, who survived until 1858, could remember seeing on Temple Bar the head of one of the rebels of 1745.

[5] The grossest may be seen in 3 Hargrave's State Trials, 340, 409.

act of murder, p. 117). At last it was enacted, in 1814,[1] that the beheading and quartering should not take place till after the prisoner had been put to death by the hanging. (Women were never beheaded or quartered; but[2] burned.) And finally in 1870 by the Forfeiture Act[3] all the exceptional features of execution for treason were abolished, except in cases where quartering or beheading may be ordered by royal warrant. For by the Act of 1814[4] the Crown has still power to order, by warrant under the sign manual, that any male who has been sentenced to be hanged for treason shall be beheaded. The judge, however, cannot appoint any mode of death[5] but hanging. In treason (as in all capital crimes except murder), the common-law rule which permits executions to take place in public still holds.

A penalty which was entailed at common law by all capital crimes, and which sometimes was more dreaded than that of death, was the loss of all the offender's property, and the consequent ruin of the fortunes of his family. But in treasons his landed estate was not disposed of in the same way as in felonies. For in cases of treason, as we have already seen, not only the personal but also the real estate was forfeited to the Crown absolutely. But in case of felonies, the realty was forfeited to the Crown for no longer than the offender's life and a year afterwards; after which period his estate (if in fee simple and not of gavelkind tenure) escheated at common law to the lord from whom it was held.

There had been no trial, in England or Wales, for a treason since 1882 (or for a treason-felony since 1885), until Lynch[6] was tried for treason on Jan. 21, 1903.

[1] 54 Geo. 3, c. 146.

[2] Till 1790; 30 Geo. 3, c. 48. Here again, in later years, by a merciful illegality, a fatal hanging usually preceded the burning.

[3] 33 and 34 Vict. c. 23. [4] 54 Geo. 3, c. 146, s. 2.

[5] As to infants under eighteen, see p. 57 *ante*. All sentences on even adult traitors after 1820 were commuted till Casement's in 1916.

[6] [1903] 1 K. B. 444.

Misprision of Treason

In our account of the law of Principal and Accessory[1] we saw that, when a treason has been committed, anyone who knowingly receives or assists the traitor, so as to aid him in escaping from justice, becomes himself guilty of complicity in the past act of treason as a "principal after the fact". And, in the case of felonies, a corresponding rule renders a similar harbourer an "accessory after the fact" to the original felony. We may now add that, even where no active assistance is thus given to the person who has committed a treason or a felony, anyone who knows of his guilt, and can give information that might lead to his arrest, will commit an offence if he omits to communicate that information to some justice of the peace. The "misprision" (*i.e.* high misdemeanor) of thus concealing a treason, or a felony, is usually termed briefly "misprision of treason" or "misprision of felony".[2] There is some authority[3] for saying that a misprision may also be committed in the case of a treason or felony that is merely being planned, if anyone who knows of the design refrains (however much he may disapprove of the project) from disclosing it to a justice of the peace in order to prevent its accomplishment.[4] If he go so far as to give actual assent and encouragement to the plot, he may of course become guilty (not of this mere misdemeanor but) as an accomplice in the felony or treason itself, should the design be ultimately carried into effect. A misprision of

[1] *Ante*, p. 96.

[2] The word Misprision was formerly in use as a general name for any of the more heinous kinds of misdemeanors (4 Bl. Comm. 119); but it has become obsolete except in the two offences now mentioned; where it probably means "undervaluing" the crime concealed. In French "mépriser".

[3] 2 Hawkins P. C. c. 29, s. 23.

[4] For the wider duty imposed in India, including even that of answering questions put by the police, see the Indian Penal Code, s. 44.

felony is punishable with imprisonment and fine;[1] but a misprision of treason with imprisonment for life and the forfeiture of the offender's goods absolutely and of his lands for so long as he lives. In the case of mere misdemeanors[2] there is no similar crime in omitting to disclose them.

It is moreover in felonies, and perhaps also even in misdemeanors[3] an offence to "compound" them; *i.e.* to bargain, *for value*, to abstain from prosecuting the offender who has committed a crime.[4] You commit this offence if you promise a thief not to prosecute him if only he will return the goods he stole from you; but you may lawfully take them back if you make no such promise. You may shew mercy, but must not sell mercy. This offence of compounding is committed by the bare act of agreement; even though the compounder afterwards breaks his agreement and prosecutes the criminal. And inasmuch as the law permits not merely the person injured by a crime, but also all other members of the community, to prosecute, it is criminal for anyone to make such a composition; even though he suffered no injury and indeed has no concern with the crime.

Praemunire

Akin in nature to treason, though far less heinous in degree, are the miscellaneous offences which have become

[1] Prosecutions for it are now unknown, but Lord Wensleydale had tried two; *The Times*, March 18, 1852. In 1914 a prosecution for it was commenced in County Clare; but was abandoned on the six defendants agreeing to give evidence against the murderer.

[2] Cf. p. 102 *ante*.

[3] Often, certainly, as a "conspiracy to pervert the course of justice". Cf. p. 354 *post*. But as to it in "quasi-private" crimes, see Anson, *Law of Contracts*, 17th ed. II, vii, s. 1. The numerous authorities on the whole question are collected in Archbold's invaluable *Criminal Pleading, Evidence and Practice*, 28th ed., pp. 1243 *et seq.* See, too, Winfield, *Abuse of Legal Procedure*, pp. 146–154.

[4] But you *may* so bargain for not taking divorce proceedings, as they are civil.

grouped together under the name of Praemunire. Under this head are comprised a variety of crimes whose chief connection lies in their having the same punishment. But all the earlier offences so punished were, as some of the later also are, acts tending to introduce into the realm some foreign power (usually that of the Pope), to the diminution of the King's authority. The word "praemunire" was the name of the writ which commenced the proceedings against a person guilty of such an offence; but afterwards it was also applied to any statute that created an offence for which this writ was to be issued; and, still later, it came to be applied to the punishment appointed for such offences, and even to the offences themselves.[1]

Voluminous as are the collections of our State Trials, they contain only one English instance of any proceedings under any Statute of Praemunire; viz. that of some Quakers who refused to swear allegiance to Charles II.[2] The principal offences of praemunire still recognised in our criminal law are the following:

(1) By 25 Henry 8, c. 20, the refusal of a dean and chapter to elect to a bishopric the clergyman nominated to them by the King.

(2) By the Habeas Corpus Act, 1679 (31 Car. 2, c. 2), the unlawful sending of any prisoner outside the realm, so that he would be beyond the protection of the writ of Habeas Corpus.

Not only is this offence made a praemunire, but, as we have seen, even the Crown's power to pardon it is taken away.[3]

(3) By 6 Anne, c. 23, s. 9, if the Scottish peers when met to elect their representative peers to the House of

[1] 4 Bl. Comm. ch. VIII.
[2] 6 St. Tr. 201. There is also one Irish case, 2 St. Tr. 553.
[3] *Ante*, p. 16.

Lords discharge any further business they commit a praemunire.

(4) By 12 Geo. 3, c. 11, Royal Marriages Act, 1772, to assist knowingly and wilfully at a marriage or the making of a matrimonial contract forbidden by the Act.[1]

(5) To maintain by spoken words the invalidity of the line of succession to the Crown.[2]

The offence of praemunire is only a misdemeanor; yet it is punished more severely than most felonies. For the offender (*a*) is placed out of the King's protection, *e.g.* he cannot sue; (*b*) he is imprisoned for life; and (*c*) he forfeits to the Crown all his property, real as well as personal, absolutely. This forfeiture is pronounced expressly as a part of the sentence. Consequently it does not render the offence a felony,[3] and it is not removed by the Forfeiture Act, 1870.

SEDITION AND OTHER OFFENCES AGAINST THE STATE

The law of Sedition relates to the uttering of seditious words, the publication of seditious libels, and conspiracies to do an act for the furtherance of a seditious intention. Sedition, whether by words spoken or written, or by conduct, is a misdemeanor at common-law punishable by fine and imprisonment. Sir James Stephen[4] defined a seditious intention as "an intention to bring into hatred or contempt, or to excite disaffection against the person of, His Majesty, his heirs or successors, or the government and constitution of the United Kingdom by law established, or either House of Parliament, or the administration of justice, or to excite His Majesty's subjects to

[1] Wade and Phillips, *Constitutional Law*, 2nd ed., p. 166.
[2] See p. 312 *ante*.
[3] *Ante*, p. 106.
[4] *Digest of Criminal Law*, 7th ed., Arts. 123–126.

attempt otherwise than by lawful means, the alteration of any matter in Church or State by law established,... or to raise discontent or disaffection amongst His Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects". But "an intention[1] to shew that His Majesty has been misled or mistaken in his 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 His 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 removal, matters which are producing, or have a tendency to produce, feelings of hatred and ill-will between classes of His Majesty's subjects, is not a seditious intention". It is the right of every citizen to discuss public affairs fully and freely, but such discussion must not be directed to the incitement of unlawful acts or calculated to excite disaffection.[2] In a twentieth-century prosecution for sedition the judge told the jury that they could take into account the state of public feeling.[3]

There are several statutes that relate to offences against the State, but not all call for special mention. The Unlawful Drilling Act, 1819,[4] prohibits unauthorised drilling. The Unlawful Oaths Act, 1797,[5] prohibits unlawful oaths. Tumultuous petitioning to the King or Parliament is prohibited by a statute of Charles II.[6] The Incitement to Mutiny Act, 1797,[7] makes it a felony punishable with penal servitude for life maliciously and advisedly to endeavour to seduce any person or persons serving in His

[1] *Digest of Criminal Law*, 7th ed., pp. 123–126.

[2] For illustrations of sedition, see Archbold, 28th ed., pp. 1139–1141; Russell on *Crimes*, 8th ed., pp. 303 *et seq.*; *Reg.* v. *Burns* (1886), 16 Cox 355. As to imprisonment for sedition see p. 578 *post*.

[3] *Rex* v. *Aldred* (1909), 22 Cox 1.

[4] 60 Geo. 3 and 1 Geo. 4, c. 1.

[5] 37 Geo. 3, c. 123.

[6] 13 Car. 2, st. 1, c. 5.

[7] 37 Geo. 3, c. 70. Extended to the air force under 7 and 8 Geo. 5, c. 51, s. 13.

Majesty's forces by sea or land from his or their duty and allegiance to His Majesty, or to make or endeavour to make any mutinous assembly, or to commit any treasonable or mutinous practice whatsoever. Under the Incitement to Disaffection Act, 1934,[1] which contains special provisions for the prevention and detection of offences,[2] it is an offence, triable either on indictment or summarily, maliciously and advisedly to endeavour to seduce any member of His Majesty's forces from his duty or allegiance to His Majesty. The punishment on conviction on indictment is imprisonment for a term not exceeding two years and/or a fine not exceeding £200,[1] and on summary conviction the punishment is imprisonment for a term not exceeding four months and/or a fine not exceeding £20. If any person with intent to commit or aid, abet, counsel or procure the offence of endeavouring to seduce from duty or allegiance has in his possession any document of such a nature that its dissemination would constitute such an endeavour to seduce he is guilty of an offence under this Act.[3] By the Police Act, 1919,[4] it is a misdemeanor punishable with two years' imprisonment to cause or do any act calculated to cause disaffection among the members of any police force, or to induce any member of such a force to commit breaches of discipline. The Official Secrets Acts, 1911 and 1920,[5] are directed to the punishment of spies and the prevention of the disclosure of State secrets. They deal with numerous offences including the wrongful approach to prohibited places:[6] the wrongful communication for a purpose prejudicial to the safety of the State of documents or information calculated to be useful to an enemy,[7] the wrongful commu-

[1] 24 and 25 Geo. 5, c. 56, ss. 1 and 3. [2] See p. 525, n. 3, *post*.
[3] 24 and 25 Geo. 5, c. 56, s. 2. [4] 9 and 10 Geo. 5, c. 46, s. 3.
[5] 1 and 2 Geo. 5, c. 28 and 10 and 11 Geo. 5, c. 75.
[6] For the full provisions of these Acts, see Archbold, 28th ed., pp. 1163–1174.
[7] "Enemy" includes "a potential enemy with whom we might some day be at war", *Rex* v. *Parrott* (1913), 8 Cr. App. R. 186.

nication of documents or information obtained in confidence from one holding office under His Majesty; the wrongful communication of information received by reason of holding office under His Majesty; failure to take reasonable care of secret official documents; the wrongful receiving of information obtained in contravention of the Acts; the harbouring of spies; the wrongful use of official uniforms; personation or the making of false statements in order to gain admission to prohibited places. By an unusual provision the conduct or known character of the accused is admissible as evidence that his purpose was a purpose prejudicial to the safety or interests of the State. The Acts apply to acts committed by anyone in any part of His Majesty's dominions, or by British officers or subjects anywhere.

OFFENCES AGAINST THE PUBLIC PEACE

In reviewing the law of treason, we have seen[1] that the extension of that crime by judicial constructions has enlarged its scope so as to include many acts which would seem to fall more naturally under the head of the much less heinous offence of Rioting. This offence itself is also one of a very wide and elastic character. This comprehensiveness is probably due (like the severity of the law of Conspiracy[2]) to the weakness which characterised our constitutional provisions for the prevention of crime throughout the long period that elapsed, after the decay of the old system of corporate responsibility by Frankpledge,[3] before the establishment by Sir Robert Peel of our modern force of borough and county police. Throughout these intervening centuries, the law felt its parish constabulary to be comparatively powerless to prevent any offence that involved the presence of a plurality of offenders. It consequently attempted to supply the defect

[1] *Ante*, p. 315. [2] *Post*, p. 339. [3] *Ante*, p. 31.

by very comprehensive prohibitions of all such crimes. Sir William Holdsworth has pointed out[1] that the severity of the law relating to offences against the public peace may be justified as well as explained. "Unlimited tolerance undermines all those fundamental principles upon which the stability of the state and, therefore, of civilisation itself, depends."

Hence it was laid down that whenever so many as three persons meet together to support each other, even against opposition, in carrying out a purpose which is likely to involve violence or to produce in the minds of their neighbours any reasonable apprehensions of violence, then even though they ultimately depart without doing anything whatever towards carrying out their design, the mere fact of their having thus met will constitute a crime. It will be the indictable misdemeanor of Unlawful Assembly. Such an offence will therefore be committed as soon as three labourers collect in a cottage, with a view to a night's poaching, or to attending service in the village church and protesting turbulently against the mode in which it is conducted; even though they never actually start on their expedition. Similarly, a group of people who have come together to see a prize-fight constitute an unlawful assembly, even though the fight never takes place.[2] The offence is sometimes defined so widely as to include all cases where three or more persons are assembled for any unlawful purpose whatever, even though it be one that can cause no fears of violence. But this comprehensive definition, long ago called in question,[3] has now been set aside by the case of *Field* v. *The Receiver for the Metropolitan Police District*, [1907] 2 K. B. 853 (which should also be studied for its definition of the offence of

[1] *History of English Law*, VIII, pp. 331–333.

[2] *Rex* v. *Brodribb* (1816), 6 C. and P. 571; cf. *Reg.* v. *Coney* (1882), 8 Q. B. D. 534.

[3] Stephen's *Digest of Criminal Law*, 1st ed., Art. 75. Cf. *Beatty* v. *Gillbanks* (1882), 9 Q. B. D. 308 (K. S. C. 392).

Riot).[1] Accordingly, when three boys meet to go and gamble at pitch-and-toss on a common, or when three costermongers go into a street on Sunday morning to sell their vegetables contrary to the Sunday Observance Act, they do not constitute an unlawful assembly (though they may be guilty of an indictable conspiracy[2]).

By the Seditious Meetings Act, 1817,[3] it is an unlawful assembly if more than fifty persons meet within a mile of Westminster Hall during sittings of Parliament for the purpose or on the pretext of considering or preferring a petition, complaint, remonstrance or address to the King or either House of Parliament for alteration of matters in Church or State. This act is a relic of the legislative restraint inspired by the French Revolution. Of the same era is the Unlawful Societies Act, 1799,[4] which prohibits secret societies and all societies composed of different divisions or branches other than certain excepted societies and societies formed for religious or charitable purposes only.[5]

In the offence of Unlawful Assembly, as in all others, the law regards persons as responsible for the natural consequences of their conduct. Consequently if people have assembled together under such circumstances as are in fact likely to cause alarm to bystanders of ordinary courage, the assembly will be an unlawful one, even though the original purpose for which it came together involved neither violence nor any other illegality. "You must look not only to the purpose for which they meet, but also to the manner in which they come, and to the means which they are using" (Bayley, J.). Accordingly the idea of an unlawful assembly is not restricted to gatherings met

[1] Cf. *Ford* v. *The Receiver for Metropolitan Police District*, [1921] 2 K. B. 344.

[2] *Post*, p. 337.

[3] 57 Geo. 3, c. 19, s. 25.

[4] 39 Geo. 3, c. 79, amended by 57 Geo. 3, c. 19.

[5] These acts are not applicable to Trade Unions, see Halsbury, *Laws of England* (Hailsham ed.), vol. IX, para. 473, note o.

together for the commission of some crime (like the poachers or prize-fighters already mentioned), or for arousing seditious feelings, or for inciting to some breach of the law (such as the non-payment of rents). For however innocent[1] may be the object for which a meeting is convened—*e.g.* to support some Parliamentary measure by strictly constitutional means—it will nevertheless become an unlawful assembly if the persons who take part in it act in such a way as to give firm and rational men a reasonable ground for fearing that some breach of the peace will be committed.[2] Mere numbers alone, it is true, will not suffice to make an assembly unlawful; but they are a circumstance to be considered. And a marked absence of women and children from a crowd, an unusually late hour of meeting, a seditious tone in the speeches, any menacing cries or banners, any carrying of weapons, are similarly circumstances which must be taken into account in determining whether a meeting might reasonably inspire terror in a neighbourhood. But it is important to notice that, if persons meet together for a lawful purpose and quite peaceably[3] in act and intent, the fact of their being aware that other people, less scrupulous, are likely to disturb them unlawfully and thereby to create a breach of the peace, does not render their assembly an unlawful one. A man cannot be convicted for doing a lawful act, *merely* because his doing it may cause some one else to do an unlawful act.[4] But to do this

[1] The seriousness of possible risks was well illustrated in 1908 when the Battersea Borough Council were told by the Commissioner of Police that they must either remove the "Battersea Brown Dog" with its provocative anti-vivisectionist inscription or pay £700 a year for special police protection.

[2] *Reg.* v. *Vincent* (1839), 9 C. and P. 91 (K. S. C. 391). *E.g.* if speeches provocative of violence are made.

[3] As to the necessity of this qualification, see *Wise* v. *Dunning*, [1902] 1 K. B. 167; Dicey's *Law of the Constitution*, 8th ed., App. v.

[4] *Beatty* v. *Gillbanks* (1882), 9 Q. B. D. 308 (K. S. C. 392); cf. 51 L. T. 304, and *McClenaghan* v. *Waters* (*The Times*, July 18, 1882). Yet it seems clear in (at any rate) Irish law, that constables are justified in *removing*

intrinsically lawful act, *e.g.* to wear a party badge with the desire of thereby irritating others into a breach of the peace, would render it unlawful. Some authorities go further, and hold that mere knowledge (without desire) of the irritation being probable will suffice to render the act unlawful if it be done without reasonable occasion (cf. *Reg.* v. *Clarkson* (1892),[1] and the Draft Code of 1879).

The alarm with which the common law viewed unlawful assemblies naturally led to the establishment of the rule that they may be dispersed forcibly, even by private persons acting on their own initiative.[2] The particular degree of force which such persons will be lawfully justified in using must be determined by the particular necessities of each individual case. But an unlawful assembly—even when accompanied by such further circumstances as aggravate it into a common-law riot—only amounts to a misdemeanor; and therefore, although blows with fists or with sticks may be struck when necessary to suppress it, it will be unlawful to kill any of the rioters or to employ deadly weapons. If, however, the rioters go beyond their mere misdemeanor and proceed to the length of some felonious violence, then even the infliction of death will be permissible in resisting such violence or in dispersing or arresting the rioters, and the act of killing will be a justifiable homicide.[3] Indeed, so long as those

such innocent persons to a safer place, if it be the only means of avoiding an *imminent* breach of the peace, *Coyne* v. *Tweedy*, [1898] 2 I. R. 167. So too a meeting with a lawful object may be dispersed where dispersal is necessary for the preservation of the peace and persons may be required to find sureties to keep the peace, who might yet be found innocent if charged with taking part in an unlawful assembly, *Wise* v. *Dunning* (*supra*), *O'Kelly* v. *Harvey* (1883), 14 L. R. Ir. 105, *Duncan* v. *Jones* (1935), 52 T. L. R. 26, and see p. 582 *post*. Refusal to disperse when lawfully required to do so will render an assembly unlawful, *Humphries* v. *Connor* (1864), 17 Ir. C. L. 1.

[1] 17 Cox 483.

[2] When an anti-scientific crowd, on Dec. 2, 1833, attacked the Anatomical School at Cambridge the undergraduates aided in its defence.

[3] "The law of England is unswervingly Socialistic. The individual rioter must be shot down rather than be allowed to interfere with the good of the community" (Lord Haldane).

engaged in suppressing the felonious violence act with due care, the accidental killing of even an innocent bystander by the means lawfully employed for the suppression will amount only to a case of homicide by misadventure.

Closely akin to the offence of an unlawful assembly are some other crimes of tumultuous disorder which are technically distinguished from it. Thus an unlawful assembly developes into a *Rout*, so soon as the assembled persons do any act towards carrying out the illegal purpose which has made their assembly unlawful; *e.g.* so soon as they actually commence their journey towards the plantation which is to be netted or the field where the fight is to come off. And the rout will become a *Riot*, so soon as this illegal purpose is put into effect forcibly by men mutually intending to resist any opposition;[1] *e.g.* so soon as a hare is netted or a blow is struck. All these three offences are misdemeanors punishable with the common-law penalties of fine and imprisonment; to which, by statute, hard labour may now be added.[2]

But from these mere misdemeanors we must pass to a cognate but more modern and more heinous offence; which has no recognised technical name but, for distinction's sake, may conveniently be termed a Riotous Assembly. It is the creation of the Riot Act of 1715,[3] which was passed in consequence of the riots in many towns that followed the accession of George I in 1714. It establishes a wiser mode of prosecuting grave tumults than by treating them as treasonable "levyings of war".[4] Under its provisions, whenever an unlawful assembly of *twelve* or more persons do not disperse within an hour after a Justice of the Peace has read, or has endeavoured

[1] *Field* v. *The Receiver for the Metropolitan Police District*, [1907] 2 K. B. 853; cf. *Rex* v. *Wong Chey* (1910), 6 Cr. App. R. 60.

[2] 4 and 5 Geo. 5, c. 58, s. 16.

[3] 1 Geo. 1, st. 2, c. 5. This statute contains (s. 7) the remarkable provision that its contents must be "openly read at every quarter sessions and at every court leet"; a provision disobeyed probably everywhere except at the annual court leet of Southwark.

[4] *Ante*, p. 315.

to read, to them a proclamation (set out in the Act) calling upon them to disperse, they cease to be mere misdemeanants and become guilty of a felony, punishable with penal servitude for life. But, by a departure from the general rule of criminal procedure (see p. 486 *post*), no prosecution for this felony can be commenced after the lapse of twelve months from its commission.

The Riot Act contains an express clause[1] indemnifying any persons who, after the expiration of the statutory hour, may have to use violence for dispersing or arresting the rioters and in so doing may hurt or kill some one. Indeed, such an indemnity was already implied in the provision that, after the lapse of the hour, the rioters' offence should become aggravated into a felony;[2] for this rendered justifiable the employment of any amount of force necessary to suppress this tumultuous felony, *e.g.* even the infliction of death, as by troops firing upon the crowd. But even whilst the hour is still unexpired the common-law right of dispersion[3] still exists, unaffected by the Riot Act and by the justice's proclamation. Consequently a moderate degree of force may be lawfully used even then. And if the rioters should proceed to commit any felonious violence, they may be checked with the same extreme measures of force as if the statutory hour were over. But a misapprehension that the Riot Act had somehow impliedly modified the common-law right did at one time prevail, and sometimes led to grave disorder being allowed to rage unchecked. In 1780, for instance, in consequence of this misapprehension, London was abandoned to pillage for three days during the disturbances initiated by Lord George Gordon.[4] Neither the citizens nor the soldiers dared to fire upon the plundering incendiaries who had become masters of the metropolis,

[1] s. 3. [2] *Ante*, p. 109. [3] *Ante*, p. 330.

[4] See Dickens' *Barnaby Rudge*, chs. LXIII–LXVII. Cf. the Dublin riots of 1913 in which 196 policemen were injured.

because no magistrate was present to "read the Riot Act". Their timidity was doubtless enhanced by the verdict of murder which had been given at Edinburgh in 1736 against Captain Porteous,[1] and by the indictments which had been found in 1768 against the soldiers who fired upon the Wilkite rioters in London.[2] But the result of the Gordon riots was to make it clear, beyond doubt, that every citizen—and the armed soldier, no less than any other—has by common law the right and the duty of using even deadly violence, whenever it is indispensable for the purpose of protecting person and property against a felonious mob of rioters. For, in Lord Mansfield's phrase, "whether the citizen's coat be a brown one or a red" it is equally his duty to aid the law.[3] This principle is vividly recognised in the present Army Regulations; which (whilst providing that, if a magistrate be present, the officer in command of the troops should not fire without the magistrate's orders)[4] direct that if no magistrate be present, the officer need not wait for one before taking active steps to prevent outrage upon persons or property.[5]

The matter, indeed, is not merely one of right, but of duty. It is an indictable misdemeanor for any person to refuse to take part in suppressing a riot, when called upon to

[1] *Ante*, p. 310.

[2] Of those Wilkites, a certain stout-hearted Mr Green, with the help of his equally courageous maidservant, slew no fewer than eighteen, when they attacked the little alehouse which he kept. He was tried for murder, and acquitted; but seven of his antagonists were hanged (Knight's *Popular History of England*, VI, 291).

[3] During the Littleport riots of 1816 the heads of the Cambridge colleges passed a resolution "to arm the undergraduates if necessary".

[4] And even those orders will not absolve the officer from the duty of exercising his own discretion before proceeding to fire.

[5] An admirable account of the law as to the suppression of riots will be found in the Report (drafted by Lord Bowen) upon the Featherstone Riots of 1893; when 2000 miners, about to destroy a colliery, were faced by twenty-eight soldiers; see *The Times* of December 8, 1893, and Dicey's *Law of the Constitution*, 8th ed., App. n. VI. Cf. the Report of the Royal Commission of 1914 on the landing of arms at Howth.

do so by a justice of the peace or by a constable. And the duty of the justice of the peace himself goes further. It is incumbent on him to proceed to the scene of a riot, and to read the statutory proclamation if the riot be such as to require it, and to take whatever subsequent steps are necessary to disperse the rioters.[1] If he fail to do this, he is guilty of a criminal neglect of duty, unless he can shew that he has at least done all that a man of firm and constant mind would have done under the circumstances. In the vast majority of cases the mere arrival of troops suffices to quell the disturbance.[2]

The holding of lawful public meetings is protected by the Public Meeting Act, 1908,[3] which makes it an offence to prevent by disorderly behaviour the transaction of business at a lawful public meeting.

[1] *Rex* v. *Kennett* (1781), 5 C. and P. 283 (K. S. C. 396). Neglect of duty or misconduct in the performance of duty by a public officer is an indictable misdemeanor at common law, see Archbold's *Criminal Pleading, Evidence and Practice*, 28th ed., p. 1176.

[2] The law of Riot includes a remarkable instance of a Vicarious liability —that thrown upon the inhabitants of any locality where rioters (even mere misdemeanants) have done damage to "buildings", to make good that damage. The particular locality originally assigned as the unit for this purpose was the Hundred. It is now the district—whether a borough or a section of a county—which maintains the local police-force; and the liability is discharged out of the local police-rate (the county or borough rate). See the Riot (Damages) Act, 1886 (49 and 50 Vict. c. 38). It protects not only the building but also the premises appurtenant to it; and the property within.

[3] 8 Edw. 7, c. 66.

CHAPTER XVIII

CONSPIRACY AND INDUSTRIAL DISPUTES

CONSPIRACY is the agreement of two or more persons to effect any unlawful purpose, whether as their ultimate aim or only as a means to it. This definition presents three points for notice: (1) the act of agreement, (2) the persons agreeing, (3) the purpose agreed upon.

(1) *The Agreement.* It must not be supposed that conspiracy is a purely mental crime, consisting in the mere concurrence of the intentions of the parties. Here as everywhere in our law, bare intention is no crime. "Agreement", as Lord Chelmsford puts it clearly, "is an act in advancement of the intention which each person has conceived in his mind."[1] It is not mere intention, but the announcement and acceptance of intentions. Bodily movement, by word or gesture, is consequently indispensable to effect it. In order of time, this precedes the act agreed upon. But the mere fact of the parties having come to such an arrangement suffices to constitute a conspiracy.[2] Hence it is not necessary to shew that they went on to commit some overt act towards carrying it out, though this (and also some consequent Damage) would be necessary in an action of Tort for conspiracy.[3] It follows that a person may be convicted of a conspiracy as soon as it has been formed, and before any overt act has been committed. The offence is complete as soon as the parties have agreed as to their unlawful purpose, although nothing has yet been settled as to the means and devices to be employed for effecting it. Thus if two lovers agree to commit suicide together, but promptly

[1] *Mulcahy* v. *The Queen* (1868), L. R. 3 H. L. at p. 328.

[2] *Rex* v. *Gill* (1818), 2 B. and Ald. 205 (K. S. C. 398).

[3] *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1888), 21 Q. B. D., *per* Lord Coleridge, C.J., at p. 549; *Sorrell* v. *Smith*, [1925] A. C. 700, 725–726.

think better of it, they nevertheless are liable to an indictment for conspiracy.[1] On the other hand, the actual accomplishment of the crime agreed upon will not cause the original offence of conspiracy to become "merged" in it.[2] Hence it would be technically possible to bring an indictment for a mere conspiracy to commit some grave crime, and then support it by evidence that tends to shew an actual consummation of the crime; but judges sternly discourage such a course as unfair to the accused.[3]

It is not necessary that the intended victims should be persons already ascertained. An indictment may charge a conspiracy to defraud "such persons as might thereafter be induced to deal with" the conspirators.

(2) *Two persons.* The very name of the crime indicates that it is essentially one of combination; a man cannot by himself *con*-spire.[4] Moreover, the law applies here the old doctrine of conjugal unity, reckoning husband and wife as one person; so that an unlawful combination by him and her alone does not amount to a conspiracy. But though there must be a plurality of conspirators, it is not necessary that all should be brought to trial together. One person may be indicted, alone, for conspiring with other persons who are not in custody, or who are even unknown to the indictors. Indeed some of the conspirators may be unknown even to the others, provided they all be acting under the directions of one common leader. There need not be communication between each conspirer and every other, provided that there be a design common to them all.[5]

[1] The question has been raised whether there is an indictable conspiracy when one of the parties has no intention to carry it out, and aims merely at getting money from the other under pretence of conspiring.

[2] As attempts *are* merged; see p. 94 *ante*.

[3] See *Rex* v. *Luberg* (1927), 19 Cr. App. R. at p. 137; 135 L. T. 414.

[4] So, on indictment of *A* and *B* for conspiring together, if *A* be acquitted, *B* cannot be convicted.

[5] *Rex* v. *Meyrick and Ribuffi* (1929), 21 Cr. App. R. 94; 45 T. L. R. 421 (K. S. C. 573).

(3) *An unlawful purpose.* The term "unlawful" is here used in a sense which is unique;[1] and, unhappily, has never yet been defined precisely. The purposes which it comprises appear to be of the following species:

(i) Agreements to commit a substantive crime; *e.g.* a conspiracy to steal, or even merely to incite some one else to steal. This extends to all cases where it would be criminal for any of the conspirators to commit the act agreed upon; even though there be in the gang other persons in whom it would be no offence to commit it; and to all "crimes", even non-indictable ones;[2] *e.g.* non-payment of poor-rates.

(ii) Agreements to commit any tort that is malicious[3] or fraudulent. Some say that agreements to commit any tort, of whatever kind, are indictable as conspiracies. But the weight of authority[4] seems to be in favour of limiting the rule to torts of fraud or malice; thus excluding, for instance, a trespass committed *bonâ fide* by persons eager to assert their supposed right of way.

(iii) Agreements to commit a breach of contract under circumstances that are peculiarly injurious to the public.[5]

(iv) Agreements to do certain other acts, which (unlike all those hitherto mentioned) are not breaches of law at all, but which nevertheless are outrageously immoral or else are, in some way, extremely injurious to the public. We may quote, as instances, agreements to facilitate the

[1] Contrast its sense in the Vagrancy Act; *post*, p. 382 n. 2.

[2] *Reg.* v. *Whitchurch* (1890), 24 Q. B. D. 420. Cf. p. 328 *ante*; and Lord Campbell's "If two men agree to blow their noses together during Divine service so as to disturb the congregation, they may be indicted for conspiracy" (Hansard, March 1, 1859).

[3] Wright's *Conspiracy*, p. 40; *e.g.* to pirate a copyright book.

[4] The conflicting authorities are well collected in Harrison on Conspiracy, pp. 91–96. See also "Criminal Conspiracy", *Harvard Law Review*, xxxv, 393.

[5] *Vertue* v. *Lord Clive* (1779), 4 Burr. 2472 (K. S. C. 401). Cf. p. 343 *post*.

seduction of a woman;[1] or to run slackly in a race so as to enable a confederate to win his bets;[2] or to hiss a play unfairly;[3] or to defraud a shipowner by secretly putting stow-aways on board. Similar criminality would arise in agreements to raise by false reports the price of the Funds[4] or of any other vendible commodity;[5] or so to carry on trade as to diminish the revenue; or to persuade a prosecutor not to appear at the trial; or to give false information to the police; or to indemnify a prisoner's bail.[6] On the other hand, it is doubtful whether an agreement to make loud noises for the purpose of disturbing an invalid neighbour would be indictable as a conspiracy.[7] And a thrifty combination of poor-law authorities to marry a female pauper to a pauper of another parish, in order to relieve the ratepayers of the woman's parish, is not a conspiracy.[8] Yet some combinations for procurement of marriage will amount to conspiracy; *e.g.* taking a young woman of property from the custody of her relations in order to marry her to one of the conspirators.[9] And although some combinations "in restraint of trade" may be so far illegal as to be unenforceable,[10] it is now settled that they do not necessarily constitute a criminal offence.[11]

The vagueness of the definition of this fourth class of "unlawful" purposes—to say nothing of the minor

[1] *Rex* v. *Howell* (1864), 4 F. and F. 160.

[2] *Rex* v. *Orbell* (1704), 6 Mod. 42.

[3] *Gregory* v. *Duke of Brunswick* (1843), 6 Man. and Gr. 205.

[4] *Rex* v. *De Berenger* (1814), 3 M. and S. 67 (the trial of Lord Dundonald, the naval hero).

[5] 1 Q. B. D. at p. 743; 2 Q. B. D. at p. 59.

[6] *Rex* v. *Porter*, [1910] 1 K. B. 369. See p. 538 *post*.

[7] Contrast *Rex* v. *Lloyd* (1803), 4 Esp. 200, with *Rex* v. *Levy* (1819), 2 Starkie 458.

[8] *Rex* v. *Seward* (1834), 1 A. and E. 706 (K. S. C. 405). At Meldreth (Cambs.) in 1724 a widow who cost the ratepayers 70*s*. a year was thus got rid of at an expense of only 50*s*. 8*d*.

[9] *Rex* v. *Wakefield* (1827), 2 Lew. 1, cf. *Rex* v. *Thorp* (1696), 5 Mod. 221 (K. S. C. 407).

[10] *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, [1892] A. C. 25. Leake, *Contracts* (8th ed., 1931), 563–564.

[11] See p. 342 *post*.

uncertainties hanging over the second and third classes—is historically intelligible. For in days when our police system was ineffective, the law felt itself dangerously threatened by any concert amongst evil-doers; and consequently, in the seventeenth and eighteenth centuries, indictments against conspirators were held good very readily. "A conspiracy", said even Holt, C.J., "is odious in the law."[1] But this vagueness renders it possible for judges to treat all combinations to effect any purpose which happens to be distasteful to them as indictable crimes, by declaring this purpose to be "unlawful". Owing to this elasticity in the definition of the crime, and also to the unusually wide range of evidence by which (as we shall see) indictments for it may be supported, there is much justification for the language used by Fitzgerald, J., in reference to it, in the Irish State Trials of 1867: "The law of conspiracy is a branch of our jurisprudence to be narrowly watched, to be jealously regarded, and never to be pressed beyond its true limits." For, in the prudent words of the greatest of American judges: "It is more safe that punishment should be ordained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they are to operate, than that it should be inflicted under the influence of those passions which a trial seldom fails to excite, and which a flexible definition of the crime, or a construction that would render it flexible, might bring into operation."[2]

A recent decision of the Court of Criminal Appeal, *Rex* v. *Manley*, [1933] 1 K. B. 529,[3] has extended the element of uncertainty to cases where there is no combination. A woman was charged with unlawfully causing a public mischief by false statements leading policemen to devote their time to the investigation of false allegations

[1] 5 Mod. 407.

[2] *Per* Marshall, C.J., in *Ex parte Bollman* (1807), 4 Cranch 127.

[3] K. S. C. 575. Cf. *Rex* v. *Bassey* (1931), 22 Cr. App. R. 160 (K. S. C. 577), as to meaning of public mischief.

of robbery. In delivering judgment Lord Hewart, C.J., laid it down that "all such acts or attempts as tend to the prejudice of the community are indictable". It is clear that this sweeping dictum opens wide the door to an indefinite multiplication by the judiciary of criminal offences. As was written by Sir James Stephen:[1] "If Parliament is not disposed to provide punishment for acts which are upon any ground objectionable or dangerous, the presumption is that they belong to that class of misconduct which it is not desirable to punish. Besides there is every reason to believe that the criminal law is, and for a considerable time has been, sufficiently developed to provide all the protection for the public peace and for the property and persons of individuals which they are likely to require under almost any circumstances which can be imagined; and this is an additional reason why its further development ought to be left in the hands of Parliament." It has been pointed out that the indictment in *Rex* v. *Manley* might have been supported on the narrower ground that it was a public cheat levelled against the administration of criminal justice.[2]

As to the Evidence admissible, the principles are just the same for conspiracy as for other crimes. But, owing to two peculiarities in the circumstances to which those principles are here applied, it often seems as if there were an unusual laxity in the modes of giving proof of an accusation of conspiracy.[3] For (*a*) it rarely happens that the actual fact of the conspiring can be proved by direct evidence; since such agreements are usually entered into both swiftly and secretly. Hence they ordinarily can be

[1] *History of Criminal Law*, III, 359–360.

[2] W. T. S. Stallybrass in article "Public Mischief", 49 L.Q.R. 183; cf. C. K. Allen, *Legal Duties*, pp. 245–246, and the charge to the grand jury at Derby of Humphreys, J., *The Times*, Nov. 17, 1932. For cheats see pp. 298 *ante* and 354 *post*.

[3] See *Rex* v. *Hunt* (1820), 1 St. Tr. (N. S.) 437; cf. 7 St. Tr. (N. S.) 472–475.

proved only by a mere inference from the subsequent conduct of the parties, in committing some overt acts which tend so obviously towards the alleged unlawful result as to suggest that they must have arisen from an agreement to bring it about.[1] Upon each of several isolated doings a conjectural interpretation is put; and from the aggregate of these interpretations an inference is drawn. The circumstantial evidence thus rendered necessary will often embrace a very wide range of acts, committed at widely different times and in widely different places.[2] The range of admissible evidence is still further widened (*b*) by the fact that each of the parties has, by entering into the agreement, adopted all his confederates as agents to assist him in carrying it out. Consequently, by the general doctrine as to principal and agent, any act done[3] subsequently for that purpose[4] by any of them will be admissible as evidence against him;[5] unless, before it was done, he had given them notice that he *withdrew* from the conspiracy. Just the same doctrine is, of course, applicable to any crime where a plurality of offenders are concerned, and so is not peculiar to trials for conspiracy. But in them it assumes unusual prominence; because, in cases of conspiracy, an unusually long interval

[1] *Reg.* v. *Parnell* (1881), 14 Cox 505 (K. S. C. 412), *Rex* v. *Parsons* (1762), 1 W. Bl. 391 (K. S. C. 408). For acts *not* obvious enough, see *Rex* v. *Connolly* (1909), 3 Cr. App. R. 27 at pp. 31, 32.

[2] *Rex* v. *Hammond and Webb* (1799), 2 Esp. 718 (K. S. C. 411).

[3] But not a mere *admission* uttered; see *post*, p. 472. The cobbler is the burglar's agent for mending the noiseless shoes, but not for uttering a remark as to the use they have been put to (though he can, of course, give evidence as to such a remark having been made by the burglar).

[4] But not acts that go beyond that purpose; *e.g.* where the purpose was only theft, yet murder was committed. Nor acts done after the purpose has been accomplished; *e.g.* the disposal of his share of the proceeds of the theft.

[5] Hence in trials for conspiracy a difficulty is apt to arise in determining at what stage the judge will pronounce the evidence to have given sufficient *primâ facie* proof of a conspiracy, and of the defendant's being a party in it, to render it now permissible to give against him evidence of the conduct of his colleagues (furthering it) when he was *absent* from them.

often elapses—with consequently an unusually long series of acts—between the time when the common criminal purpose is formed and the time when it is carried out or is frustrated by arrest.

Moreover there is often, just as on every other protracted trial of a plurality of defendants, the danger that the jury may—even despite judicial warning—be influenced against one of the accused by evidence that is legally admissible only against another of them. Thirteen days were occupied at Birmingham in 1925 by the trial of a group of nineteen men for a conspiracy to defraud. To prevent any misapplication of evidence by the jury, the judge found it desirable to sum up against each prisoner separately, and took the verdict upon him before passing to the next man's case.

Conspiracy is a misdemeanor; punishable with fine and imprisonment, to which no limit is affixed. Since the Criminal Justice Administration Act, 1914 (see p. 578 *post*), hard labour may, in all cases, be added. Moreover a conspiracy to murder is punishable with penal servitude for ten years, though it still remains only a misdemeanor (24 and 25 Vict. c. 100, s. 4).

INDUSTRIAL DISPUTES

It is now only of historical interest to consider how far combinations of employees to raise wages or improve conditions were criminal conspiracies at Common Law as being in restraint of trade or as designed to "molest, ignore, or impoverish an individual, or to prevent him from carrying on his business".[1] The right to strike was established beyond doubt by the Conspiracy and Protection of Property Act, 1875 (38 and 39 Vict. c. 86), which enacted (section 3) that "An agreement or combi-

[1] Contrast *Reg.* v. *Bunn* (1872), 12 Cox 316 with the speech of Lord Bramwell in *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, [1892] A.C. 20 at p. 47. See Wright, *Criminal Conspiracy*, for the history.

nation by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime." An individual who withholds his labour does not commit a crime. A strike which is in itself legal may, however, be accompanied by violence or other illegalities and the same section provides that "Nothing in this section shall exempt from punishment any persons guilty of a conspiracy for which a punishment is awarded by any Act of Parliament" and that "Nothing in this section shall affect the law relating to riot, unlawful assembly, breach of the peace, or sedition, or any offence against the State or the Sovereign".

A strike may, though it need not, involve breaches of contract; but for an individual to break a contract is not ordinarily a crime, and a strike which involves broken contracts does not for that reason become a criminal conspiracy. But in the public interest certain breaches of contract have been made criminal. By the Act of 1875[1] it is a crime punishable by a fine of £20 or imprisonment for not more than three months for any person employed by suppliers of gas or water (whether municipal authorities or private contractors) wilfully and maliciously to break a contract of service knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be to deprive the inhabitants of any place wholly or partly of their supply of gas or water. These provisions were extended by the Electricity (Supply) Act, 1919,[2] to electricity undertakings. Similar penalties are also imposed by the Act of 1875[3] on any person who wilfully or maliciously breaks any contract of service knowing or having reasonable cause to believe that the probable

[1] 38 and 39 Vict. c. 86, s. 4.
[2] 9 and 10 Geo. 5, c. 100, s. 31.
[3] 38 and 39 Vict. c. 86, s. 5.

consequences of so doing, either alone or in combination with others, will be to endanger human life, or cause serious bodily injury, or to expose valuable property to destruction or serious injury. Finally by the Trade Disputes and Trade Unions Act, 1927,[1] a penalty of a fine of £10 or imprisonment for not more than three months is imposed upon any person who wilfully breaks a contract of employment with a local or other public authority, knowing or having reasonable cause to believe that the probable consequence of his so doing, either alone or in combination with others, will be to cause injury or danger or grave inconvenience to the community. Thus a strike may be a criminal conspiracy because it involves agreements to break, or the persuasion of others, to break contracts, the breach of which the law treats as crimes.

While, apart from breaches of contract, a man is free to withhold his labour as he wills, he is not free to coerce others into withholding theirs. The right to work is as important as the right to strike. It is impossible for the law to interfere with the pressure of the opinions of a man's fellow-workmen, but the law will not allow pressure to take the form of intimidation or molestation. By the Conspiracy and Protection of Property Act, 1875, section 7, it is an offence, subject to a penalty of a fine of £20 or imprisonment for not more than three months, wrongfully and without legal authority, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing,

(1) to use violence to or to intimidate such other person or his wife or children, or to injure his property,

(2) persistently to follow such other person about from place to place,

[1] 17 and 18 Geo. 5, c. 22, s. 6 (4).

(3) to hide any tools, clothes or other property owned or used by such other person, or to deprive him of or to hinder him in the use thereof,

(4) to watch or beset the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place,

(5) to follow such other person with two or more other persons in a disorderly manner in or through any street or road.

To intimidate means "to cause in the mind of a person a reasonable apprehension of injury to him or to any member of his family or to any of his dependants or of violence or damage to any person or property, and the expression 'injury' includes injury to a person in respect of his business, occupation, employment or other source of income, and includes any actionable wrong".[1] By the Trade Disputes Act, 1906 (6 Edward 7, c. 47, s. 2), it was declared lawful for "one or more persons, acting on their own behalf or on behalf of a trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working", but by the Trade Disputes and Trade Unions Act, 1927, "Notwithstanding anything in any Act, it shall not be lawful for one or more persons, for the purpose of inducing any person to work or to abstain from working, to watch or beset a house or place where a person resides or the approach to such a house or place"[2] and by the same Act it is to be deemed to be a watching or besetting within the

[1] 17 and 18 Geo. 5, c. 22, s. 3 (2).
[2] 17 and 18 Geo. 5, c. 22, s. 3 (4).

meaning of the Act of 1875 for one or more persons "to attend at or near a house or place where a person resides or works or carries on business or happens to be, for the purpose of obtaining or communicating information or of persuading or inducing any person to work or to abstain from working, if they so attend in such numbers or otherwise in such manner as to be calculated to intimidate any person in that house or place, or to obstruct the approach thereto or egress therefrom, or to lead to a breach of the peace".[1] Picketing therefore is only legal if it is free from the elements of intimidation and obstruction, nor must it be calculated to lead to a breach of the peace, or amount to a watching or besetting of a man's place of residence with the purpose of inducing him to work or abstain from working.

The protection against the Common Law of Conspiracy given by section 3 of the Act of 1875 (*ante*, p. 342) extends only to acts "in furtherance of a trade dispute". By the Trade Disputes Act, 1906,[2] protection was given against civil liability for certain acts done in contemplation or furtherance of a trade dispute, and by section 5 (3) of that Act the expression "trade dispute" was defined as follows for the purposes of both that Act and the Act of 1875. "The expression 'trade dispute' means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms of employment, or with the conditions of labour, of any person, and the expression 'workmen' means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises".[3] It is clear that this definition is wide enough to cover "sympathetic strikes" and that the protection given cannot be confined to acts

[1] 17 and 18 Geo. 5, c. 22, s. 3 (1).

[2] 6 Edw. 7, c. 47.

[3] The words "between employers and workmen" in section 3 of the Act of 1875 were expressly repealed.

done by parties to a dispute. It was, however, contended[1] that the General Strike of 1926 was not in furtherance of a trade dispute and was illegal as being designed to bring pressure not upon employers but upon the Government. To remove all doubts upon the illegality of such a strike there was passed the Trade Disputes and Trade Unions Act, 1927.[2] This Act declares that any strike or lock-out is illegal if it (1) has any object other than or in addition to the furtherance of a trade dispute within the trade or industry in which the strikers or employers locking-out are engaged; *and* (2) is a strike or lock-out designed or calculated to coerce the Government either directly or by inflicting hardship upon the community. To render a strike illegal under this act both factors must be present. It must be designed or calculated to coerce the Government, and it must have an object other than or in addition to the furtherance of a dispute within the strikers' own industry. A trade dispute is not to be deemed to be within a trade or industry unless it is a dispute between employers and workmen, or between workmen and workmen, in that trade or industry, which is connected with the employment or non-employment or the terms of the employment, or with the conditions of labour of persons in that trade or industry. Workmen whose wages or conditions of employment are determined by the same joint industrial council, conciliation board or other similar body, or in accordance with agreements made with the same employer or group of employers are deemed to be within the same trade or industry. Any person who incites others to take part in, or who otherwise acts in furtherance of, an illegal strike or lock-out is liable to a fine of £10 or im-

[1] And it was so decided by Astbury, J., in *National Sailors' and Firemen's Union* v. *Reed*, [1926] Ch. 536, but for a powerful argument to the contrary see Prof. A. L. Goodhart's "The Legality of the General Strike in England" in *Essays in Jurisprudence and the Common Law*, ch. XI.

[2] 17 and 18 Geo. 5, c. 22, s. 1.

prisonment for a term not exceeding three months, but it is not an offence merely to cease work, or to refuse to continue to work or to accept employment. The intention of the Act is to facilitate the punishment of leaders and agitators rather than ordinary strikers. After a charge has been brought, no further proceedings may be taken without the consent of the Attorney-General, unless the prosecution has been instituted by or on behalf of the Director of Public Prosecutions.

CHAPTER XIX

PERJURY

In Anglo-Saxon legal procedure, judicial oaths played a very important part, being taken both by jurors and by compurgators. Both these classes were punishable for any perjuries they uttered. But the functions of the modern witness had not yet been differentiated from those of the juror; and perjury by witnesses was consequently an unknown crime.[1] And when, in the fourteenth century, witnesses did begin to be brought in to inform the jury, perjury by them was not made a punishable offence. Hence it became a maxim that the law regarded every witness's oath as true. Even the ecclesiastical courts, though treating breaches of faith in general as matters within their jurisdiction, took no notice of the grave breach of faith involved in giving false witness. But, before the end of the fifteenth century, the Star Chamber sometimes interposed to punish perjuries. And, in the sixteenth century, Parliament itself began to interfere with the immunity of witnesses; dealing in 1540[2] with subornation of perjury, and in 1562[3] with perjury itself. But for each of these offences it imposed only a pecuniary penalty, recoverable civilly by a penal action. Finally, however, the Star Chamber, in 1613, declared perjury by a witness to be punishable at common law.[4] Sir James Stephen emphatically characterised this decision as "one of the boldest, and, it must be added, one of the most reasonable, acts of judicial legislation on record".[5]

[1] See Pollock and Maitland, II, 539; Stephen, *History of Criminal Law*, III, 240.

[2] 32 Hen. 8, c. 9, s. 3.

[3] 5 Eliz. c. 9.

[4] *Rex* v. *Rowland ap Eliza* (1613), 3 Coke Inst. 164 (K. S. C. 415).

[5] *Digest of Criminal Law*, 1st ed., p. 345.

The offence thus created was one which could only be committed in a judicial proceeding,[1] and by a witness who gave false evidence on oath. But the law gradually came to assume a far more complicated form. Parliament specified various matters which were not judicial proceedings, yet in which the telling a falsehood upon oath was to be a Perjury. Again, some classes of witnesses came to be allowed by statute to give evidence in judicial proceedings on mere affirmation, without any oath; and falsehood by them, though no Perjury, was made as severely punishable as if it were one. Moreover, the judges proceeded to declare that, in any matter wherein the law required an oath to be taken, the taking it falsely—if it were not judicial, and so not a Perjury—would be at least a common-law misdemeanor,[2] punishable with fine and imprisonment, though not with the penalties of Perjury.

Happily the multifarious rules on these subjects have now been reduced to a comparatively simple and logical form. The noble task of codifying our criminal law, a task attempted by the statesmen of a few generations ago[3] on a comprehensive scale but with no practical result, was resumed in 1910 by Lord Loreburn in a more fragmentary manner but with legislative success. For he carried the Perjury Act, 1911 (1 and 2 Geo. 5, c. 6); which modifies not only the common law but also the provisions of upwards of a hundred and thirty Acts of Parliament.

It creates, or continues, numerous offences of False Public Statement. All, however severely punishable, are only misdemeanors. In each of them the offence lies in the breach of the oath or affirmation or declaration; that breach constituting only one single crime, however many be the lies that falsify the evidence. A fresh lie does not create a fresh perjury, but is merely a fresh proof of the

[1] *The Keepers of the Liberties* v. *Gwinn* (1652), Style 336 (K. S. C. 416).
[2] *Rex* v. *Foster* (1821), R. and R. 459 (K. S. C. 417).
[3] See p. 620 *post*.

one general perjury; or, in technical phrase, "matter for a new *Assignment* of Perjury". "Assertory" oaths, not "promissory" ones, are concerned.

The Statute classifies the offences into three groups.

(A) The grade most heinous consists of the offences punishable with seven years' penal servitude, or with two years' imprisonment (whether with or without hard labour), or with a fine (whether in addition to one of the preceding punishments or alone). Of these there are several.

(1) "Perjury"; a term which is henceforth to be restricted, as it was originally, to the case of *forensic* false evidence. It is defined—s. 1 (1)—as the crime committed when a person, lawfully "sworn"[1] as a witness (or an interpreter) in a *judicial* proceeding wilfully makes a statement, material in that proceeding, which he knows to be false or which he does not believe to be true.

The term "judicial" is, however, employed here in a wide sense which will cover not only inferior courts, like petty sessions, or courts outside the common law, like a court-martial, but even many matters of mere administrative business. For it is—s. 1 (2)—to include all proceedings "before any court, tribunal, or person, having by law the power to hear, receive, and examine evidence on oath".[2]—An action brought against a non-existent person has been held to be a judicial proceeding.[3] Yet

[1] The expression is here not limited to religious Oaths, but includes also the taking of a legal Affirmation or Declaration—s. 15 (2). But the *child* who gives evidence without being sworn (*post*, p. 447) is punishable for its falsity only by being sent for a month to a mere remand home, see p. 579 *post*.

[2] Difficulties as to the common-law "territoriality" of criminal jurisdiction (*post*, p. 487) the Act obviates by treating as perjuries punishable in this country not only—s. 1 (4)—such as are committed here for the purposes of a judicial proceeding in colonial or foreign territory, but also —s. 1 (5)— all that are committed for the purposes of an English judicial proceeding, though committed in other parts of the King's dominions or (if before a British functionary) even in some foreign country.

[3] *Rex* v. *Castiglioni* (1912), 106 L. T. 1023.

clearly the offence will not be committed unless the evidence be actually taken before a person who has legal power to take it. Thus when a Registrar in bankruptcy, who was presiding over the examination of a debtor, left the room to discharge other duties but bade the solicitor go on questioning the debtor, false answers given after his leaving were held to be no perjury.[1] And when justices of the peace held an informal preliminary meeting, at which they took evidence, in order to lighten the labour of their statutory licensing-session, a witness who swore falsely at this unauthorised meeting was held to have committed no offence.[2]

(2) Similar conduct when committed, outside all judicial proceedings, by a person who has been "required or authorised by law to make any statement on 'oath' [including, by s. 15, Affirmation or Declaration] for any purpose"; s. 2 (1).

In these two crimes—A (1) and A (2)—in which, whether in a judicial or a non-judicial proceeding, the offender has been "sworn" it is not necessary that his statement should be false at all. The man becomes punishable simply through uttering an assertion, false or true, which he does not positively "believe to be true"; s. 1 (1), s. 2 (1). For a man who tells the truth quite unintentionally is morally a liar. Bracton (fo. 289) enforces this principle by the grotesque illustration of a Jewish juryman who, by concurring in a verdict that Christ was born of a virgin, committed a perjury, whilst his Christian colleagues of course committed none.[3] Conversely, false swearing is no crime when it is not wilful, but merely inadvertent (see p. 355).

On the other hand, a rule of peculiar, and perhaps

[1] *Reg.* v. *Lloyd* (1887), 19 Q. B. D. 213.

[2] *Rex* v. *Shaw* (1911), 6 Cr. App. R. 103.

[3] Falsity as to a *mental* fact suffices; *e.g.* the witness's belief, or his "I cannot remember"; *Reg.* v. *Schlesinger* (1847), 10 Q. B. 670.

unfortunate,[1] leniency is borrowed by the Act, from the older law, for these two important offences—A (1) and A (2)—and also for one—viz. B—of those that are less heinous. For in these three crimes no guilt is incurred by a wilful false statement unless it be "material"[2] to the proceeding, or the purpose, for which it was made. This lenient old rule has often enabled witnesses, who had wilfully given false evidence, to escape all punishment. Fortunately the judges construe the rule very narrowly. Thus they have held that the evidence need not be material to the actual issue of the litigation—a lie about his solvency by a man who merely offers himself as bail is sufficiently material to a criminal prosecution. Again, evidence may be sufficiently "material" even though it were material, not intrinsically, but only by its facilitating the jury's acceptance of other testimony which had an intrinsic materiality.[3] Thus mere trivial details, mentioned by a witness in giving his account of a transaction, may become important by their leading the jury to believe that his knowledge of the transaction is complete, and his evidence therefore likely to be accurate. On the same ground, all statements made by a witness as to matters that merely affect his credibility are material,[4] *e.g.* his denial of having been convicted of a crime. And even if the false evidence were legally inadmissible, yet this need not prevent its being regarded as "material" enough to form the subject of an indictment for perjury. There is, for instance, a rule that when a witness answers questions that relate merely to his own credibility,[5] his answers are to be taken as final; so that no other witness can legally

[1] The Indian and Canadian Penal Codes shew no such leniency.

[2] *I.e.* such as might actually affect the mind of the tribunal. Materiality as to the *sentence* suffices, *Rex* v. *Wheeler*, [1917] 1 K. B. 283.

[3] "A witness's statements as to his Identity—his name, abode, position in life—are material. For they affect the degree of trust which the jury will give him." *Per* Darling, J., at C. C. C., Jan. 12, 1923.

[4] *Reg.* v. *Baker*, [1895] 1 Q. B. 797 (K. S. C. 419).

[5] *Post*, p. 429.

be brought to contradict them. Yet if, by a breach of this rule, some second witness be permitted to give this contradiction, and he give it falsely, he may be indicted for perjury; for, so soon as the contradiction was admitted, it did affect the credit given to the previous witness, and so became "material".[1]

The long-disputed question whether it is for the judge or for the jury to say if a statement was or was not "material", is determined by the Act in favour of the judge; s. 1 (6).

It is an indictable misdemeanor at common law to do an act which shows a tendency and is intended to pervert the administration of public justice. Thus it is a crime to prepare false evidence even if it is never used, *Reg.* v. *Vreones*, [1891] 1 Q. B. 360. Similarly it is a crime at common law to persuade a witness to give at the trial an account different to that given at the police court, *Rex* v. *Greenburg* (1919).[2]

(3) The wilful use of a false affidavit for the purposes of the Bills of Sale Act, 1878;[3] s. 2 (2).

Moreover this first grade of crimes includes the following two offences which may be committed even when no formal oath or affirmation has been taken.[4]

[1] *Reg.* v. *Gibbon* (1862), L. and C. 109.

[2] 121 L. T. 288. Cf. p. 538, note 1 *post*. Other offences against public justice are maintenance (procuring without lawful justification any person to institute, carry on, or defend civil proceedings, see *Neville* v. *The London Express Newspaper Ltd.*, [1919] A. C. 368. Charity is a lawful justification); champerty (maintenance where the maintainor agrees to take as his reward a portion of the property in dispute, see *Haseldine* v. *Hosken*, [1933] 1 K. B. 822); and barratry (habitually to move, excite or maintain suits or quarrels). For embracery and bribery see p. 293 *ante*. At Manchester Assizes in 1935 there was tried a private prosecution for conspiracy to commit criminal maintenance, champerty, and barratry. Greaves-Lord, J., stated that for maintenance there must be an existing suit, *sed quaere*, see 180 L. T. Jo. 63. For the whole topic, see Winfield, *Abuse of Procedure*, chs. III–V.

[3] 41 and 42 Vict. c. 31.

[4] The Criminal Justice Act, 1925 (s. 28), allows in *both* these two offences —(4) and (5)—the alternative of trial at Petty Sessions; but in that case the utmost punishment for either would be a fine of £50.

(4) False statements, whether they be "sworn" to or not, made with reference to effecting the celebration or registration of a marriage: s. 3 (1).

(5) False statements, sworn to or not, with reference to the registration[1] of a birth or of a death; s. 4 (1).

(B) A less guilty group of offences consists of some that are not punishable with penal servitude but only with two years' imprisonment, or a fine, or both (s. 5).

In these no Oath has been taken. They are committed when statements, wilfully false in a *material* particular, are made in a "Statutory Declaration";[2] or in some document which the offender was authorised or required to make, or some oral declaration or answer which he was required to make, by a public general Act of Parliament.[3]

(C) The least heinous grade is that of the offences for which the punishment is imprisonment for a year (with, since 1914, hard labour) with or without a fine, or a fine alone. These offences arise when a man makes (either in writing or orally) a representation "which he knows to be false or fraudulent" for the purpose of getting himself registered, or of procuring a certificate of some one's being registered, on the statutory roll of persons legally qualified to practise a particular calling—*e.g.* medicine or dentistry; s. 6.[4]

In all these various offences, from Perjury downwards, wilfulness is an element essential to guilt. The man who

[1] On indictment for this offence a fine cannot be inflicted along with penal servitude or imprisonment, but only in substitution for them.

[2] See the Statutory Declarations Act, 1835 (5 and 6 Will. 4, c. 62). The Criminal Justice Act, 1925, s. 24 and Sched. 2, allows the alternative of trial at Petty Sessions; with a possible punishment of, at most, six months' imprisonment and £100 fine.

[3] As when a voter is questioned by the returning officer at a general election.

[4] The Act is so comprehensively framed that perhaps no form of Public Statement is omitted. But what of false statements given orally, and not on oath, by a witness at a Local Government public inquiry? For false statements made to procure motor licences, etc., see Road Traffic Act, 1930, s. 112; Road and Rail Traffic Act, 1933, s. 34; Road Traffic Act, 1934, Sched. III.

makes an untrue assertion, but with an honest belief that it is true, commits no crime. His clerk made out the account, or his solicitor prepared the affidavit; and then he, on reading it over, felt no doubt of its correctness. Though due to inadvertence or forgetfulness or mistake—even careless and stupid mistake—his untrue words were not due to wilfulness. The case would be different if, instead of an actual belief that his assertion was true, he had had no belief either way;[1] for, by making the assertion, he pledged himself that his mind was not a blank with regard to it, so he lied "wilfully". It may however be doubted whether such non-belief would support a conviction for those offences—A (4) and B and C—which the Act requires to be committed not only wilfully but *knowingly*.

If any one incites a person to commit either perjury or any other offence against the Act, he commits, of course (*ante*, p. 91), a misdemeanor for which he may be fined and imprisoned with (since 1914) hard labour. But if his incitement prove so successful that the other man does commit the offence, there is then an actual Subornation; and for this the suborner may be visited with as severe a punishment as for the perjury, or other offence, itself (s. 7).

For all the above-mentioned offences a time-honoured precaution, which the common law of Evidence imposed in prosecutions for perjury, is perpetuated. By s. 13, a person shall not be liable to be convicted of *any offence* against this Act (or of any offence declared by any other Act to be, or to be punishable as, perjury or subornation of perjury) solely upon the evidence of one witness as to the falsity of any statement alleged to be false. Otherwise there would but be one man's oath against another's —the statement originally sworn to by the defendant,

[1] See 9 A. C. at p. 203.

and, on the other hand, the contradiction of it now sworn to by the witness for the prosecution. (See *post*, p. 457.) But it is sufficient if this one direct witness be corroborated by some admission which the prisoner has made, or by circumstantial evidence.[1]

The Divorce Court is commonly regarded as "the playground of Perjury"; and not merely because a perverted sense of honour frequently prompts adulterers to falsehood. But the crime is still more common in the collision cases of the Admiralty Court; where sailors often manifest a clannish zeal for their ship. The Commercial Court is probably the tribunal most free from mendacity.

[1] Cf. *Rex* v. *Saldanha* (1921), 85 J. P. 47.

CHAPTER XX

BIGAMY

BIGAMY, as Blackstone tells us, properly signifies being married *twice*; but in law is used as synonymous with polygamy, or having a plurality of wives at once. (In 1790 a man named Miller was pilloried for having married so many as thirty women, for the sake of getting their money.) It was originally a purely ecclesiastical offence. But in 1603, by 1 Jac. 1, c. 11, it was made a felony. This statute, after being repealed and re-enacted by 8 and 9 George 4, c. 31, is now reproduced in the Offences against the Person Act, 1861 (24 and 25 Vict. c. 100, s. 57).

The offence is committed when a person who

(1) has previously been married,

(2) and has not since been legally divorced,

(3) goes through a legally recognised ceremony of marriage with another person,

(4) whilst the original wife or husband is still living;

(5) unless the original wife or husband has been continuously absent from the accused husband or wife during the seven years preceding the second marriage; and has not during that time been known by him or her to be living.

1. *Previously married.*[1] To sustain an indictment for bigamy the first marriage[2] must have been valid according to the law of the domicil of the parties, so far as concerns

[1] As to the proof of this, see p. 389 *post.*

[2] *Rex* v. *Moscovitch* (1924), 44 T. L. R. 4. In *Rex* v. *Naguib*, [1917] 1 K. B. 359 it was indicated by Avory, J., that in his view a "marriage" under polygamous law would not suffice. The decision was affirmed by the Court of Criminal Appeal on another ground, and the question is one of extreme difficulty. See "The Recognition of Polygamous Marriages in English Law" by W. E. Beckett, C.M.G. in 48 L. Q. R. 341.

their personal capacity to marry;[1] and according to the law of the place of celebration, so far as concerns the ceremonial form.

Amongst possible causes of voidness may be mentioned the fact of either party being an idiot at the time of marriage; or the fact of the parties being within the prohibited degrees of relationship (as upon a man's marriage with his niece). So too, if the prisoner's first wife were actually the wife of someone else, at the time of her marriage with him, this marriage would necessarily be void. Consequently for him to proceed to marry some other woman will, though apparently a bigamy, be really no crime.[2] Similarly if *X* marries first *A*, and secondly *B*, and then thirdly, after *A*'s death, marries *C*, this marriage between *X* and *C* will not be indictable as a bigamy; inasmuch as the marriage with *B* was a mere nullity.

But besides those invalid marriages which are actually void (*i.e.* which may be treated as null by any court where evidence is given of the circumstances that invalidate them), there are others which are only voidable, *i.e.* the cause of their invalidity is merely one for which a court of matrimonial jurisdiction may set aside the marriage, if called upon to do so, whilst both the parties are still alive. But, until thus set aside, such a marriage must be treated by all courts as valid. Hence even a voidable marriage, as where either party to the marriage is then under the age of capacity (sixteen),[3] or is sexually impotent, has always been regarded as sufficient to fix the wife's nationality and domicil, and to render any second marriage bigamous.

[1] Dicey's *Conflict of Laws*, 5th ed., p. 734. But see *ibid.* pp. 921 *et seq.* as to the growing tendency to test Capacity by the same rule as Form.

[2] Lord Euston in 1871 married *A*. Afterwards, on finding that *B*, whom she had married in 1863, was still alive, he sued for nullity of marriage. But her successful defence was that in 1863 *B* was already married to *C*, who lived till 1867.

[3] See p. 182 *ante*.

2. *Not divorced.* It will be a good defence to a charge of bigamy, if the prisoner prove that the first marriage had been validly dissolved[1] (or judicially declared to have always been void), before the celebration of the second marriage. The divorce must be a legal one; legal, that is, by the law of the country where the divorced parties were domiciled at the time.[2] If it were not thus valid, the fact that, by an error of law, they honestly though mistakenly supposed it to be valid, will not prevent the second marriage of either of them from being criminal.[3] But if valid under that country's law, a divorce will be effectual here as a defence to a charge of bigamy, even though the ground on which it was granted was one that would not have enabled the parties to obtain a divorce in this country, had they then been domiciled here.

3. *Legally recognised ceremony.* Bigamy, like homicide, forms one of the rare exceptions to the principle that criminal jurisdiction is purely territorial. For, if the person accused be a British subject, it is immaterial in what territory (even though it be outside the British dominions altogether[4]) the second marriage took place; and he may be tried in any part of the United Kingdom where he may be in custody. But a person who is not a subject of His Majesty cannot thus be tried here for a bigamy committed outside the United Kingdom.

The second marriage (the alleged crime) must have been in a form recognised by the law of the place where it was celebrated.[5] But any form, legally recognised there, is

[1] A "decree nisi" is *not* enough; a point too often overlooked.

[2] *Le Mesurier* v. *Le Mesurier*, [1895] A. C. 517. It may be convenient to note here that by the Administration of Justice Act, 1920, s. 15, questions of even a *foreign* law must now be decided by the judge himself, instead of being, as formerly, submitted, as questions of Fact, to the jury.

[3] See p. 363 *post.*

[4] *Earl Russell's Case*, [1901] A. C. 446. Cf. p. 164 *ante.*

[5] *Reg.* v. *Allen* (1872), 1 C. C. R. 367 (K. S. C. 423). In India, if the first marriage be under monogamous law, a second marriage even under a polygamous law will be a criminal bigamy, *The Emperor* v. *Lazar* (1907), 30 Madras 551.

sufficient. It is enough that it would have been good on some occasions; notwithstanding its being one which could not have been effectual on that particular occasion, even had the guilty person not been already married. Thus it is no defence for a man, accused of bigamy, to shew that he is a Christian, and that the form of marriage which he went through at his second wedding was one that is valid for Jews alone. Nor is it any defence to shew that the parties were too near akin to be able to contract a valid marriage. For the ground upon which bigamy is punished is the broad one of its involving an outrage upon public decency by the profanation of a solemn ceremony.

4. *Original spouse still living.* The prosecution must establish the fact that the prisoner's original husband or wife was still living at the time of the second marriage. Still it is not necessary that this should be shewn by the direct evidence of some one who can speak to having seen that person alive at that date. It may be sufficiently established by mere probable inference from circumstances; *e.g.* from the fact that the prisoner's first wife was alive and well a few days before his second marriage. But the fact of her having been alive merely within the often-cited period of "seven years" before that marriage, will frequently be utterly insufficient to justify an inference that she was still alive when it was solemnised. For the effect of shewing that she was alive at some time within these seven years is merely to neutralise the presumption[1] of her death, not to reverse it and so throw back the burden of proof upon the prisoner. It simply releases the jury from any technical presumption; and sets them free to look to the circumstances of the particular case. From the woman's age and health, the climate of the country in which she resided, the period which has elapsed since she was heard of, and similar circumstances, they must

[1] *Post*, pp. 388, 390.

draw an inference as to whether she did or did not survive until the time when her husband married again.

5. *Not absent for seven years.* It is provided by the statute[1] that it shall be a conclusive defence to shew that the prisoner's original spouse (1) had been continuously absent from the prisoner (even though by his wilful desertion), during the seven years preceding the second marriage, and (2) had never been heard of by the prisoner meanwhile. It is not necessary that the prisoner should give express proof of both the elements requisite to this defence. For if his wife's continuous absence for seven years be proved, this will suffice to raise a *primâ facie* presumption of her not having been heard of throughout that period.[2] But of course the prosecution may rebut this presumption, by shewing that within the seven years the fact of her being alive had become known to the prisoner.

We now come to a difficulty about which there have been keen controversies. If it be shewn (1) that the prisoner's wife was alive at the time of his second marriage, and (2) that at some time during the seven years preceding the second marriage he had known of her being still alive, must he necessarily be convicted? What if, subsequently to his last hearing of her as alive, he had received authoritative,[3] though mistaken, assurance that she was dead? So far as the mere language of the statute goes, he undoubtedly has satisfied its definition of bigamy. Yet he may have done nothing which he did not honestly believe, and reasonably believe, to be perfectly lawful. For a long time judges differed in their decisions as to whether such a belief would or would not be a good defence for the re-marrying. But in 1889 it was decided in

[1] 24 and 25 Vict. c. 100, s. 57; cf. 1 Jac. 1, c. 11, s. 2.

[2] *Reg.* v. *Curgerwen* (1865), 1 C. C. R. 1 (K. S. C. 426).

[3] He must not act upon mere rumour but must make searching inquiries, proportionate to the seriousness of such an act as marriage. "My husband was a sailor; and a sailor—whom I did not know and have never since seen—told me in Hull that he died in Chatham hospital" was held insufficient by Pickford, J.

the Court for Crown Cases Reserved, by nine judges to five, that the general principle of criminal law, that a person cannot be guilty of a crime unless he has a guilty mind, is so fundamental that it must here override the omission of the statute in not expressly including a mental element as an essential requisite in the offence of bigamy.[1] Accordingly the majority of the court held that the prisoner's *bonâ fide* belief, on reasonable grounds, that his wife was dead, would excuse his re-marrying even within the seven years, *Reg.* v. *Tolson* (1889).[2] In the United States the opposite view prevails. And in England it is now settled by the case of *Rex* v. *Stocks and Wheat*,[3] [1921] 2 K. B. 119 (despite earlier rulings to the contrary) that no such excuse is afforded by a similar mistaken belief, at the time of the later marriage, that the former marriage had been dissolved by a Divorce. The distinction between *Tolson's* case and the case of *Stocks and Wheat* appears from the judgment to be based on the terms of the statute, though they might perhaps have been distinguished on the ground that divorce is a question of law or at least mixed fact and law whereas death is a question of fact.[4] It is uncertain whether or not any excuse for bigamy is afforded by a mistaken belief that the former marriage was to a married person and therefore void. This defence was rejected by Humphreys, J., in *Rex* v. *Kircaldy*,[5] again as in the case of *Stocks and Wheat* in reliance upon the terms of the

[1] See p. 50 *ante*.

[2] 23 Q. B. D. 168 (K. S. C. 15). On the other hand, his merely *conjectural* (though correct) belief of her being alive will not make it a crime for him to re-marry after seven years' absence; for the Act requires Knowledge.

[3] For an interesting criticism of this case see *The King* v. *Carswell*, [1926] N. Z. L. R. at p. 336.

[4] See p. 78 *ante*. A learned American writer (E. R. Keedy in *Harvard Law Review*, XXII, p. 75) distinguishes between ignorance of law and mistake of law and suggests that the latter is a good defence, but *Rex* v. *Stocks and Wheat* is, as is pointed out by W. T. S. Stallybrass in *Journ. of Comp. Law* (1933) XV, Part 4, p. 236, quite to the contrary.

[5] (1928), 167 L. T. Jo. 46 not following *Rex* v. *Connatty* (1919), 83 J. P. 292.

statute. If *Tolson's* case and the case of *Stocks and Wheat* are to be distinguished on the ground of mistake of fact and mistake of law, it would follow that *Rex* v. *Kircaldy* was wrongly decided, for the mistake as to the former marriage appears in this case to have been one of fact.[1]

As regards the evidence which will be available at the trial, it should be noted that, although the husbands or wives of accused persons were excluded by the common law from giving evidence at the trial of the accusation, Parliament has greatly relaxed this exclusion. The Criminal Evidence Act, 1898,[2] now admits the husband or wife to give evidence *for* a prisoner; and, if the accusation be one of Bigamy, the husband or wife may, by the Criminal Justice Administration Act, 1914, also be called even for the prosecution, and without the consent of the person accused.[3]

Bigamy is a felony, punishable with penal servitude for not more than seven years or less than three, or with imprisonment (with or without hard labour) for not more than two years.[4] It is, like manslaughter, a peculiarly "elastic" crime:[5] the degrees of guilt varying—according to the degree of deceit practised and the sex of the person wronged—from an offence closely approximating in heinousness to a rape,[6] down to cases in which the parties' only guilt consists in their having misused a legal ceremonial for the purpose of giving a decent appearance

[1] This case is supported in 51 L. Q. R. 286, but criticised in 52 L. Q. R. 65, by W. T. S. Stallybrass.

[2] *Post*, p. 474.

[3] But is not himself or herself a compellable witness, see p. 482 *post*.

[4] Lord Russell, L.C.J., added "and the having two mothers-in-law."

[5] During the one year 1920 the sentences inflicted for it by one very experienced judge ranged from four years' penal servitude down to a single day's imprisonment.

[6] Hence when the guilty party is the man, the judge, before passing sentence, usually inquires from the "wife" whether sexual intercourse had taken place between them before the "marriage". If it had *not*, his guilt is much greater.

to intercourse which they knew to be illicit. Indeed there may even be cases of an undoubtedly criminal bigamy where there is no moral guilt at all. For both parties may have been misled by some very natural misapprehension of law. The great, and unhappily increasing, dissimilarity between the matrimonial laws of civilised nations has made it but too easy for a man and woman to be husband and wife in one country and yet not so in another.

The other party to the bigamous marriage, if aware, at the time, of its criminal character, became guilty of aiding and abetting the crime; and accordingly may be indicted for bigamy as a principal in the second degree. On the other hand, when a woman, who reasonably believes her husband to be dead, marries a man who knows (but conceals) the fact of his being still alive, this man will escape all punishment; for the woman committed no crime, so he cannot be treated as an accessory.[1]

[1] *Draft Criminal Code for Jamaica*, p. 112.

CHAPTER XXI

LIBEL

A LIBEL[1] is such a writing or picture as either defames an individual ("private" libel) or injures religion, government[2] or morals ("public" libel).

We have already seen[3] that most crimes are also torts. But the most conspicuous illustration of this is afforded by the defamatory, or private, Libel. It is a crime which not only is a tort, but is constantly treated as such in actual practice. For (1) it is only a misdemeanor, and accordingly not affected by the rule which delayed, and therefore usually frustrated, civil proceedings for crimes that were of the degree of felonies. And again, (2) it is a crime which, unlike most others, is often committed by persons whose pecuniary means are large enough to enable them to pay whatever compensation a civil court may award. Hence libels are much more frequently followed up by civil than by criminal proceedings. And the judges of the present day desire to see *indictments* for defamation restricted to those cases in which the libel is sufficiently aggravated, either by its intrinsic gravity or its public nature (*e.g.* libels on persons in a public position, or tending to defame persons of influence in foreign countries so as to interfere with pacific relations[4]) or by its obstinate repetition is likely to provoke its victim to commit a breach of the peace. A criminal prosecution for libel should not be instituted unless the offence is of such

[1] The *Oxford Dictionary* states that the original meaning, "a little book" (*libellus*), had been narrowed to the present meaning of an unlawful book at least as early as 1631.

[2] *E.g.* 151 C. C. C. Sess. Pap. 459.

[3] *Ante*, p. 21.

[4] *Rex* v. *Peltier* (1803), 28 St. Tr. 589.

gravity as to tend to disturb the peace of the community. A prosecution should not be employed in a mere squabble between two individuals. It is not, however, incumbent on the prosecution to prove that the libel would have been unusually likely to provoke the wrath of the person defamed.[1]

It may be sufficient for the purposes of the present volume if we indicate very briefly the fundamental principles which are common to both the civil and the criminal law of libel, and then explain the distinguishing features of the latter aspect of this wrong.[2] The following principles are common to both its aspects:

(I) Anyone who publishes a defamatory document concerning another person, so as to tend to bring him into hatred,[3] contempt, or ridicule,[4] or in any way to diminish the good opinion that other persons have of him, is guilty of "publishing a defamatory libel".[5] This "document" may consist of either a written or a pictorial[6] composition; *e.g.* even of an effigy suspended from a mock gibbet.

(II) The publication need not be "malicious" in the popular sense of that word (*i.e.* it need not be due to spite, or, as it is called, "express malice"), nor even in the statutory one (*ante*, p. 170) of evil intention. A printer's purely accidental omission of a "not" will suffice. It is true that the Libel Act, 1843, when dealing with criminal libel, does in terms restrict the offence to "malicious

[1] *Rex* v. *Wicks* (1936), 52 T. L. R. 253.

[2] See Stephen, *History of Criminal Law*, II, 298–395.

[3] Even merely amongst a narrow circle of associates, *e.g.* a little coterie of anarchists; *Rex* v. *Malatesta* (1912), 7 Cr. App. R. 273.

[4] In one of the United States, it has thus been held libellous to describe a man as "a Tory". With emphatic rhetoric the Supreme Court of Georgia thus ruled the point: "When the name of Washington shall grow cold to the ear of the patriot, when the poles of the earth shall be swung round to a coincidence with the equator, then and not till then will it cease to be a libel" to call a man a Tory; *Giles* v. *The State* (1849), 6 Cobb 284.

[5] *Reg.* v. *Munslow*, [1895] 1 Q. B. 758 (K. S. C. 432).

[6] *Monson* v. *Tussauds*, [1894] 1 Q. B. 671.

publication". But from the mere fact of publishing such matter, without any of the recognised legal grounds of excuse, the law draws an absolute presumption that the publication was malicious. Hence it is now settled[1] that it is not even necessary for the prosecutor or plaintiff to make in his pleadings any formal allegation that the libel was published maliciously. The law of libel has thus, at last, worked itself free from entanglement with the old fictions of a "constructive malice", which sometimes (as in the case of ardent social or political reformers) was—in Lord Macaulay's words—"only a technical name for benevolence".[2]

(III) The unlawful meaning which the document is alleged to have conveyed must be one:

(i) which it was reasonably capable of conveying to ordinary people of the class addressed,[3] and

(ii) which it actually did convey to the particular person to whom it was published.

(IV) Everyone who circulates, or authorises the circulation of, a libel is *primâ facie* regarded as publishing it. But if he can be shewn to have been a mere unconscious instrument (as, for instance, is generally the case with a newsboy), this will be a sufficient defence;[4] some mental element being necessary to constitute such an act of "publication" as will render the doer responsible for it.

(V) There are certain occasions upon which the publication of (what would on ordinary occasions be) a libel becomes privileged.[5] Such a privilege may be either:

[1] *Reg.* v. *Munslow*, *ante* p. 367.
[2] *Miscell. Works*, IV, 189.
[3] *Capital and Counties Bank* v. *Henty* (1880), 7 A. C. at p. 776.
[4] *Emmens* v. *Pottle* (1885), 16 Q. B. D. 354.
[5] As to libels in conjugal life, see p. 84 *ante*.

(*a*) *Absolute*; *e.g.* for publication in a House of Parliament,[1] or by its order; and also for publication in a Court of Justice.[2]

(*b*) *Qualified*; *i.e.* arising *primâ facie*, but ceasing if the prosecution shew that the publication was made with a spiteful motive, or, in other words, that there was "express" malice on the part of the defendant. A privilege of this qualified character is conceded to matter that is published under a legal or even a social duty; or as a fair comment upon a subject of public concern;[3] or for the protection of the interests of the person to whom it is published, provided the person publishing it has also an interest in the matter communicated or is under a duty to communicate it;[4] and to fair and accurate reports of Parliamentary or judicial proceedings;[5] and also, by statute,[6] to such fair and accurate reports of public meetings, or of open sittings of public bodies, as are published in a "newspaper" and relate to some matter of public concern.

(VI) It is the function of the judge to decide (i) whether the document is reasonably capable of bearing the alleged defamatory meaning, *e.g.* a banker's note on a cheque "Refer to drawer" is *not* defamatory;[7] (ii) whether the occasion was privileged; and—where there exists a qualified privilege—(iii) whether there is *any* evidence of express malice. All other matters, including now

[1] *Rex* v. *Lord Abingdon* (1794), 1 Esp. 225 (K. S. C. 440).

[2] *Watson* v. *Jones*, [1905] A. C. 480. This covers communications made to a solicitor, or a constable, even when legal proceedings are as yet only in contemplation, by a person who may (or may not) become a witness in the case. See 30 T. L. R. 591. Contrast 30 T. L. R. 596.

[3] *Thomas* v. *Bradbury*, [1906] 2 K. B. 627. *E.g.* public cricket matches.

[4] *Watt* v. *Longsdon*, [1930] 1 K. B. 130.

[5] *Usill* v. *Hales* (1878), 3 C. P. D. 319 (K. S. C. 442).

[6] 51 and 52 Vict. c. 64, s. 4. This Act also gives "newspapers" a statutory privilege for their reports of *judicial* proceedings that seems to be an Absolute one (see Gatley, *Law of Libel*, 2nd ed. p. 351).

[7] *Plunkett* v. *Barclays Bank, Ltd.* (1936), 52 T. L. R. 353.

even the fundamental question whether the document is or is not a libel,[1] are left to the jury. For the crime lies not in the document itself but in the act of publishing it; and the guilt or innocence of that act lies in the surrounding circumstances (of which the jury alone are the judges). Red-hot coals, destructive on the floor, may be welcome in the fireplace.

But though the criminal and the civil rules as to cases of libel are, fundamentally, thus similar, they differ as regards some few minor points. These are the following:

(1) No civil action will lie for a libel unless it has been published to some *third* person; since the sole object of such an action is to secure to the plaintiff compensation for the wrongful loss of that esteem in which other people formerly held him.[2] Hence a defamatory letter sent to the very person defamed will not, in the ordinary course, become actionable; though a defamatory post-card addressed to him will be.[3] But the reason for the criminal prohibition against libels is, on the other hand, their tendency to provoke the libelled person into committing a breach of the peace; and this tendency is naturally greatest when it is directly to himself that the defamation is addressed. Accordingly a publication to the actual person defamed is quite sufficient to support an indictment.[4]

(2) The *truth* of the matter complained of—even though the jury find it to have been published "maliciously"—

[1] See Lord Campbell's *Lives of the Lord Chancellors*, ch. CLXXVIII, and May's *Constitutional History*, II, 253–263, as to the historic controversy, during 1752–1791, on this important constitutional question, ultimately settled by Mr Fox's Libel Act, 32 Geo. 3, c. 60.

[2] *Barrow* v. *Llewellin* (1615), Hobart 62 (K. S. C. 437).

[3] *Post*, p. 390 n. 1.

[4] *Clutterbuck* v. *Chaffers* (1816), 1 Starkie 471 (K. S. C. 438). Cf. 4 Bl. Comm. 150. It is often said that when the publication is, thus, only to the person libelled the indictment must expressly allege an intent to cause a breach of the peace. But it would seem that this is not really necessary; for in *Reg.* v. *Adams* (1887), 22 Q. B. D. 66 the count contained no such allegation.

has long been a good defence in a civil action for libel. For it "justifies" the words, by shewing that the plaintiff has no right to that reputation which he claims compensation for being deprived of. But the common law did not regard this as being any defence to criminal[1] proceedings; for the truer the charge, the more likely was it to cause a breach of the peace. An honest man may often despise calumnies; but a rascal is sure to resent exposure. Hence in criminal courts it used even to be a maxim that "the greater the truth, the greater the libel".[2] But this difference between the civil and criminal rules has been almost wholly removed by Lord Campbell's Act (6 and 7 Vict. c. 96), which permits the truth—the substantial truth, even with errors of detail—of a *private*[3] libel to be a valid defence to criminal proceedings for it. This permission to "justify" the defamation is, however, subject to a proviso that the defendant must further allege expressly, and prove to the satisfaction of the jury, that it was for the public benefit that the matter in question should be made known. The existence of this proviso makes it possible to repress the publication of statements which, though quite true, are objectionable, whether on grounds of decency, or as being disclosures of State secrets, or as being painful and needless intrusions into the privacy of domestic life. It may be for the public benefit to make it known that a man is suffering from an infectious fever; but not that he is suffering from heart-disease, or from some carefully concealed deformity (like that club-foot, the consciousness of whose existence embittered the whole life of Byron).

(3) There is no civil action for libelling a *class* of persons,

[1] Hobart 253; Moore 627; 5 Coke Rep. 125.

[2] Journalists are said to add "and the greater the libel, the greater our circulation".

[3] Hence Mylius, who accused the King of bigamy, was prosecuted, not as for a seditious libel, but as for a private one; thus enabling him to plead Truth, and thereby to enable the King to disprove it (*The Times*, Feb. 2, 1911).

if, as must usually be the case, its members are too numerous and unascertainable to join as plaintiffs in a litigation. But since, technically speaking, it is not by the persons injured, but by the King, that criminal proceedings are carried on, an indictment will lie; provided only that the class defamed be not an indefinite (*e.g.* "the men of science", "the Socialists") but a definite one (*e.g.* "the clergy of the diocese of Durham",[1] "the justices of the peace for the county of Middlesex").

(4) No civil action for a libel upon a person *deceased* has ever been brought by his representatives;[2] for the dead have no legal rights and can suffer no legal wrongs. But in those extreme cases where the libel, under the guise of attacking the dead man, attacks living ones by bringing his posterity into contempt or hatred, they—like any other class of persons who are injured by a libel—may obtain protection from the criminal law.[3] Yet to extend that protection to the case of ordinary attacks upon the reputation of persons deceased, would be to impose an intolerable restraint upon the literary freedom of every writer of modern history;[4] especially as the lapse of time might have rendered it impossible for him to obtain *legal* proof of the truth of his statements, and as that truth, moreover, even if proved, might not be of sufficient public moment to constitute a statutory defence to criminal proceedings. Historical criticism may, no doubt, cause much pain to the descendants of the person criticised; but mere mental suffering never suffices, by itself, to render an act wrongful.

[1] *Rex* v. *Williams* (1822), 5 B. and Ald. 595. Cf. 2 Swanston 503.

[2] *Reg.* v. *Labouchere* (1884), 12 Q. B. D. at p. 324.

[3] See *Rex* v. *Topham* (1791), 4 T. R. 126; *Reg.* v. *Ensor* (1887), 3 T. L. R. 366; *Rex* v. *Hunt* (1820), 2 St. Tr. (N. S.) 69, for libelling Geo. III in Geo. IV's reign. As to blackmailing by threats to libel the dead, see Larceny Act, 1916, s. 31, p. 256 *ante*.

[4] In 1916, at Tacoma, U.S.A., a man was convicted as a libeller for having written that George Washington was "a slaveholder and an inveterate drinker"; Parmelee's *Criminology*, p. 460.

(5) In civil actions, a master is liable for *all* libels published by his servants in the course of their employment. But in criminal cases, it is[1] a good defence if he prove that the libel was published neither by his authority nor through his negligence.

Besides differing thus in their treatment of libellous writings the two systems also differ in their treatment of the cognate subject of unlawful *oral* utterances.[2] These never create, as a defamatory libel does, a twofold liability, at once civil and criminal. For if the spoken words are merely Slander, *i.e.* if they only defame private persons, a civil action will lie in certain grave cases;[3] but an indictment will not lie[4] (except in those rare instances where the words tend quite directly to a breach of the peace,[5] as when they convey a challenge to fight). And, conversely, if the oral words are blasphemous,[6] or obscene,[7] or seditious,[8] or reflect on the administration of justice, an indictment can be brought (as for similar *written* words); but no civil action can.

[1] 6 and 7 Vict. c. 96, s. 7. See p. 46 *ante*.

[2] If I dictate to my shorthand-writer a defamatory letter, it is an open question whether this (if not privileged) is libel or slander; *Osborn* v. *Boulter*, [1930] 2 K. B. 226.

[3] See Pollock, *Law of Torts*, 13th ed., ch. VII.

[4] But the Indian Penal Code (s. 499) allows criminal proceedings. Yet unwisely; for oral utterances are heard by few, are transient, are often hasty, and are always apt to be misapprehended.

[5] *Reg.* v. *Langley* (1704), 6 Mod. 125 (K. S. C. 437). In *London* 2 and 3 Vict. c. 47 makes such words, if uttered "in a public place", punishable at petty sessions.

[6] For the lenient rule, recently established, as to what constitutes an indictable blasphemy, see *Reg.* v. *Ramsay* (1883), Cababé and Ellis 126; and *Bowman* v. *Secular Society*, [1917] A. C. 406. Cf. 1 *Cambridge Law Journal*, p. 127. The framers of the French code of 1924 for Cambodia, similarly found it necessary to protect current feeling, and imposed penalties on all who mock any idol or defile it (arts. 209–216).

[7] On obscene publications, see *Reg.* v. *Hicklin* (1868), L. R. 3 Q. B. at p. 371, where Cockburn, C.J., says "the test of obscenity is whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall".

[8] See p. 323 *ante*.

Libel is a misdemeanor, punishable with fine and imprisonment.[1] In the case of seditious, blasphemous, and other public libels there appears to be no limit to the period of imprisonment;[2] and similar words uttered orally are punishable similarly. But in the case of defamatory libels, the term has been restricted by statute to two years, when the libel was published with a knowledge of its being false; and, in all other cases of defamatory libels, to a single year.[3]

Originally, hard labour could not be imposed in any case of Libel, whether defamatory or public. But for all libels, except seditious ones, it now can be. For the Criminal Justice Administration Act, 1914, provides, s. 16 (1), that any sentence of imprisonment without option of fine may, in the discretion of the court, impose hard labour, "notwithstanding that the offence is an offence at common law or that the statute under which the sentence is passed does not authorise the imposition of hard labour".

[1] For a libel in a "*newspaper*" a judge's order is needed before taking criminal proceedings against the proprietor or editor (51 and 52 Vict. c. 64, s. 8).

[2] In the case of *seditious* libels or utterances, the form of imprisonment must be only that of offenders of the first division (40 and 41 Vict. c. 21, s. 40).

[3] 6 and 7 Vict. c. 96, ss. 4, 5.

CHAPTER XXII

OFFENCES AGAINST INTERNATIONAL LAW

With a view of discharging those duties to the other nations of civilised mankind which are imposed upon us alike by political prudence and by International Law, our criminal law has made provision for the punishment of all persons who (1) infringe the rights of the ambassadors sent to us by foreign nations, or (2) commit acts of piracy, or (3) violate the neutrality due from us to belligerent nations.

(1) As regards offences against the privileges of ambassadors, it is unnecessary to add to the brief mention that has already been made of the statute of 1708,[1] which makes it a misdemeanor (with remarkable peculiarities of procedure) to execute even a judicial civil process against the person or goods of any ambassador or his registered servant.

(2) Of piracy according to International Law (or "piracy *jure gentium*") we obtain a good example when the crew of a vessel mutiny, and seize the ship. But, old and famous though the crime is, there is not, even now, any authoritative definition of it.[2] Clearly it is not every felony that becomes piracy by being committed on board ship; for violence is essential, so mere larcenous pilfering would not suffice. It has been said that piracy is "only a sea term for robbery;"[3] but actual robbery is not an essential element in the crime of piracy *jure gentium*, for a frustrated attempt to commit piratical robbery is equally

[1] 7 Anne, c. 12; *ante*, p. 107.

[2] Stephen, *History of Criminal Law*, II, 27; *Digest of Criminal Law*, 7th ed., ch. x.

[3] *Att.-Gen. of Hong Kong* v. *Kwok-a-Sing* (1873), L. R. 5 P. C. 199. Cf. *China Navigation Co. Ltd.* v. *Attorney-General*, [1932] 2 K. B. at p. 222.

piracy, though on land it would not be a robbery, but only an assault with intent to rob.[1] Moreover some menacing thefts which by English law do technically amount to robberies would not be regarded as piracy if they were committed at sea. Probably the best approach to a correct definition is "any armed violence at sea which is not a lawful act of War";[2] *e.g.* by mutineers on board. For a pirate must be one who may be taken to be a source of danger to the vessels of all nations; and therefore those who act solely against a particular belligerent and in the interests of the Power that is at war with it, are not pirates, even though they go beyond their commission.[3] Nor will they be, even though their action be spontaneous and without any commission at all from the Power (whether a recognised State or not) whose interests they serve.[4] But, whatever be the precise limits of piracy *jure gentium*, it is at least clear that nothing that does not fall within them would be taken account of, as a piracy, by the common law.

But by statute it has further been made piracy:

(*a*) For any British subject to commit hostilities at sea, under the commission of any foreign Power, against *other British subjects*,[5]

(*b*) For any British subject, or any resident in the British dominions, to take part in the slave trade.[6]

[1] *In the matter of Piracy jure gentium*, [1934] A. C. 586 (K. S. C. 578).

[2] Of this definition the Privy Council said ([1934] A. C. 586): "Possibly the definition of piracy which comes nearest to accuracy coupled with brevity is that given by Kenny in *Outlines of Criminal Law* when he said: 'Piracy is armed violence at sea which is not a lawful act of War', though even that would include a shooting affray between two passengers on a liner, which could not be held to be piracy."

[3] "Enemies not of the human race, but solely of a particular State"; for the essence of Piracy "consists in the pursuit of private, as contrasted with public ends"; see *Republic of Bolivia* v. *Indemnity Co., Ltd.*, [1909] 1 K. B. 785.

[4] *In re Tivnan* (1864), 5 B. and S. at p. 680. Cf. [1909] 1 K. B. 785.

[5] 11 and 12 Will. 3, c. 7, s. 7.

[6] 5 Geo. 4, c. 113, s. 9.

Every piracy, whether of the common-law form or of the statutory, is a felony, and usually punishable with penal servitude for life.[1] But if accompanied by any act that may endanger life it is punishable with death.[2] It is an offence now almost unknown in our criminal courts; no case having occurred since 1894, and that only an unimportant one.[3]

(3) Previously to the nineteenth century, there was no hindrance in the way of an Englishman's following the profession of a soldier of fortune wheresoever he chose; saving only the claim of the King of England to his continued loyalty, and perhaps to his services if they should be needed.[4] The former right of the King was considered to be in jeopardy in James I's reign, and an Act (3 Jac. 1, c. 4) was passed with the object of preventing subjects of the Crown from being contaminated in religion or loyalty by the Jesuits whom they might meet in Continental armies.[5] The second right appears to have been in the mind of the framers of the statute passed in 1736,[6] now repealed, which made it felony, without benefit of clergy, to enlist in the service of any foreign prince; an enactment which seems, however, to have remained a dead letter. But the modern development of International Law created a new reason for similar prohibitions; and in the nineteenth century Foreign Enlistment Acts were passed with the object of preserving England's neutrality, by forbidding her subjects to give any assistance to foreign belligerents. In treatises on International Law the student will find narrated the growth of the principle of Neutrality, as determining the course of conduct to which nations are now bound to adhere, whenever a condition of war exists

[1] 7 Will. 4 and 1 Vict. c. 88, s. 1, and the Penal Servitude Acts.
[2] 7 Will. 4 and 1 Vict. c. 88, s. 2.
[3] *Criminal Statistics of England and Wales*, issue of 1901, p. 29.
[4] See Stephen, *History of Criminal Law*, III, 257–262.
[5] See the preamble to the Act.
[6] 9 Geo. 2, c. 30.

between Powers with whom they themselves are at peace. The ancient powers of the Crown in England being insufficient to enable it to prevent its subjects from committing acts which might be at variance with the modern conceptions of the obligations of neutrality, Parliament found it necessary to make participation in foreign hostilities a criminal offence. The first Foreign Enlistment Act was passed in 1819,[1] to restrain outbursts of sympathy with the revolt of Spain's South American colonies against her. During the American Civil War, it proved insufficient to prevent the traffic between English shipbuilders and the Confederate Government; and was accordingly replaced in 1870 by a more stringent enactment.[2] Under this one, the chief offences forbidden are:

1. To enlist oneself or others—without a licence from the Crown—for service under a foreign State which is at war with a State that is at peace with us.[3]

2. To equip, build,[4] despatch, or even agree to build, within British dominions—without licence from the Crown—a ship with reasonable cause to believe that it will be employed in such service as aforesaid.[5]

3. To fit out, within the British dominions—without a licence from the Crown—any naval or military expedition to proceed against the dominions of any State that is at peace with us.[6]

Each of these offences is a misdemeanor, punishable with a fine and with imprisonment for a period not exceeding two years, with or without hard labour. All ships or munitions of war in respect of which the offence is committed are to be forfeited to the Crown.

[1] 59 Geo. 3, c. 69. [2] 33 and 34 Vict. c. 90.

[3] s. 4. This is an offence whether committed within *or even without* the British dominions.

[4] The previous Act (of 1819) forbade nothing short of the ultimate "equipping, fitting-out, or arming" of a ship. See the case of *The Alexandra* (1864), 2 H. and C. 431.

[5] 33 and 34 Vict. c. 90, 58.

[6] *Ibid.* s. 11; see *Reg.* v. *Jameson*, [1896] 2 Q. B. 425.

The student must bear in mind that, though it is sometimes said that "International Law is part of the laws of England", this is true only in that loose historical sense in which the same is also said of Christianity. But an indictment will not lie for not loving your neighbour as yourself. Equally little will it lie for trading in contraband of war, or for the running of a blockade. Both these acts are visited by International Law with the penalties of confiscation; but neither of them constitutes any offence against the laws of England, or is even sufficiently unlawful to render void a contract connected with it.[1]

[1] See *Ex parte Chavasse* (1864), 4 De G. J. and S. 655. To trade with persons domiciled in a country with which *our own* country is at war seems to have been regarded in William III's time as an indictable misdemeanor at common law; 1 T. R. at p. 85. Cf. a case in 1319 of trading with Scotland during our war with her (Rolle's Abr. *tit.* Prerogative). But in 1817 Sir Samuel Romilly repudiated this doctrine as one which "no one" would now hold (*Life of Robert Aspland*, p. 383). In 1914 it was made a statutory misdemeanor, punishable with seven years' penal servitude, for any one thus to trade with the enemy "during *the present war*", except in such transactions as might be permitted by royal proclamation (4 and 5 Geo. 5, c. 87). See Hall's *International Law*, 8th ed., pp. 459 *et seq.*

CHAPTER XXIII

OFFENCES OF VAGRANCY

THE historical interest and the juridical anomalies of the Vagrancy Act are such as to justify a fuller reference to it here than the importance of the offences created by it might seem to call for. An experienced observer of criminal proceedings has pronounced it, somewhat sweepingly, to be "the most unconstitutional law yet lingering on the statute book".[1] It is a survival from a long series of penal enactments—enforced by imprisonment, flogging, enslavement, and death—whereby the legislature strove to grapple with the difficulties created by the steady increase in the numbers of the migratory population. Legislation for this purpose began so far back as 1388; when the dearth of labourers, caused by the devastations of the Black Death in the period 1348–1369, had produced competition amongst employers and, consequently, many migrations of labourers towards the districts where they could profit by this competition. The legislature interposed in order to check both the rise of wages consequent upon all such free exchange between labour and capital, and also some more genuine evils, arising from the mendicancy of such of the wanderers as did not obtain employment, and the dishonesty of many of them who did not even seek for it. To this latter class of vagrants, a dangerous addition was made in the reign of Henry VIII, by the arrival of the first Gipsies. The establishment under Elizabeth of a compulsory parochial assessment, for the relief of the destitute, naturally led to the imposition of further penalties to protect parishes from the arrival of strangers who might become a burden

[1] Serjeant Cox's *Principles of Punishment*, p. 212.

on the local assessment. The modern reform of our industrial legislation and of our system of poor relief has now swept away almost the whole of the long series of enactments which four centuries had accumulated. But there still remains the Vagrancy Act, 1824; whose provisions might be unintelligible if we did not regard them as a supplement to the old Poor Law, intended to prevent indigent persons from wandering out of their parishes, and to restrain the offences likely to be committed by such wanderers. Offenders against the Act (5 Geo. 4, c. 83) are of three classes; according to the maximum punishment which can be inflicted upon them. Every case is tried at Petty Sessions; though in cases of the third class, as will be seen, the sentence is not pronounced there.

I. The first class consists of the persons who are guilty of the more trivial offences of vagrancy. Typical instances are:

(1) A person whose wilful neglect to work causes him or her, or any of his or her family, to become chargeable to the parish.

(2) A person wandering abroad to hawk goods without a pedlar's licence.

(3) A person begging[1] in any public place,[2] or encouraging any child to do so.

(4) A common prostitute wandering in the public streets and behaving riotously or indecently.[3]

[1] For any able-bodied man to beg was made an offence by 12 Ric. 2, c. 7; but a university student might beg if the Chancellor of the University had given him a certificate. At Bridgwater such a certificate is still preserved.

[2] Metropolitan magistrates have held that a street box-collector can be convicted of begging, if she receives *any* share of the money collected.

[3] The Town Police Clauses Act, 1847, makes it an offence for her simply to "loiter and importune" in a street. But within the precincts of the Universities of Oxford (6 Geo. 4, c. 97, s. 3) and of Cambridge (57 and 58 Vict. c. lx) she commits an offence by merely wandering in a public street and not giving a satisfactory account of herself.

(5) Persons committing various offences in connection with poor relief, *e.g.* refusing to work when in receipt of relief.[1]

All these are technically denominated by the Act "*Idle and disorderly persons*". They are liable to a punishment of imprisonment for not more than a month with or without hard labour, or a fine not exceeding £5.

II. The second class consists of the persons who are guilty of the more grave forms of vagrancy. The following instances may be cited (see also, p. 204 n. *ante*):

(1) A person convicted for a second time of any of the offences of the former series. The two need not be both of the same species.

(2) A person running away and leaving his wife or child chargeable to the parish.

(3) A person endeavouring to procure alms by exposing deformities or by making fraudulent pretences.

(4) A person found in a building, or inside an enclosed yard or garden, for any unlawful (*i.e.* criminal[2]) purpose.

(5) A person gaming,[3] in an open and public place, at some game *of chance*,[4] with cards, coins, or other instruments.

(6) A person telling fortunes; or using any subtle craft, by palmistry or otherwise, to deceive,[5] *e.g.* casting astrological nativities.

[1] 20 and 21 Geo. 5, c. 17, s. 151; see also ss. 20, 150 and 152.

[2] Not mere immorality.

[3] *I.e.* playing for stakes contributed, wholly or even in part, by the *players* themselves; not for a prize given entirely by someone else. See 36 and 37 Vict. c. 38, s. 3.

[4] But a publican commits an offence by permitting gaming at *any* game, even one of skill, on his licensed premises; *e.g.* bowls played for beer.

[5] A *fortune-teller* who believes in his skill is nevertheless guilty, *Stonehouse* v. *Mason*, [1921] 2 K. B. 818. But an avowed juggler is not, *Johnson* v. *Fenner* (1869), 33 J. P. 740.

(7) A person wandering abroad and lodging in unoccupied buildings or under a tent or in a cart,[1] and not giving a good account of himself. It must be proved (1) that he has been directed to a reasonably accessible place of shelter and has failed to apply there or refused accommodation there *or* (2) is a person who persistently wanders abroad or lodges as aforesaid or (3) while lodging as aforesaid has caused damage to property or infection with vermin or other offensive consequence, or lodged as aforesaid in circumstances likely to cause such damage or infection.[2]

(8) A male person (α) knowingly living, wholly or in part, on the earnings of prostitution, or (β) persistently soliciting, in public, for immoral purposes. This much-needed prohibition of the calling of a *souteneur* was added by the Vagrancy Act, 1898 (61 and 62 Vict. c. 39). Prosecution for it may also be by indictment.

All these are styled "*Rogues and Vagabonds*". (Both words originally meant simply "wanderers", the "rogues forlorn" of King Lear; from the Latin *rotare* and *vagari*.) They may be punished with imprisonment up to three months,[3] with or without hard labour, or with a fine not exceeding £25.

III. The third class consists chiefly of those who have been twice[4] convicted—or who have resisted arrest when apprehended on even a first charge—of any offence of the second series.[5] Such a person is technically an "*Incorrigible Rogue*". The procedure is curious. The offender, as in the two previous classes, is convicted at a court of

[1] Other than that with or in which he travels.

[2] Vagrancy Act, 1935 (25 and 26 Geo. 5, c. 20). This act is criticised in 180 L. T. Jo. 56.

[3] By 2 and 3 Geo. 5, c. 20 the eighth class may be imprisoned for *six* months (or, on indictment, for two years).

[4] The two convictions need not be for offences of the same species.

[5] Other than the eighth, the *souteneur*, 2 and 3 Geo. 5, c. 20, s. 7 (2).

Petty Sessions as an incorrigible rogue;[1] but this court can only commit him to imprisonment (with hard labour) until the next court of Quarter Sessions. (In 1930, 58 were so committed.) That court will receive the conviction and without further accusation can inquire and pass the sentence upon it; which may extend to a year's further imprisonment, with hard labour, and in the case of a male, the prisoner may also be ordered to be whipped.[2]

[1] *Rex* v. *Evans*, [1915] 2 K. B. 762.

[2] This is only done in bad cases; *e.g.* where a vagrant, thrice deported, had thrice returned unlawfully to England; or where a man had forced a child to beg, by threatening to drown it.

BOOK III
MODES OF JUDICIAL PROOF

CHAPTER XXIV

THE NATURE OF PRESUMPTIONS AND OF EVIDENCE

A READY knowledge of the law of evidence is essential to all who are engaged in forensic practice. The occasions for applying it arise suddenly; and the rules must be put in force forthwith, before the witness has had time to break them. Hence, as Sir Henry Maine has remarked, there is probably no other legal accomplishment so widely diffused amongst the members of the English bar as skill in appreciating evidence and familiarity with the law relating to it.

The restrictions imposed by the English rules of evidence are in startling contrast to the laxity[1] of proof allowed in Continental tribunals.[2] But the constitutional value of our stringency is great. For it has done much towards producing that general confidence in our criminal courts which has kept popular feeling in full sympathy with the administration of the criminal law, and has thereby facilitated the task of government to an extent surprising to Continental observers. In the emphatic words of the late Prof. W. L. Birkbeck, Q.C., "the Jury and the law of Evidence are Englishmen's two great safeguards against the worst of all oppressions—that oppression which hides itself under the mask of justice". And these two safeguards are intimately connected; for the

[1] The danger of laxity is illustrated by the fact that, about 1750, to serve a client indicted at the Old Bailey for robbery, an attorney named Brecknock forged an almanac to show that there had been no moon that night (Burke's *Connaught Circuit*, p. 129).

[2] France, unlike England, permits (*a*) leading questions, (*b*) hearsay evidence, (*c*) evidence of matters only remotely relevant.

one is a product of the other. Our rules of evidence were created in consequence of a peculiarity of English procedure in taking away from the trained judges the determination of questions of fact, and entrusting it to untrained laymen. The Romans had no law of evidence; for, with them, questions of fact were tried in civil cases by a *judex* who was a citizen of rank; and in criminal cases by a court actually forbidden to check a witness.[1] But in England jurymen's inexpertness led the courts to establish many rules for the exclusion of certain kinds of evidence that seemed likely to mislead untrained minds.

Whenever, in any country, a tribunal is called upon to decide any question of fact, it must do so either by obtaining actual evidence, or by the easier yet less precise method of employing, instead, some *à priori* presumption. Before commencing a detailed account of evidence, it may be convenient to explain the technical substitutes which thus sometimes replace it. Presumptions are of three kinds.

(i) *Praesumptiones juris* (*i.e.* drawn by the Law) *et de jure* (*i.e.* in an Obligatory manner). These are inferences of fact so overwhelming that the law will not permit evidence to be called to contradict them. Such is the presumption (*ante*, p. 56) that an infant under eight cannot have a guilty intention. Such presumptions, though in form connected with the law of Proof, are in truth rules of substantive law disguised in the language of mere adjective rules.

(ii) *Praesumptiones juris*, *i.e.* inferences of fact which only hold good until evidence has been given which contradicts them. They consequently afford merely a *primâ facie* proof of the fact presumed; a proof which may be overthrown by evidence which negatives it, or by collision with some other and still stronger presumption which suggests a contrary inference. Thus, in the United

[1] Mommsen, *Straf.* p. 422; Strachan-Davidson's *Problems*, II, 119.

States, when slavery existed, there was, in the slave-holding States, a *primâ facie* presumption that every man of black or mulatto skin was a slave, unless he proved himself to be a freeman.

(iii) *Praesumptiones hominis*, or *facti*. These do not really deserve to be classed amongst legal presumptions; for though, like the two preceding classes, they are inferences of fact, the law does not (as in those two cases) command juries to draw them, but only advises their doing so. A good instance of such a recommendation is the presumption that arises from possession of goods recently stolen (see p. 391).

The presumptions important enough to call for detailed notice here belong mainly to the second class, the *praesumptiones juris, sed non de jure*.

(1) There is a presumption of this kind against the commission of any crime.[1] This holds good, not merely in criminal trials, but probably also in every civil case where any allegation is made that a criminal act has been committed.[2] Thus in an action on a life-insurance policy, the presumption is against suicide. So strong is this presumption that in order to rebut it, the crime must be brought home to a prisoner "beyond reasonable doubt"; and the graver the crime, the greater will be the degree of doubt that is reasonable. Hence (*a*) the commission of the crime —that the horse actually was stolen, or the man killed— must be clearly proved; so clearly, that circumstantial evidence will rarely suffice to prove it.[3] Thus on a charge of murder the fact of death must be very fully proved; which can rarely be done unless the body be produced,

[1] *Reg.* v. *Manning* (1849), K. S. C. 446. It must be remembered that there is no similar *general* presumption of innocence of all crimes, alleged or unknown. So if a prisoner assert his good character, he must give proof of it. Study "The Presumption of Innocence", C. K. Allen, *Legal Duties*, p. 253.

[2] But as to whether the presumption is *equally* violent against a defendant who in a *civil* action is charged with crime, see p. 454 *post*.

[3] *Post*, p. 402.

mere circumstantial evidence of death thus being usually insufficient.[1] Moreover (*b*) after proving that the crime was committed, the prosecution must also prove distinctly that it was committed by the very person accused; so that when two men are charged with a crime, and it is made clear that one of them committed it, but it cannot be shewn which one, both must be acquitted.[2] If, too, the defence suggests an alternative theory which is possible and consistent with the evidence, the accused must be acquitted.[3]

Strong as is the presumption of Innocence, it is not too strong to be sometimes rebutted by the presumption of the Continuance of Life;[4] *e.g.* in a case of bigamy, the presumption that the prisoner would not have contracted a second marriage unless his first wife were dead, may be outweighed if it be shewn that she was alive only five and twenty days before this second wedding took place.[5] But it may be useful to note that an amount of testimony which is not sufficient to rebut the presumption of innocence entirely[6] (*i.e.* to shift the burden of proof so completely as to compel the prisoner to call legal evidence of circumstances pointing to his innocence), may yet suffice to throw upon him the necessity of offering, by at least an unsworn statement, some explanation.[7] If he remain silent and leave this hostile testimony unexplained, his silence will corroborate it, and so justify his being con-

[1] Hale P. C. ch. XXXIX (K. S. C. 449); 3 Coke Inst. 104 (K. S. C. 449). See p. 403 *post*. [2] *Rex* v. *Richardson* (1785), 1 Leach 387 (K. S. C. 448).

[3] *Rex* v. *Turkington* (1930), 22 Cr. App. R. 91.

[4] *Post*, p. 390.

[5] 2 A. and E. 540; *secus*, if no more shewn than that she was alive twelve months before the second wedding, 2 B. and Ald. 389. The question is entirely for the jury to decide between the conflicting presumptions, *Reg.* v. *Willshire* (1880), 6 Q. B. D. 366.

[6] For illustrations of such insufficient evidence see *Reg.* v. *Walker* (1854), Dearsly 280 (K. S. C. 450); *Reg.* v. *Slingsby* (1864), 4 F. and F. 61 (K. S. C. 452). Contrast *Reg.* v. *Hobson* (1854), Dearsly 400 (K. S. C. 453).

[7] *Reg.* v. *Frost* (1839), 4 St. Tr. (N. S.) 86 (K. S. C. 374). Cf. 7 Cr. App. R. 58.

victed. A frequent illustration of this occurs in the case where a person accused of theft is shewn to have been in possession of the goods shortly after the stealing.[1]

(2) There is a presumption against the commission of any immoral act. Hence cohabitation, with the general reputation of being husband and wife, is, in most cases, sufficient *primâ facie* evidence of marriage.[2] And birth is presumed to be legitimate. But the presumption against moral wrong-doing is not so strong as the presumption against criminal wrong-doing. Hence *A*'s cohabitation with *B* does not constitute such strong evidence of his being married to her as will justify his being convicted of bigamy if he proceeds to marry *C*.[3]

(3) *Omnia praesumuntur rite ac solenniter esse acta*;[4] *i.e.* all things are presumed to have been done in the due and wonted manner. This presumption acquires increased weight as the event recedes in time. It is one of great force, especially when applied to public or official acts. Thus from the fact that a church has been frequently used for the celebration of marriage services the court will infer that it had been duly licensed for that purpose. Similarly the fact of a person's acting in a public office (*e.g.* as sheriff, justice of the peace, or constable), is sufficient *primâ facie* evidence of his having been duly appointed to it.[5] And there is a presumption that in any Government office the regular course of business has been followed (*e.g.* that the particulars on a postmark represent the time and place at which the letter was handled in the post). Even in a private establishment the course of dealing may become so systematic and regular as to justify a similar employment of this presumption.[6] Thus

[1] *Post*, p. 392.
[2] *Doe dem. Fleming* v. *Fleming* (1827), 4 Bingham 266 (K. S. C. 458).
[3] *Morris* v. *Miller* (1767), 1 W. Bl. 632 (K. S. C. 459).
[4] See *Neal* v. *Denston* (1932), 48 T. L. R. 637.
[5] *Rex* v. *Borrett* (1833), 6 C. and P. 124 (K. S. C. 461).
[6] *Macgregor* v. *Kelly* (1894), 3 Exch. 794.

a letter left in the ordinary course with a servant for delivery to his master may be presumed to have reached the master's hands. Or a letter, duly addressed and posted, and not returned soon afterwards by the Dead Letter Office, to have been duly delivered. Or a postcard, duly posted, to have been read during its transmission.[1] Again, a deed will be presumed to have been executed on the day whose date it bears.[2] And the holder of a bill of exchange is deemed *primâ facie* to be a "holder in due course". And any one who has entered into a contract is presumed to be of sufficient age to be legally competent to contract.[3]

(4) The possessor of property, real or personal, is presumed *primâ facie* to be full owner of it.[4] In the case of real property, accordingly, the presumption is that he is seised in fee simple.

(5) There is a presumption that any existing state of things will continue for some time further.[5] Accordingly if a partnership or agency is shewn to have once existed, those who allege it to have been subsequently dissolved will have the burden of proving the dissolution. This presumption is often applied in questions as to the duration of human life. Where a person is once shewn to have been living he will be presumed to have continued alive[6] for some time longer; though the strength of this presumption will depend upon the particular circumstances of the case, such as his age and his state of health. But if it be shewn that for the last seven years he has not been heard of

[1] [1915] 3 K. B. 32; [1916] 2 K. B. 615.

[2] *Malpas* v. *Clements* (1850), 19 L. J., Q. B. 435.

[3] 1 T. R. 649.

[4] L. R. 1 Q. B. 1; 5 Taunt. 326; 8 C. and P. 537.

[5] *E.g.* a train's, or motor-car's, rate of speed, *Rex* v. *Dalloz* (1908), 1 Cr. App. R. 258. Or again that Mr Bradlaugh, an atheist in 1882, was still one in 1884. Where the charge is one of dangerous driving, evidence may be given of the manner of driving just before the spot in relation to which the charge is made, *Hallett* v. *Warren* (1929), 93 J. P. 225.

[6] *Reg.* v. *Jones* (1883), 11 Q. B. D. 118 (K. S. C. 428); *Reg.* v. *Willshire* (1880), 6 Q. B. D. 366 (K. S. C. 429).

by those persons who would naturally have heard of him had he been alive, the presumption of his continued existence becomes reversed.[1]

(6) A sane[2] adult is presumed to intend all the consequences likely to flow directly[3] from his intentional[4] conduct.[5]

Besides these obligatory presumptions of Law, there is one discretionary presumption of Fact[6] which deserves careful attention—viz. that the possessor of goods recently[7] stolen may fairly be regarded as either the actual thief or else a guilty receiver.[8] His possession raises also—but less strongly—a presumption of his guilty connection with any further crime that accompanied the theft, *e.g.* a burglary, an arson, or a murder.

We have said that this presumption arises in the case of goods which had been stolen recently. It therefore does not arise until proof has been given that the goods in question have actually been stolen.[9] Thus it is not sufficient that a tramp is wearing three gold watches and

[1] *Hopewell* v. *De Pinna* (1809), 2 Camp. 113; compare 2 A. and E. 540.

[2] Every man is presumed sane, until the contrary is proved.

[3] As to the indirect consequences, see 7 Cr. App. R. 140.

[4] Not from the *accidental* going-off of his gun; 8 Cr. App. R. 211.

[5] 7 Cr. App. R. 140; 8 Cr. App. R. 211. This is *not*, as is often stated, an irrebuttable presumption; see 2 Cr. App. R. 57 and 14 Cr. App. R. 116; [1910] 2 I. R. 29. Drunkenness, for instance, may rebut it. For its application in Homicide, see pp. 140, 161 *ante*.

[6] It is not a presumption of Law, for it does not need sworn evidence to rebut it; the prisoner's unsworn explanation suffices.

[7] *I.e.* recently before he obtained possession; though perhaps long before he was arrested.

[8] Lord Alverstone, L.C.J., and Phillimore, L.J., habitually advised juries to prefer the latter view. In a case in 1918 the goods stolen in a burglary were found in the prisoner's possession two days after it. Avory, J., said, "Possession so long afterwards is not sufficient evidence of stealing; you had better convict of receiving". Possession even so early as twenty minutes after the theft may support a verdict of receiving; 17 Cr. App. R. 124, cf. 18 Cr. App. R. 118.

[9] *Rex* v. *Yend* (1833), 6 C. and P. 176 (K. S. C. 468).

gives quite contradictory accounts as to how he got possession of them.[1] As to what time is near enough to be "recent", no general rule can be given; for the period within which the presumption can operate will vary according to the nature of the article stolen. Three months has been held sufficiently recent for a motor-car, and four months for a debenture-bond (10 Cr. App. R. 264). But for such articles as pass from hand to hand readily, two months would be a long time; particularly in the case of money. In regard to a horse, it has been held that six months is too long.[2] Eight months is too long to be "recent" for a bale of silk (17 Cr. App. R. 191). And it would seem that, whatever the article were, sixteen months would be too long a period.[3] This presumption does not displace the presumption of innocence so far as to throw upon the accused the burden of producing legal proof of the innocent origin of his possession. He merely has to state how it did originate. If his account is given at, or before, the preliminary examination, and is minute and reasonably probable, then he must not be convicted unless the prosecution can prove the story to be untrue.[4] But if he has put forward two inconsistent accounts, his explanation cannot be regarded as satisfactory; and the prosecution need not call evidence to rebut these varying stories. Even if he give an explanation which the jury disbelieve, or give none at all, they are not bound to convict him;[5] though they probably will do so. For, if his story *might* reasonably be true, the Crown has not given proof "beyond reasonable doubt".[6]

[1] Cf. p. 402 *post*; but contrast, in *London*, no. (iii) on p. 411.

[2] *Reg.* v. *Cooper* (1852), 3 C. and K. 318 (K. S. C. 468).

[3] 2 C. and P. 459 (K. S. C. 469), *per* Bayley, J.

[4] If he "raises a reasonable doubt", this suffices; 2 Cr. App. R. at p. 242.

[5] The absence of satisfactory explanation does not *compel* a jury to convict, *Rex* v. *Schama and Abramovitch* (1915), 11 Cr. App. R. 45; 31 T. L. R. 88. Cf. 13 Cr. App. R. 17; 19 Cr. App. R. 159.

[6] See p. 387 *ante*.

A kindred presumption of guilt arises when a murdered body is found in the possession of some one who is concealing it.[1]

"Presumptions of guilt and *primâ facie* cases of guilt in the trial of a party charged with a crime, mean no more than that from the proof of certain facts the jury will be warranted in convicting the accused of the offence with which he is charged."[2]

Evidence

A litigant, whose case is not made out for him by any Presumption, must convince the tribunal by producing Evidence. The evidence known to our courts admits of a ready classification, according to differences in its intrinsic nature, into three kinds; which are respectively described in the Indian Evidence Act as (*a*) Oral evidence, (*b*) Documentary evidence, (*c*) Material—meaning thereby not "relevant" but "physical"—non-documentary evidence. The same principle of classification has been carried out, in other phraseology and in a slightly different arrangement, by Jeremy Bentham, as follows:

1. "Real" evidence, *i.e.* that consisting in the condition of physical matter, even a living human body;[3] as, for example, a fence, a uniform, a fingerprint, a tattoo mark, a wound, an assailant's bitten finger, a smell of prussic acid, the lion-bitten shoulder which identified Dr Livingstone's corpse. Thus bloodstains upon a knife are "real" evidence of its having caused a wound.[4]

[1] See *The Trial of Wainwright*, p. 226.

[2] *Woolmington* v. *D.P.P.*, [1935] A. C. 462.

[3] Thus a very close resemblance of features affords "real" evidence of Consanguinity; see 39 L. Q. R. 297.

[4] "Wash this filthy witness from your hand"; *Macbeth*, Act II, sc. 2. Once at Ennis an assassin's detached finger, blown off by the bursting of his gun, identified him.

2. "Personal" evidence, *i.e.* evidence which was produced directly by the mental condition of a human being.[1] This may be either,

(*a*) Involuntary; *e.g.* a blush,

(*b*) Voluntary, *i.e.* intended to be Testimonial; *e.g.* an affidavit. It may be either,

(i) Oral, or

(ii) Written.[2]

There is also a very dissimilar, but not less important, mode of classifying evidence, which turns upon differences in its logical bearing upon the question before the court. Considered from this point of view, all evidence is either (i) direct, or (ii) indirect (or, "circumstantial"[3]).

(i) Direct evidence is testimonial evidence to one or more of the *facta probanda* (or "facts in issue"), the essential elements of the question under trial; *i.e.* those facts which, if all of them be proved, render legally necessary a decision favourable to the litigant producing them.

(ii) All other evidence is "circumstantial". This term consequently includes:

(*a*) all "real" evidence;[4]

(*b*) all "involuntary personal" evidence;

(c) such testimonial evidence as concerns only *facta probantia*; *i.e.* circumstances which tend to prove, or to

[1] Or, indeed, of an animal; as when the stolen horse (whose identity is denied), on being taken to the prosecutor's yard, goes at once to its own stable and its own stall.

[2] So early as 1292 we find a writing used as evidence to the jury; Thayer, *Evidence*, Pt. I, p. 106, n. 5.

[3] The student must distinguish between this technical use of the word, and a more popular one, in which it is also applied to evidence, but means simply "full of detail", "circumstanti*ated*" (*e.g.* "his tedious and circumstantial description"); and in which it consequently may be as applicable to a witness's Direct as to his Indirect evidence.

[4] *E.g.* a weapon *tightly* grasped by a corpse shows suicide, not murder. A small dose of poison suggests murder; a large one, suicide.

disprove, some *factum probandum*, or "fact in issue". Thus in a prosecution for libel, the act of publication by the defendant is a fact in issue; whilst the similarity of the defendant's ordinary handwriting to that on the envelope in which the libellous document was posted, is a fact that tends to prove this fact, and so becomes relevant to the issue.

The following are instances of some of the principal forms of circumstantial evidence familiar in criminal cases: the rank of the defendant, his disposition, his motives, his threats, his opportunities, his preparations, his attempts, his false statements, his silence, his fabrication or destruction of evidence, his flight, his possession of stolen property. But circumstantial evidence is just as applicable in civil cases as in criminal. Thus, in an action on a loan, the defendant may call evidence of the poverty of the plaintiff in order to help to prove that the money was not lent. Yet the controversies with regard to its value have arisen almost entirely in connection with criminal offences. For the much greater severity of the penalties that may be inflicted for them has caused many persons to challenge the probative force of circumstantial evidence, as being logically inadequate to support a conviction for (at any rate) any capital crime.

The question thus raised is so fundamental as to need our careful consideration. It is clear that in dealing with any testimonial evidence whatever, whether "circumstantial" or "direct", a jury may be misled. For they have to depend upon:

(1) the accuracy of the witness's original observation of the events he describes;

(2) the correctness of his memory; and

(3) his veracity.

But in addition to the risks of mistake, forgetfulness, and falsehood, which thus arise even when none but direct evidence is given, there are additional risks to run in

dealing with circumstantial evidence. For here the jury have also to depend upon:

(4) the cohesion of each circumstance in the evidence with the rest of that chain of circumstances of which it forms a part;

(5) the logical accuracy of the jury themselves in deducing inferences from this chain of facts. "The more ingenious the juryman the more likely is he to strain his facts to fit his theory" (Alderson, B.). For "every fact has two faces". Readiness in detecting them and seizing on the favourable aspect is an important qualification in an advocate. Thus excitement on being accused may be due either to consciousness of guilt or to indignant innocence. Lord Jeffrey (*Life*, I, 359), in defending Paterson for poisoning his wife, was met by proof of his having once contemplated that murder; but this very fact he claimed as exculpative, urging that contemplation of so horrible a purpose must have made a husband ultimately recoil from it.

These fourth and fifth hazards have impressed some writers so deeply as to make them urge that no conviction for any capital offence should be allowed to take place upon merely circumstantial evidence. But those who so contend have not always realised that in every criminal case the *mens rea* must necessarily be proved by circumstantial evidence alone[1] (except when the prisoner actually confesses). Nor have they realised how extremely obvious may often be the inference to be drawn from circumstantial evidence; as, for instance, in a case where the evidence is of an "alibi".[2] Indeed the circumstantial

[1] Aided by legal presumptions, *e.g.* that "a man intends the natural consequences of his act".

[2] Or of identification by Sir F. Galton's plan of Fingerprints. Of the first million finger-prints recorded by the London police, no two correspond in more than seven out of the eleven "characteristics" by which they are classified. Galton estimated that the chances against a single finger of one man being identical with the same finger of another are sixty-four thousand millions to one. The chances against all five finger-

element often plays a large part in what would pass, at first sight, as excellent "direct" evidence. Thus a witness may depose that he saw *A* point a rifle at *B* and fire it; saw the smoke, heard the crack, and saw *B* fall; and then, on going up to him, saw a bullet-hole in his leg. But still he did not see *A*'s bullet strike *B*; so this fact (the really essential one) depends entirely upon circumstantial evidence; *i.e.* it has to be merely inferred from these other facts which he actually did see.[1]

No distrust of circumstantial evidence has been shewn by English law. It does not even require that direct evidence shall receive any preference over circumstantial. Memorable instances of important capital convictions,[2] whose correctness is unquestioned, that were based solely on indirect evidence are found in the trials of Courvoisier for the murder of Lord William Russell in 1840,[3] and of Crippen in 1910 for the murder of his wife (*post*, p. 403 n.;

prints of a hand tallying with those of another man's hand are much over thirty-two *millions of millions* to one. An important extension of these records has been "Poroscopy", the examination of the pores (instead of merely the ridges) in the finger-prints. By the Telestograph, finger-prints can now be wired by our police to those of foreign countries. Finger-prints are admissible evidence of identity (*Rex* v. *Castleton* (1909), 3 Cr. App. R. 74), and there is no necessity for corroboration, but *quaere* whether such evidence is conclusive (*Rex* v. *Parker*, [1912] V. L. R. 152 and 14 C.L.R. 681 and *Rex* v. *Krausch* (1913), 32 N. Z. L. R. 1229). Finger-prints of an arrested person may be taken without a warrant, [1933] S. C. (J.) 72.

[1] Accordingly, in an old case under unpopular Game Laws, a friendly jury accepted the hypothesis of the poacher's counsel, that the gun fired by his client was not loaded with shot, and that the pheasant died of mere fright. And the superior court did not set aside this verdict (though, it being a civil case, they had full jurisdiction to do so); 4 T. R. 468.

[2] Whenever an enquiry has to be made into the cause of death of a person, and there being no direct evidence, recourse must be had to circumstantial evidence, any evidence as to the habits and ordinary doings of the deceased which may contribute to the circumstances by throwing light upon the probable cause of death is admissible, *Joy* v. *Phillips Mills and Co. Ltd.*, [1916] 1 K. B. 849, 854.

[3] *The Times*, June 19, 1840; Townsend's *Modern State Trials*, I, 267, where an account will be found of the grave question raised by this case as to the duties of an advocate to a client who tells him that he is guilty.

[1911] P. 108). Reference may also be made to *Rex* v. *Nash* (1911)[1]; and *Rex* v. *Robertson* (1913).[2]

Indeed some experienced English and American lawyers have even gone so far as to prefer circumstantial evidence to direct. "Witnesses", say they, "can lie; circumstances cannot." Undoubtedly many famous cases may be cited where great masses of direct evidence have proved to be utterly misleading.[3] Such cases have shewn that the direct and explicit assertions of scores of witnesses, by being given on *opposite* sides, may create a far greater uncertainty than that which attends the employment of circumstantial evidence.[4]

Three such cases may be briefly referred to.

(1) In the *Leigh Peerage Case*,[5] the claimant of a title based his claim on his alleged descent from one Christopher Leigh. The proof of such descent was the alleged inscription on a monument, which was said to have formerly stood inside Stoneleigh Church. Thirty witnesses appeared before a committee of the House of Lords, and swore orally to their recollection of the monument; and affidavits to the same effect were made by about thirty others. But these sixty witnesses were contradicted (*a*) by twenty-one other witnesses, who denied altogether that any such monument had existed; and also (*b*) by the fact that their own descriptions of its shape, its colour, and the inscription carved on it were utterly irreconcilable.[6] Accordingly the committee refused to believe these sixty persons.

[1] 6 Cr. App. R. 225. [2] 9 Cr. App. R. 189.

[3] For the remarkable error in "direct" evidence of identity in Adolf Beck's case see p. 622 *post*. Similarly, twenty-one witnesses mistakenly identified one Thompson in 1912, 7 Cr. App. R. 203.

[4] On the general controversy see pp. 39–52 of Wills, *Circumstantial Evidence*. The whole volume deserves the careful study of every advocate.

[5] 1832. See the Committee's Report.

[6] To take, for instance, only some seven out of the first thirty, they thus differed as to the colour of the monument: "nearly black"; "a kind of dove colour"; "black with white letters"; "had been originally white"; "black"; "light marble with dark introduced into it"; "bluish

(2) In *Elizabeth Canning's Case* (1754),[1] thirty-five witnesses swore that a gipsy (of peculiarly unmistakable features) who had been convicted of a robbery in Middlesex, was in Dorsetshire at the time of the robbery; but were contradicted by twenty-five other witnesses, who swore to having seen her then in Middlesex. Besides shewing by this contradiction how untrustworthy even the most direct testimonial evidence may be, the case further emphasises the same lesson by the instance of Canning's own narrative of abduction and robbery, which was discredited by its sheer improbability, without being contradicted at all.

(3) But the case of *Reg.* v. *Castro*,[2] the longest and most remarkable trial in our legal history, affords the most vivid illustration of the untrustworthiness of direct evidence. A butcher, named Orton or Castro, came forward in 1866 claiming to be Sir Roger Tichborne, a young baronet who was believed to have perished in 1854 in a shipwreck. On Orton's being ultimately tried for perjury, 212 witnesses were examined for the Crown, and 256 for the defence. These included four large groups of people who respectively gave the following items of direct evidence:

(1) the claimant is not Roger Tichborne;

(2) he is Arthur Orton;

(3) he is not Arthur Orton;

(4) he is Tichborne.

grey". As to its shape: "oblong"; "square at top, but narrowed to a point at bottom"; "square at bottom, but narrowed to a point at top"; "square at top and square at bottom". And as to the inscription on it: "all Latin"; "a great deal of it English"; "all English except *anno domini*"; "all Latin".

[1] 19 St. Tr. 283. See *Cornhill Magazine*, 1904. A full account of this extraordinary case will be found in an article in *Blackwood's Magazine* for 1860, p. 581, written by a well-known metropolitan magistrate, who considers it "perhaps the most inexplicable judicial puzzle on record"; and also in one contributed by the author to the *Law Quarterly Review* in 1897.

[2] *Annual Register*, vols. for 1871, 1872, 1873, 1874.

These four vast groups, accordingly, served only to prove each other to be untrustworthy; and the case had therefore to be decided by circumstantial evidence, such as the claimant's degree of education, his ignorance of the affairs of the Tichborne family, and his conduct towards them and towards the Orton family.

These cases shew vividly that testimony, even when a large number of witnesses corroborate each other, may be quite untrustworthy; and therefore that direct evidence is not necessarily to be believed. It may even be less trustworthy than circumstantial evidence,[1] if the latter happens to consist of a great number of detached facts, which are severally proved by different witnesses. For, in such a case, each witness's contribution may well appear to him too trivial for it to be worth while to commit perjury about it (though, on the other hand, the same triviality which thus diminishes the chance of mendacity, increases somewhat the chances of mistake and of forgetfulness). But in all other cases circumstantial evidence must certainly be pronounced to be less trustworthy than direct evidence; since a dangerous source of error is introduced by the difficulty of reasoning from the fragmentary items of proof to the conclusion to be proved. For, though "circumstances cannot lie", they can mislead.[2] They may even have been brought about for the very purpose of misleading; as when Joseph's silver cup was placed in Benjamin's sack, or when Lady Macbeth "smeared the sleeping grooms with blood".

Unfortunately it is in the graver rather than the lesser crimes that circumstantial evidence has the most fre-

[1] Especially in Oriental countries, where "truthfulness is an eccentricity, and evidence on oath a marketable commodity"; Sydney Smith's *Forensic Medicine*, p. 472.

[2] As when Bodin tells us that "For the woman not to weep when accused is one of the strongest presumptive proofs of witchcraft that Grillard and other Inquisitors had observed, after having tried and executed very many witches": *Démonomanie*, IV, ch. IV.

quently to be relied upon; because in such crimes an offender is the more careful to avoid eye-witnesses. Just as adultery can scarcely ever be proved by direct evidence,[1] so no deliberately planned murder is likely to be carried out when any third person is at hand. Hence comes it that if a child has died just about the time of birth, though the question whether it was born alive or dead can usually be settled easily in civil actions (friends of the mother, who were present at the birth, being called), yet its determination on a criminal trial for infanticide is usually most difficult.[2] For it ordinarily has to depend wholly on circumstantial evidence, and this has to be drawn from post-mortem appearances of an ambiguous character. Hence has arisen a widespread impression that the evidence *requisite* to prove live birth is different in civil and in criminal cases; the only difference being, in reality, in the evidence usually *available* in the one and in the other.

These various considerations point to the conclusion that circumstantial evidence should be admitted, but admitted only with watchful caution. With this conclusion the practice of English courts accords. (The caution, however, as Stephen[3] points out, must not be excessive; as when some maintain that there should be no conviction unless guilt be "the only possible inference" from the circumstances. For even in the best-proved case there must always be some possible hypothesis which would reconcile the evidence with innocence.[4]) The prudent hesitation of English law in regard to circumstantial

[1] Lord St Helier said that if direct evidence of adultery be given, this very fact should inspire doubts as to the truth of the accusation. But the combination of guilty passion with opportunity affords some circumstantial evidence of it.

[2] "Almost impracticable" (Ogston's *Medical Jurisprudence*, p. 220); "almost impossible" (Atkinson's *Medical Practice*, p. 217); "absolutely impossible" (T. F. Smith's *Medical Jurisprudence*, p. 224).

[3] *General View of Criminal Law*, 2nd ed., pp. 179–207.

[4] Cf. the hypothesis mentioned, *ante*, p. 397 n.

evidence has found expression in some familiar restrictions upon its employment. Two of these are of special importance.

(*a*) No conviction for larceny is to be allowed unless the fact that a larceny has actually taken place be proved fully.[1] It is not enough that a penniless tramp has been found to be wearing two diamond rings. To convict him of larceny, it must further be proved that these rings had somewhere been stolen; and this must be proved either by direct evidence or at least by exceptionally strong circumstantial evidence. Usually therefore it will be necessary to bring the owner himself, to prove his loss of some article and its identity with the article which is the subject-matter of the indictment.[2] But it is possible that even circumstantial evidence may be so peculiarly strong as to justify a conviction without any such direct proof; as where a person, on coming out of a barn, is found to have corn (or one coming out of a cellar is found to have wine) concealed under his coat.[3]

(*b*) Similarly no conviction for homicide is allowed unless the fact that there has been a death be proved fully. This again must be done either by direct evidence (*e.g.* the finding of the body), or by circumstantial evidence of an exceptionally strong character.[4] Hale and Coke illustrate the importance of this rule by actual instances in which persons were executed for murder, and yet their supposed victims subsequently reappeared alive.[5] Hence in a case where the father and mother of a bastard child were seen to strip it and throw it into the Liverpool Docks,

[1] Cf. p. 224 *ante*.

[2] *Rex* v. *Joiner* (1910), 4 Cr. App. R. 64. Hence the frequent impunity of those who make a trade of picking up stray balls on golf-links.

[3] *Reg.* v. *Burton* (1854), Dearsly 282.

[4] *Rex* v. *Hindmarsh* (1792), 2 Leach 569. In 1929 a man surrendered to the police stating that he had thrown a woman into the Thames from Waterloo Bridge. The river was searched but no body found. There were certain inconsistencies in the confession and the magistrate refused to convict. He observed, however, that, if further evidence was discovered, no plea of *autrefois acquit* would arise (see 166 L. T. Jo. 225).

[5] Hale P. C. c. XXXIX; 3 Coke Inst. 104 (K. S. C. 449).

and the body could not afterwards be found, Gould, J., nevertheless advised that, as there was a bare chance that the child might have been carried out to sea by the tide and picked up alive, the parents ought not to be convicted of its murder.[1] It thus is usually necessary that the body, or some identifiable portion of it, should be found.[2] An accused person must not be convicted either of murder or manslaughter, unless there is evidence either of the killing or of the death of the person alleged to have been killed. In the absence of such evidence there is no onus upon the prisoner to account for the disappearance or non-production of the person alleged to be killed.[3] A memorable instance of the identification of a mere portion occurred in a famous American trial of 1850; that of Professor Webster, of Harvard University, for the murder of Dr Parkman.[4] The body had been burnt in a furnace in the Professor's laboratory and the only identifiable portion left was the victim's false teeth; but they fortunately were of a peculiar character.

[1] Cited in *Rex* v. *Hindmarsh*, loc. cit. Doubt has been thrown on this ruling as over-cautious. But *Rex* v. *Farquharson* (Sussex Assizes, June 29, 1908) is similar. The prisoner confessed having thrown her baby into a tidal stream. It was proved on the next morning the body of a baby of the same sex and age was found on the shore, a mile away, in the line of current. Jelf, J., told the jury that they could not convict unless satisfied that the body found was that of the prisoner's child. In *Reg.* v. *Armstrong* (*The Times*, Aug. 18, 1875), a man had been thrown overboard in a Gold Coast river, rife with sharks, and his body was never seen again. Archibald, J., left the case to the jury, saying, "The rule only requires the jury to act with caution."

[2] The phrase *corpus delicti*—though often applied to the body of a murdered man, or the stolen goods, or any other Thing which is the subject-matter of criminal conduct—more properly means the criminal conduct itself, *e.g.* the act of killing the man, or of stealing the goods. See the phrase discussed by Wills (*Circumstantial Evidence*, 6th ed., p. 324).

[3] See *Rex* v. *Davidson* (1934), 25 Cr. App. R. 21.

[4] 5 Cushing 295. Compare, too, Crippen's case, in England in 1910; where no head and no bones were found and no organs that indicated sex, but only pieces of flesh, on one of which was an identificatory scar. And in *Rex* v. *Peacock* (1911), an Australian case (13 C. L. R. 619), the murderer had burned the whole of the corpse, yet was convicted. Cf. *Rex* v. *McNicholl*, [1917] 2 I. R. 557, and *Rex* v. *Rouse*, *The Times*, Jan. 27, 1931.

CHAPTER XXV

THE GENERAL RULES OF EVIDENCE

WE now come to consider the chief general rules of evidence. They consist, as we have seen (p. 386 *ante*), mainly of rules of Exclusion. And they are not limited to excluding such matters as are irrelevant to the issue to be tried. For even of relevant testimony there are two kinds which it is highly desirable to exclude.[1]

(*a*) Evidence of matters so slightly relevant as not to be worth the time occupied in proving them. If every circumstance which might tend to throw light on the matters in issue were let in, trials would be protracted to an intolerable length; especially (Maine says) in India, where extraordinary ingenuity is exhibited in discovering every fact which has the remotest bearing on a question under litigation.

(*b*) Evidence which, though relating to facts that are not only relevant but even important, is itself of such a character that experience shews it to be likely to impress persons of merely ordinary intelligence as being a more cogent proof of those facts than it really is. "Hearsay" affords a conspicuous example of this kind of evidence. The legal rules of evidence were probably developed in consequence of the gradual discovery by judges that certain kinds of proof were apt to be thus accepted, by inexperienced jurymen, with a degree of respect which was undeserved. Hence an adherence to the rules was insisted upon chiefly in cases where it was by jurymen that the

[1] "Experienced citizens, and judges of the highest eminence, reach conclusions in their own private affairs by reference to a more relaxed standard than the courts allow. But the issues pronounced upon by courts are attended with such grave consequences that in matters of evidence a standard of admissibility so cautious as to be meticulous is in fact essential" (Lord Birkenhead, L.C.).

evidence was to be weighed. Accordingly where the functions of the Court alone are concerned (as in determining the sentence for a convicted prisoner), facts are often taken into account which have not been established in accordance with the strict rules of evidence.[1] So the law of evidence was not reduced to definite form until long after our forensic procedure had become familiar with the practice of producing witnesses to give evidence to juries. It was in civil courts that—in the seventeenth century—the rules of evidence first arose; and they thence passed to criminal courts, where, however, they came to assume an even greater importance than was accorded to them in civil ones.[2]

A marked distinction between the civil and the criminal views of the law of evidence is that its rules may in civil cases be waived, either by consent or by an order made on a summons for directions; but in criminal cases the rules of evidence are matters *publici juris*, and cannot be dispensed with by consent of the parties.[3] For, here, others than they have an interest at stake. Not merely the single person accused, but also every other inhabitant of the realm, has an interest in seeing that the prisoner's liberty or life is not taken away except under the whole of the safeguards which the law has prescribed. Thus a photograph, unverified by oath, cannot be given in evidence even if both parties are willing that it should be.

And till recently there was a further grave distinction. For in civil cases, a new trial is not allowed merely because

[1] But the fact that the prisoner is present and does not deny them, does often give ground for receiving them, even technically, as Admissions.

[2] "In criminal courts the rules of Evidence are strictly observed; and in six months you learn more of practical advocacy there than in ten years elsewhere" (Lord Brampton).

[3] *Reg.* v. *Bateman* (1845), 1 Cox 186 (K. S. C. 191); cf. L. R. 1 P. C. at p. 534; 11 Cr. App. R. at p. 300. But the quasi-civil character which the early law attached to mere misdemeanors (*ante*, p. 112) has occasionally led, in their case, to slight relaxations of this rule; see, *e.g.* p. 463 *post*. America tends to relax it; cf. 190 U. S. 197; 195 U. S. 138.

of an improper admission or rejection of evidence at the original trial, unless this error had occasioned "some substantial wrong or miscarriage".[1] But in criminal cases a jury's verdict of Guilty used to be liable to be quashed if *any* inadmissible evidence for the Crown had gone in; even though that evidence was trivial, and though the rest of the evidence was amply sufficient to warrant a conviction. Happily, however, the Criminal Appeal Act, 1907,[2] has abolished this scrupulosity. For it provides that "the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no *substantial* miscarriage of justice has actually occurred". A similarly wide power of dismissal had already been adopted by the High Court in dealing with appeals from rulings given about evidence in courts of Petty Sessions.[3]

So, now, a small slip in the evidence will not entitle a prisoner to appeal successfully if (even had an opposite ruling been given) the only reasonable and proper verdict for the jury to return would still have been the same, one of Guilty. In other words, if every reasonable jury not only might, but certainly must, have convicted. Yet there may be a sufficient "miscarriage of justice" to warrant setting aside a conviction,[4] even though the Court of Appeal itself thinks the conviction justifiable. It is sufficient that it would have been "fairly and reasonably" *possible* for the jury to have refused to convict, had the rules of evidence been strictly observed. For the prisoner has lost that chance of acquittal.[5] Hence a prosecutor should not press for the admission of any evidence which

[1] Rules of the Supreme Court; Order 39, Rule 6.

[2] 7 Edw. 7, c. 23, s. 4; *post*, p. 586.

[3] *Shortt* v. *Robinson* (1899), 63 J. P. 295.

[4] Wrongful rejection: 2 Cr. App. R. 119. Wrongful admission: 1 Cr. App. R. 83, 128; 5 Cr. App. R. 13, 233.

[5] 3 Cr. App. R. 177. Cf. 9 Cr. App. R. 171.

is at all of doubtful admissibility. But, on the other hand, a prisoner's counsel should not be too eager to take objections to evidence; for the jury resent any technicality which closes the avenues to truth, and therefore a successful objection often creates in their minds a prejudice more injurious than the excluded evidence itself would be. American lawyers are often surprised at the rarity, in English trials, of objections to evidence.

If any improper evidence is given, the judge should strike it out of his notes and should bid the jury pay no attention to it. In an extreme case, where the evidence has made too much impression to be counteracted thus, he should discharge the jury and re-try the prisoner before a fresh jury. Unless counsel for the defence objects the proper course is for the jury to retire during an argument as to the admissibility of evidence.[1]

We will first explain the fundamental doctrines of Evidence, applicable in all courts whether civil or criminal; and then pass to the consideration of such rules as are peculiar to courts of criminal jurisdiction. The following are the fundamental principles which require our attention.

Rule I. *Omnia praesumuntur pro negante*; or, as the rule is more fully expressed by Paulus, "ei incumbit probatio qui dicit, non qui negat".[2]

Thus the creditor who claims a debt has the burden of proving it to be owed.[3] Similarly, in any criminal accusation,[4] the burden of proof almost always lies upon the accuser as regards the *actus reus*,[5] and usually also as regards the *mens rea*; while the accused, on the other hand,

[1] *Rex* v. *Chadwick* (1934), 25 Cr. App. R. 138. [2] *Dig.* XXII, 3. 2.

[3] And even in civil cases the defendant's refusal to give information does not satisfy the plaintiff's burden of proof; [1922] 1 A. C. at p. 185.

[4] *Rex* v. *Hazy* (1826), 2 C. and P. 458 (K. S. C. 471); *Williams* v. *East India Co.* (1802), 3 East 192 (K. S. C. 472).

[5] But as to negative averments see p. 409 *post* and see also p. 411 *post*.

is entitled to maintain "a sullen silence". And this duty of every affirmant to make out his case is so clearly imposed by law that, although the judge is not a judge of Fact, yet he is a judge as to the Absence of Fact, and so must not allow the jury to pronounce a verdict in the affirmant's favour if the only evidence he has produced be so slight that no reasonable man could accept it as establishing the fact which is to be proved. Thus if it is necessary to shew that a transaction took place on a Monday, and the evidence only shews that it took place "either on a Monday or else on a Tuesday", there would be no case which the judge could submit to the jury; unless indeed this evidence were eked out by some presumption, as for instance, "omnia[1] rite esse acta". So, again, if a prisoner be identified only by footmarks, but a hundred similar pairs of boots have been sold in his village. Hence it may quite logically happen that a defendant may be acquitted, and yet that the witnesses against him, on being indicted before the same jury for perjury, may also be acquitted.

Sometimes, however, this rule, that the burden of proof is on the affirmant, may happen to come into collision with the fundamental presumption of innocence;[2] which throws the burden of proof on any person who alleges misconduct, even though his allegation of misconduct be a *negative* averment, a charge of omission. In such a collision of rules the presumption of innocence must usually be allowed to prevail; and the accuser will generally be required to give proof not only of his affirmations but even of his negations.[3] To this principle, however, a somewhat perplexing exception arises in those cases

[1] *Ante*, p. 389. [2] *Ante*, p. 387.

[3] See *Reg.* v. *Curgerwen* (1865), 1 C. C. R. 1 and p. 362 *ante*. In civil actions for Malicious Prosecution the plaintiff has to prove the negative fact that there was "no reasonable cause" for prosecuting; 11 Q. B. D. 440. So in ejectment for *non*-insurance; 8 A. and E. 571. On a charge of indecent assault the prosecution must negative consent, *Rex* v. *Horn* (1912), 7 Cr. App. R. 200; *Rex* v. *Donovan*, [1934] 2 K. B. 498 (K. S. C. 558).

where the affirmative fact, which would disprove guilt, is one which (if it exists) lies peculiarly within the knowledge of the litigant whose interest it is that this guilt should be disproved. For in these peculiar cases, so soon as the accuser has given so much evidence as a reasonable man might consider to be sufficient to establish the positive elements of the offence, there then is cast upon the accused person the burden of disproving the negative element by producing affirmative counter-evidence. So if he fail to produce that evidence, this failure may be taken as proving that no such affirmative evidence exists, and accordingly as establishing the accuser's negative allegation. Thus on an indictment for misprision of treason, though it is for the Crown to prove that the prisoner knew of the treason, it yet may legally leave the prisoner to prove (if he can) that he discharged his consequent duty of disclosing it to some magistrate.[1] And similarly in proceedings for practising medicine without a qualification, or selling game without a licence, or producing a play without the author's consent, so soon as the active conduct alleged has been proved, it has often been left to the defendant to prove that he possessed the qualification or licence or consent.[2] The prosecution need not negative a proviso in a statute, and a distinction must be drawn between the enacting part of a law which the prosecution must normally negative and exceptions in a proviso within which the accused must bring himself, *Rex* v. *Audley*, [1907] 1 K. B. 383.

But it is only in this unusual class of cases—viz. accusations of omission, and where the act omitted is such that

[1] *Rex* v. *Thistlewood* (1820), 33 St. Tr. at p. 691. Cf. [1915] 1 K. B. 618.

[2] *Rex* v. *Turner* (1816), 5 M. and S. 206 (K. S. C. 474); *Rex* v. *Scott* (1921), 86 J. P. 69 (supplying cocaine without licence); *Williams* v. *Russell* (1933), 49 T. L. R. 315. Cf. [1908] 2 I. R. 214. A prisoner setting up in answer to a charge of bigamy a marriage valid by foreign law must prove the foreign law as strictly as it must be proved if a foreign marriage is relied upon by the prosecution, *Rex* v. *Naguib*, [1917] 1 K. B. 359.

its performance could *best* be proved by the accused—that a defendant's mere silence can suffice to prove any element of his guilt. Usually, the utmost hostile inference that can be drawn from his silence does not amount to Proof but merely to Confirmation. It is not sufficient to rebut so strong a presumption as that of Innocence; but it is capable of being taken into account to corroborate other evidence which, even uncorroborated, was already legally adequate to effect that rebuttal.[1] Of course the value of this fact of silence increases in proportion as the ground of defence, about which the defendant is silent, lies the more particularly within his own knowledge. In *Att.-Gen.* v. *Bradlaugh*,[2] an action for penalties for acting as a Member of Parliament without having taken the oath, the informant alleged that the defendant's religious views made him incompetent to take an oath; and this assertion was supported by evidence. As the defendant could himself have disproved the assertion if it were not true, the jury were directed to take into account the fact that he had not done so. And in divorce proceedings, if the co-respondent is present in court, and yet does not go into the witness-box to assert his innocence, this corroborates (though only slightly) the evidence given against him. So, in the proceedings, in 1820, on the allegation of adultery against Queen Caroline, great stress was laid upon her failure to bring her devoted attendant Bergami, the alleged adulterer, as a witness to her innocence.[3]

The importance of this rule as to a defendant's silence is very great, now that the Criminal Evidence Act, 1898,[4] has allowed all accused persons to give evidence for

[1] Cf. L. R. 10 Q. B. at p. 574. See also 27 L. J., Ex. 41.

[2] *The Times*, July 1, 1884; and on appeal, 14 Q. B. D. 667.

[3] Lord Eldon, for instance, in his speech in the House of Lords (Nov. 2, 1820) treats this failure as "amounting to a tacit admission".

[4] See p. 474 *post*. Cf. 1 Cr. App. R. 62, 64, 218; *Rex* v. *Corrie* (1904), 20 T. L. R. 365; *Ward* v. *Mauritius* (*Bishop*) (1906), 23 T. L. R. 52.

themselves on oath. For, though this Act forbids counsel (see p. 477 *post*) to comment on the prisoner's not giving evidence, no such restriction is imposed upon the judge; and indeed jurymen themselves are usually quick to notice the prisoner's abstention.

It should be noted, in conclusion, that there are a few exceptional criminal cases in which the legislature has thrown upon the prisoner the *onus probandi* of a part of the issue.[1] The following are instances:

(i) By the Explosive Substances Act, 1883,[2] it is a felony, punishable with penal servitude for fourteen years, to be in possession of any explosive substance under suspicious circumstances, unless the prisoner can shew that his possession was for a lawful purpose.

(ii) By the Larceny Act, 1916, s. 28 (2) it is made a misdemeanor for a person to be found by night in possession of housebreaking implements, "without lawful excuse (the proof whereof shall lie on such person)"; see p. 204 *ante*.

(iii) By 2 and 3 Vict. c. 71, s. 24 it is made an offence to be in unlawful possession, in any street or public place, in the *Metropolitan* Police District, of goods which may reasonably be suspected of being stolen, unless the prisoner gives a good account of how he came by them (punishable by two months' imprisonment, with or without hard labour).

Rule II. The mode in which testimonial evidence is given.

The admirable method adopted is one which was gradually developed by the common-law courts. They ultimately went unfortunately far in excluding evidence, but they elicited in the best possible manner all that was not excluded (whilst in Chancery, far more evidence was always admissible, but the mode of elicitation was such

[1] See also pp. 303 and 326 *ante*.

[2] 46 and 47 Vict. c. 3, s. 4.

as to render all of it far less trustworthy). The witness must give his testimony not "spontaneously" but "responsively", *i.e.* not in a consecutive narrative, but by brief answers to brief successive questions. This method affords the opposing party an opportunity of objecting, before it is too late, to any question which tends to elicit an answer that would not be legally admissible as evidence. The questions moreover are put by counsel, and not by the judge.[1] But in French criminal trials, they are still put through the medium of the presiding judge (for though the prisoner's counsel may, now, carry on an examination or cross-examination, he usually can only do so by getting the leave of the judge for each question[2]); and the French Code of Criminal Procedure provides that a witness must not be interrupted in his answer. Hence, upon the trial of M. Zola (in connection with the Dreyfus case) in 1898, more than one of the military witnesses made a continuous speech that occupied over a quarter of an hour; and General de Pellieux was called as a witness expressly on account of his extreme eloquence.

The questions proposed to a witness may occur in as many as three successive series.

(1) He is first "examined in chief" by the party that has called him; with the object of eliciting from him evidence in support of that party's view of the question at issue.[3] The counsel ought to control his witness; and check him from tendering any inadmissible evidence.

(2) He is then cross-examined by the opposite party,

[1] Yet so late as *Lilburne's Case* (1649) a strong court told him that a prisoner might not cross-examine the Crown witnesses, but only suggest questions for the court to put (4 St. Tr. at p. 1334).

[2] "With the result that his cross-examination becomes comparatively ineffective", wrote Lord Russell of Killowen (*Life*, p. 320), after attending the trial of Capt. Dreyfus at Rennes.

[3] "Far and away the most important function of an advocate is the examination-in-chief; to think it is the cross-examination is a great mistake" (Atkin, L.J.). "Cross-examination is far easier than examination-in-chief" (Lord Alverstone, *Recollections*, p. 283).

in order to diminish the effect of the evidence which he has thus given, and perhaps also to obtain evidence in support of the case of the party cross-examining. For a cross-examination is not, as is sometimes imagined, limited to the scope of the examination-in-chief. But it should be limited to matters relevant to the issue (indirectly relevant at least, if not directly).[1] Yet irrelevant questions are sometimes asked quite properly, simply to test a witness's intelligence, or to throw a dishonest witness off his guard. Hence judges are slow to interfere with a cross-examiner. Cross-examination may reduce the effect of the evidence given in examination-in-chief either (1) simply by eliciting further facts which tend to harmonise that evidence with the case set up by the cross-examiner;[2] or (2) by shaking that evidence itself. This latter effect may, for instance, be produced by bringing the witness to admit that his opportunities of observing the facts narrated were inadequate, or that his character or bias is such as to make it unwise to rely on his veracity, or again, by involving him in such inconsistencies of statement as to make all such reliance impossible on (at any rate) this particular occasion.[3] If on a crucial point of the case it is proposed to ask a jury to disbelieve a witness, the witness should be cross-examined on that point.[4] Cross-examination should be directed to facts not arguments. It is objectionable to begin a question to a witness: "Do you ask the jury to believe" or "Is your evidence to be taken as suggesting that".[5]

(3) Finally, a witness who has undergone cross-examination may be re-examined by the party who originally

[1] See 12 Cr. App. R. at p. 76.

[2] A prisoner's evidence, in 1911, "I am an industrious man and recently worked for seven years in Devonshire", was cancelled by the cross-examiner's well-founded question, "Was it not at Dartmoor?"

[3] Quintilian's instructions on the cross-examination of witnesses still retain all their value; *Inst. Orat.* v, 7.

[4] *Rex* v. *Baldwin* (1925), 133 L. T. 191; 18 Cr. App. R. 175.

[5] *Rex* v. *Hart* (1932), 23 Cr. App. R. 202; cf. p. 418 *post*.

called him; in order to shew the real meaning of the evidence elicited by the cross-examination.[1] A re-examiner may, for instance, get the witness to explain any ambiguous expressions which he may have used on cross-examination; or his motives (*e.g.* provocation) for any conduct which he may have admitted when under cross-examination.[2] Thus, if the cross-examiner has asked, "Didn't you once assault a neighbour?" the re-examiner may ascertain what this neighbour had done to you that made you assault him. Or if the witness has been asked in cross-examination, "What are you to receive for coming here to-day?" the re-examiner may ask, "And what have your journey here and your loss of time cost you?" But re-examinations are limited strictly to the matters that have been elicited in the cross-examination. Hence, in an action against a ship-owner for negligence in his mode of loading a cargo, after a witness for the plaintiff had stated that deck-loading was perilous, and had consequently been asked by the cross-examiner, "Isn't it usual in summer voyages?" it was held not to be permissible for the re-examiner to ask, "Are those summer deck-cargoes carried at the risk of the ship-owner or of the cargo-owner?" For such a question would go beyond the range of the cross-examination and open up a new inquiry.

It should be added that if either an examiner-in-chief or a cross-examiner has elicited from a witness some portion of a conversation or of a document (even though

[1] Re-examination is so difficult that the leading counsel rarely trusts it to his junior. A great advocate said that "unless conducted irregularly, it is useless".

[2] Mr Richard R. Harris has an apt story of a witness, who had sworn to the sanity of a testator, being asked in cross-examination, "What will you get as a legatee if the will be found valid?" "£10,000." But the re-examiner asked, "And what, as next of kin, if it be found invalid?" "£50,000." I have heard a cross-examiner's question "Have you been prosecuted for theft" (which the witness admitted) followed by the re-examiner's "With what result?" and the answer "Acquittal".

he may have brought out all that it was legally permissible for *him* to ask for), his opponent becomes entitled to elicit (in his subsequent cross-examination or re-examination) all the rest of that conversation or document, so far as it concerned the same subject. Thus if the examiner-in-chief asks, "Why did you go to that house?" and receives for answer, "Because of a remark my brother made to me", *he* cannot go on to ask what this remark was (for that would be to adduce hearsay evidence): but the opposite party, when he comes to cross-examine, will be fully entitled to ask.

Rule III. Questions put to a witness by the counsel who produces him (whether in examination-in-chief or in re-examination), must not be "leading" ones.[1]

A question "leads" if, though it admits of several answers, it suggests that a particular answer is desired by the questioner. Thus an examiner-in-chief must not ask "Wasn't it a wet day?" but, "What sort of weather was it?"; not, "Was it eleven o'clock?" but, "What time was it?"; not, "Was he drunk?" but, "What was his state as to sobriety?"; not, "When he was leaving did he offer you £5?" but, "When he was leaving what did he do?" Leading questions are objectionable because (1) to a false witness they suggest what particular lie would be desirable; and (2) even an honest witness is prone to give an assenting answer from mere mental laziness. But these objections are not likely to apply to a cross-examination, so leading questions are freely permitted there.[2] To certain portions, also, of the examination-in-chief the objections

[1] Leading questions were objected to even as early as the trial of Lilburne in 1649. The Attorney-General having asked a witness such a question, Lilburne interposed, "I pray, Sir, do not direct him what to say, but leave him to his own conscience and memory" (4 St. Tr. at p. 1337).

[2] Hence there is often a struggle as to which party shall call a witness; for it must affect the right to cross-examine, and may affect the right to make the last speech to the jury; see p. 570 *post*.

are inapplicable: and therefore, as leading questions save much time, they are allowed even in it in the following cases:

(1) As to undisputed matter; *e.g.* the name, address, and occupation of a witness. If a fact has been deposed to by a witness, and he has not been cross-examined about it, this may *primâ facie* be taken to imply that the fact is undisputed, and accordingly that subsequent witnesses may be "led" with respect to it.

(2) As to the identity of persons or things; *e.g.* "Is this the watch that you missed?" Thus an examiner may ask, "Is the prisoner the man you saw?" Yet a jury would be more fully impressed if counsel asked first, "Would you recognise the man?" and then bade the witness point him out. A photograph is admissible as evidence of identity, because it is only a visible representation of the image or impression made upon the minds of the witnesses of the sight of the person or the object it represents; and therefore is, in reality, only another species of the evidence which persons give of identity when they speak merely from memory.[1] Photographs may be shewn to persons who can identify a criminal if the police are seeking for information as to the person or persons who may have committed a crime, but after identification the police should not try to corroborate the evidence of a witness by shewing him the photograph of a person whom he has already identified.[2] Photographs of a person under arrest should not be shown to witnesses who are just about to attend an identification parade.[3]

(3) For the purpose of contradicting the account which some previous witness, *A*, has given of his own utterances, a subsequent witness, *B*, may be asked a leading question;

[1] *Per* Willes, J., in *Reg.* v. *Tolson* (1864), 4 F. and F. 104.

[2] *Rex* v. *Hinds*, [1932] 2 K. B. 644. Contrast *Rex* v. *Dwyer and Ferguson*, [1925] 2 K. B. 799.

[3] *Rex* v. *Haslam* (1925), 134 L. T. 158; 19 Cr. App. R. 59.

as, "Did *A* say so-and-so?" But, *before* this is asked, *B* should be got to give his own version of what *A* said.

(4) Sometimes a witness, in the course of his examination-in-chief, shews himself to be hostile to the party producing him—meaning thereby, not that he merely gives evidence which is at variance with that party's case, but that he shews an evident unwillingness to disclose what he knows in favour of it. Thereupon the judge may, if he think fit, permit the examiner to contend with this unwillingness by asking leading questions.

(5) If the witness merely proves to be forgetful, no such permission will be given to ask questions that are strictly leading ones; yet after an examiner-in-chief has thoroughly tested and exhausted his witness's memory, he will usually be allowed to suggest points for recollection,[1] *e.g.* even to ask, "Was nothing said on the subject of the...?"

Rule IV. A witness speaks to his Memory and not to his reasoning or his opinion.

What he remembers will be admissible in evidence even though his recollection of the facts is only weak, *e.g.* "my impression" (but, of course, its value may consequently be trifling). Lord Eldon admitted testimony to the genuineness of handwriting although it was twenty years since the testifier had seen the alleged writer.[2] And a letter has been admitted[3] as evidence though the witness to its authorship could go no further than to say, "It is in a disguised hand; I believe it to be his writing, but I would not like to swear positively to it".[4]

[1] Cf. *Courteen* v. *Touse* (1807), 1 Camp. 43.

[2] 8 Vesey, at p. 474. The permission has been carried in America even to sixty years; 63 S. W. 194.

[3] *Reg.* v. *Bernard* (1858), 8 St. Tr. (N. S.) at pp. 981, 927; cf. 29 St. Tr. 740.

[4] No less a judge than Lord Tenterden refused to withdraw from the jury the question as to a defendant's signature although the only evidence of its genuineness was that of a witness who stated, after much

A witness should not be asked to answer a question of Law; [1911] 1 K. B. 484. And it is only for his memory that a witness is brought into court, not for his powers of judgment (unless he be called as a scientific expert, *e.g.* a chemist in a case of poisoning). Hence an ordinary witness must not be asked, either in examination-in-chief or in cross-examination, to draw inferences. "As *A* and *B* occupied the same cabin, would *A* have put this message into writing if he meant it for *B* only?" is an argument, not a question. Thus, similarly, on reminding a witness that his answer is a contradiction of the evidence which some previous witness has given, even the common question, "If *A* says the contrary to what you have just told us, is what he says untrue?" is, strictly speaking, one which he need not answer.[1] Similarly a cross-examiner has no right to ask, "Did you go to the prisoner's house as a spy?"[2] for this is a matter not merely of facts but of the view to be taken of those facts. Yet he may ask under what directions the witness went there, for what purpose he went, what he did when there, what report he afterwards made to those who employed him; and then, on the strength of the answers, he may urge to the jury that the conduct of the witness was that of a spy.

Rule V. Evidence must be relevant; *i.e.* it must be confined to the question at issue.

A party may prove all circumstances that are relevant to the facts in issue, but no others. The circumstances thus relevant consist not only of those which form part of the facts in issue themselves, but also of all such

hesitation, that he believed the signature was the defendant's; yet upon cross-examination, after again hesitating several minutes, said he believed it was *not*; but upon re-examination stated, though again hesitatingly, that he believed it was; *Beauchamp* v. *Cash* (1822), D. and R., N. P., 3.

[1] "If you had known this fact, would you have taken the shares?" is similarly inadmissible; 11 Cox 435.

[2] *Reg.* v. *Bernard* (1858), 8 St. Tr. (N. S.) at p. 935; 1 F. and F. 240.

further circumstances as may be necessary to identify or to explain these. This, for instance, will include, in a criminal case, not only the prisoner's commission of the crime and his guilty knowledge, but also—as facilitating a belief in these—his opportunities,[1] motives,[2] and subsequent conduct,[3] and the credibility of the witnesses produced at his trial.

Thus, where a prisoner, accused of murder, bore the somewhat unusual surname of Lamson, evidence was admitted that luggage had been deposited in that name on the day of the murder at a railway station near the scene of the crime; it being proof of opportunity, though very slight proof.[4] Not only is the prisoner's own conduct relevant, but so soon as it has been shewn that others were combined with him in carrying out a joint criminal purpose, evidence may be given of any conduct of theirs which forwarded this joint purpose; even though such conduct took place in the prisoner's absence and though they are not indicted along with him.[5] This rule is of specially frequent application on trials for conspiracy (p. 341 *ante*); but is by no means confined to them. Thus if *A* be indicted for uttering counterfeit coin, evidence may be given of his accomplice *B* going into a market and passing it there, though *A* himself did not go. Similarly, if *A* and *B* have agreed that *B* shall obtain goods at a shop by a false pretence, what *B* says in the shop may be given

[1] Evidence that skeleton-keys were found at the house of a person accused of burglary will thus be admissible if the burglary were effected by keys, but not if effected by a crowbar; 17 Cr. App. R. 88.

[2] Thus if a man be charged with the murder of his *wife*, evidence may be given of his being in love with another woman. So, in a case of theft, evidence of Poverty may be given.

[3] Thus in *Rex* v. *Hobday*, *The Times*, Dec. 12, 1933, the Court of Criminal Appeal allowed evidence that the prisoner after committing a murder, broke into a house to remove the traces of the crime from his person, and then stole a motor-bicycle on which to escape. For statements which are part of the *res gestae* see p. 437 *post*.

[4] C. C. C. Sess. Pap. xcv, 572.

[5] *Rex* v. *Stone* (1796), 6 T. R. 527; *Rex* v. *Winkworth* (1830), 4 C. and P. 444.

in evidence against *A*, though he was not there, and even though *B* is not indicted along with him.

The legal limits of relevancy exclude much evidence which, in non-legal matters, would be thought very cogent. Thus if the question at issue be as to how a man acted on one occasion, evidence of the way in which he acted on some other similar occasion is not considered sufficiently relevant to be admissible. Accordingly in civil courts, in a dispute as to what the terms of a contract were, a litigant cannot corroborate his account of them by giving proof of the terms of other contracts which his opponent made on the same subject-matter with other persons.[1] Yet evidence of these other contracts would have been quite admissible had the dispute related—not, as here, to what the opponent actually said when making the present contract, but—to what was his state of mind when making it; *e.g.* whether or not it was with a fraudulent intent that he introduced into it some ambiguous terms.[2]

And in criminal courts the same principle serves to exclude evidence of the prisoner's past offences.[3] It is true that evidence of his *good* character is always regarded as relevant (*post*, p. 464); illogically, but from historical causes. Yet his *bad* character is not regarded as similarly relevant to the question whether he committed the *actus reus*. Consequently evidence of other (even similar) offences of which he has been guilty cannot be given in order to corroborate the proof of his having committed

[1] *Hollingham* v. *Head* (1858), 4 C. B. (N. S.) 388. Cf. *Holcombe* v. *Hewson* (1810), 2 Camp. 391, where the fact that the beer which *A* had sold to *C*, *D*, and *E* was good was held to be irrelevant to the question whether that which he had sold to *B* was also good.

[2] *Barnes* v. *Merritt* (1898), 15 T. L. R. 419.

[3] "Are you going to arraign his whole life? Away, away; that is nothing to the matter," protested Chief Justice Holt, two centuries ago; 12 St. Tr. 864. See a useful essay in 39 L. Q. R. 212. Experience shews that jurors give highly exaggerated weight to evidence of bad character.

this one; nor may a prisoner's witness be asked a question in cross-examination which would ordinarily be admissible to discredit him, if the question indirectly suggests that the prisoner has previously committed a crime.[1] Yet in French criminal procedure such evidence plays a most important part.[2]

Nor is there, even in English law, any intrinsic objection to giving evidence of the prisoner's having committed other crimes, if there be any special circumstance in the case to render those crimes legally relevant. Thus burglary may be brought home to a man by shewing that a cigar case, which the burglars left behind them in the house, had that day been stolen from its owner by *him*. Or, to shew the motive of the present offence, some other crime may be disclosed:[3] as where a murder is accounted for by proving that the deceased had been an accomplice with the prisoner in some previous crime, and consequently was a person to be got rid of; or where an earlier act of sexual passion between *the same two* persons renders probable the further existence of their passion.[4] And the conduct of a prisoner, even subsequently to his offence, may throw light upon it; as where a thief, on being arrested, shoots his arrestor.[5]

Moreover, a distinction similar to that which we have already (*ante*, p. 420) noticed in civil courts holds good in criminal ones. Though a prisoner's bad character is not in itself relevant to shew his guilt, yet the fact that he has committed *similar* offences to the offence with which he is charged may often be relevant, and evidence of similar

[1] *Rex* v. *McCraig* (1925), 90 J. P. 64.

[2] In the famous trial of Landru at Paris in 1921, for ten murders, the President began by saying "*It is my duty* to enlighten the jury as to the antecedents of the accused". The Roman *quæstiones* paid more attention to those antecedents than to the testimony about the crime which was being tried; Strachan-Davidson's *Problems*, II, 119.

[3] *Reg.* v. *Neill* (1892), C. C. C. Sess. Pap. CXVI, 1417 (K. S. C. 481).

[4] *Rex* v. *Ball*, [1911] A. C. 47.

[5] Cf. *Rex* v. *Armstrong*, [1922] 2 K. B. 555; 16 Cr. App. R. 149.

facts will then be admissible and a prisoner witness may be cross-examined about them (see p. 475 *post*). "Similar" in this connection means similar in points significant for the purpose of the enquiry in hand.[1] Thus the use of drugs to procure abortion is similar to the use of instruments by the same person for the same purpose,[2] but the uttering of notes not proved to be forged is not similar to the uttering of forged notes.[3] So where a man was charged with obtaining money by falsely pretending that certain cheques were good and valid, evidence was admitted that in another case he had given another prosecutor a cheque which was dishonoured on presentation,[4] but on a charge of obtaining a pony and cart by false pretences evidence was rejected that the accused had obtained provender by *different* false pretences.[5] It is a fundamental rule that evidence is not admissible merely to prove that the person accused has a general propensity to commit a crime similar in character to that with which he is charged,[6] yet frequently evidence that will have this effect is admissible because relevant upon other grounds. On a quite different principle evidence is admitted of facts whether similar or not which form part of the *res gestae* (see p. 437 *post*). Thus where a prisoner was indicted for carnally knowing a girl under ten years of age evidence was admitted of similar offences two and four days after the offence charged on the ground that "virtually it is all part of one and the same

[1] Study "The Rule of Exclusion of Similar Fact Evidence: England", by Julius Stone, *Harvard Law Review*, XLVI, p. 954.

[2] *Rex* v. *Starkie*, [1922] 2 K. B. 275 (admissible evidence even where the women were different, in order to rebut the contention that the acts were done innocently).

[3] *Rex* v. *Millard* (1813), R. and R. 245.

[4] *Reg.* v. *Ollis*, [1900] 2 Q. B. 758. Cf. *Reg.* v. *Francis* (1874), 2 C. C. R. 128 and *Reg.* v. *Rhodes*, [1899] 1 Q. B. 77.

[5] *Rex* v. *Fisher*, [1910] 1 K. B. 149.

[6] *Rex* v. *Cole* (1810), 2 Russ. Cr. 8th ed., 955; *Thompson* v. *The King*, [1918] A. C. 221, 237.

transaction".[1] It has been said that evidence of similar facts is only admissible where it can be brought under the head of some specific exception to the general rule excluding it, but the tendency of recent decisions is to admit such evidence wherever relevant,[2] provided that it is not admitted merely to show the bad disposition of the accused.[3] It has been said that this class of evidence is admitted not because it shews that other offences have been committed, but notwithstanding that in a particular case it may happen to do so,[4] and the likelihood of such evidence giving rise to undue prejudice has led to its admission being jealously regarded. It was at one time thought that before evidence of similar facts can be admitted there must first be some evidence of the doing by the accused of the act charged, and that evidence of similar facts is only admissible *e.g.* to shew intent or guilty knowledge or to rebut a defence of innocent mistake.[5] The basis of admission is however to-day wider than this. In *Makin* v. *Attorney-General for New South Wales*, [1894] A. C. 57,[6] where the appellants were con-

[1] *Reg.* v. *Rearden* (1864), 4 F. and F. 76. See 50 L. Q. R. p. 386.

[2] A learned writer in the *Harvard Law Review* (cited in note 1, p. 422 *ante*) considers that there never was at Common Law a general rule excluding evidence of similar facts, but that such evidence was always admissible where relevant apart from merely shewing evil disposition, and that it was not until the nineteenth century that judges began to lay down a general rule excluding such evidence save in certain specific cases. The tendency towards admission shewn in recent decisions is well illustrated by two articles in the *Law Quarterly Review*, 23 L. Q. R. p. 28 and 39 L. Q. R. p. 212. See also C. K. Allen, *Legal Duties*, pp. 290–294.

[3] Even this rule would appear to have been disregarded in *Rex* v. *Chesshire and Others* (1927), 20 Cr. App. R. 47, where on a charge against two police officers for corruptly accepting a gift and against a third person for corruptly making it, evidence was admitted against all three defendants that there was found upon the third person a piece of paper which bore words alleged by the prosecution but denied by the defence to relate to other acts of corruption.

[4] *Reg.* v. *Ollis*, [1900] 2 Q. B. 758.

[5] *Reg.* v. *Hall* (1887), 5 N. Z. L. R. 93.

[6] Approving *Reg.* v. *Geering* (1849), 18 L. J. M. C. 215.

victed of murdering an infant committed to their care, it was held by the Privy Council that evidence was rightly admitted that the bodies of ten other babies were found buried in the gardens of houses formerly occupied by the prisoners, and that five women, paying inadequate premiums, had entrusted children to the prisoners and had never seen them again. It was said that "the mere fact that evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears on the question whether the acts alleged to constitute the crime were designed or accidental, or to rebut a defence which would be otherwise open to the accused". The defence to be rebutted must not be a mere fancy defence credited to the accused by the prosecution in order to rebut it "with some damning piece of prejudice",[1] but it seems that where the prosecution must shew intent the mere fact that the defence of accident or mistake is disclaimed does not render evidence of similar facts inadmissible.[2] The similar facts may in a proper case be either previous or subsequent to the offence charged.[3] Evidence of similar offences has been admitted to shew identity,[4] to disprove a defence of innocent

[1] *Per* Lord Sumner in *Thompson* v. *The King*, [1918] A. C. 221, 232. Cf. *Rex* v. *Bond*, [1906] 2 K. B. 389, 409, 417.

[2] *Rex* v. *Armstrong*, [1922] 2 K. B. 555, where the prisoner was indicted for poisoning his wife with arsenic and the defence was that she had committed suicide. The prisoner had purchased a quantity of arsenic and in order to shew that the arsenic was not bought for an innocent purpose the prosecution was held entitled to give evidence of a subsequent administration of poison to another person.

[3] *Rex* v. *Armstrong*, *ante*; *Reg.* v. *Rhodes*, [1899] 1 Q. B. 77; but in *Rex* v. *Boothby* (1933), 24 Cr. App. R. 112, it was held that a pretence made subsequently to the false pretence charged is not admissible inasmuch as the guilty intention may not have arisen until after the act on which a charge is founded. *Reg.* v. *Rhodes*, *ante*, was explained as decided upon the ground that the charge related to a representation that the accused was carrying on a genuine business. *Rex* v. *Boothby* has been forcibly criticised, D. W. Logan, *Evidence of Subsequent Acts*, 50 L. Q. R. p. 386.

[4] *Perkins* v. *Jeffery*, [1915] 2 K. B. 702.

mistake[1] or accident,[2] to shew a system[3] or course of conduct,[4] as corroboration,[5] and to rebut an alibi.[6] On a charge of unlawful carnal knowledge of a girl, evidence may be given of previous guilty relations with the same girl.[7]

In one instance the legislature has even extended this principle to evidence of offences that are not of a precisely similar kind. For under the Larceny Act, 1916, s. 43 (1), on indictments for receiving stolen goods, so soon as it has been established that the prisoner did have possession of the stolen property, the fact of his having been convicted, within five years previously to the receiving, of "*any* offence involving fraud or dishonesty" is admissible to shew guilty knowledge.[8] And on indictments for receiving stolen goods the same section, s. 43 (1), also admits evidence of the fact that other property,[9] stolen within a year before this offence, has been or is found in the defendant's possession. Such evidence may include evidence as to the circumstances and any statements made in explanation, and evidence of possession may be given even before evidence that it is stolen property.[10] Finally, in certain circumstances, an accused person, who testifies under the Criminal Evidence Act, 1898, may be cross-examined as to character (*post*, p. 475). Where the accused so conducts his defence as to render such

[1] *Rex* v. *Starkie*, see note 2, p. 422.

[2] *Rex* v. *Mortimer* (1936), 25 Cr. App. R. 150 (intentional killing by motor-car evidenced by driving shortly before, as well as after, the event).

[3] For evidence of honest business tended on behalf of accused, see *Rex* v. *Sagar*, [1914] 3 K. B. 1112.

[4] *Reg.* v. *Rhodes*, [1899] 1 Q. B. 77.

[5] *Rex* v. *Lovegrove*, [1920] 3 K. B. 643.

[6] *Thompson* v. *The King*, [1918] A. C. 221.

[7] *Rex* v. *Shellaker*, [1914] 1 K. B. 414.

[8] If prisoner has had seven days' notice of this evidence.

[9] This evidence is admitted to shew guilty knowledge. Distinguish carefully the presumption of fact that in the case of the goods which are the subject-matter of the charge their possession if recently stolen raises a presumption that the possessor is either the thief or a guilty receiver — see p. 391 *ante*.

[10] *Rex* v. *Smith*, [1918] 2 K. B. 415.

cross-examination admissible (see p. 475 *post*) he may be cross-examined as to his past offences though their only relevance is to attack his credibility and probably even to shew his disposition (see p. 476 *post*).

By a distinction precisely the converse of that which is thus applied in the case of a prisoner's character, the badness of a *witness's* character is always relevant, but its goodness is not. For the party by whom witnesses are produced cannot (in the first instance) corroborate them by offering proof of their good character or even of their having on former occasions told the same tale they now tell.[1] But the party hostile to these witnesses may discredit their characters, or may prove that at one time they told a different story. Sometimes this is done by mere cross-examination,[2] sometimes by evidence, *e.g.* evidence to shew:

(1) That the witness is notoriously mendacious. This course is now very rare; for it was decided in *Rex* v. *Watson* (1817)[3] that no evidence can be given of any particular misconduct of his, and the only question to be asked is the vague general one, "Is he to be believed on his oath?"[3]—as if mendacity were a fixed habit that did not vary with subject-matter and with personal interests. The party who has produced the witness can never discredit him thus, even if he turn out utterly hostile. When such evidence is given it entitles the other party to contradict it by proof of his witness's good character for veracity (19 St. Tr. 588, 595).

(2) That he is biassed. Bias may, for instance, be shewn by evidence that the witness has received money, or has offered money to other witnesses; or that he has

[1] Similarly, evidence to corroborate a prisoner's defence by shewing that he told his present story before ever he was accused, is considered too remote to be relevant. A far-seeing offender might tell an apt lie. Cf. p. 427 *post*.

[2] The celebrated cross-examination of the spy, Castles, by Sir Charles Wetherell deserves study; 32 St. Tr. at p. 284.

[3] 32 St. Tr. 486; *Reg.* v. *Brown* (1867), 1 C. C. R. 70.

threatened revenge.[1] And even mere relationship to the litigant who produces him is some evidence of bias.[2] But no proof of bias can be given unless the witness has been cross-examined on the point, so as to have had an opportunity of explaining the circumstances.

(3) That on some relevant fact, to which he now deposes, he had previously made a statement inconsistent with what he now says. Here, again, before proof can be given of the discrediting statement, the witness's attention must be specifically drawn to it in cross-examination, in order that he may, if possible, explain it. In criminal cases this mode of discrediting is very common:[3] because most of the witnesses at the trial have already given evidence, viz. at the preliminary examination before the justice of the peace who committed the prisoner for trial. At common law, if the previous statement were in writing (*e.g.* a deposition[4] at this examination for commitment), the cross-examiner had to put it in as part of his own evidence (thereby giving the other party a right to a speech in reply), before even asking the witness about it. But now by statute (28 and 29 Vict. c. 18, s. 5) he need not put it in, unless he desires actually to contradict what the witness says in cross-examination. He must, however, be able to produce it if required to do so by the Court.[5] Yet the judge may use it for such a contradiction, although the cross-examiner has not put it in. Even if put in, it merely cancels the evidence previously given, and must be allowed no probative effect beyond this.[6] Its effect is

[1] *Rex* v. *Yewin* (1811), 2 Camp. 637 (K. S. C. 543).

[2] *Thomas* v. *David* (1836), 7 C. and P. 350 (K. S. C. 544).

[3] Even in civil cases, the opposite party occasionally calls for any signed "proof" of his intended evidence, which the witness may have given to the solicitor; cf. p. 449, n. 2 *post*. But there is no obligation to produce it.

[4] See p. 538 *post*. But word for word agreement with a deposition looks like learning by heart; and so is far more suspicious than slight variances.

[5] *Rex* v. *Anderson* (1929), 142 L. T. 580; 21 Cr. App. R. 178.

[6] 1 Cr. App. R. 156; 17 Cr. App. R. 64; 20 Cr. App. R. 144.

to make the witness a negligible one. If however the accused heard the previous statement and by his conduct admitted it (see pp. 440, 441 *post*) a jury is entitled to believe the previous statement even though unsworn as opposed to a subsequent sworn statement.[1] Depositions, though they may be used to impeach the credit of a witness, do not thereby become evidence at the trial so as to provide corroboration of a witness.[2]

Even the party who produces a witness is allowed to discredit him by thus proving a previous inconsistent statement of his, should he turn out to be (in the opinion of the judge) hostile to that party; *i.e.* not doing his best to answer frankly (cf. p. 417 (4) *ante*). And, even without any such recognition of his hostility, the assertion which he now makes may be contradicted by the subsequent witnesses, called on the same side, if it be a fact which is intrinsically relevant to the issue. For clearly those witnesses who could have spoken to this fact if they had been examined before he was, cannot be excluded by the mere accident of his having been called first.[3]

Besides these three modes of discrediting a witness by the evidence of other persons, his credit may, as we have said, be shaken by his own[4] cross-examination, and shaken in a manner much more extensive.[5] For he may be cross-examined not only on the matters already mentioned—his mendacity, his bias, his former inconsistent statements—but as to any past conduct of his of a discreditable character.[6] This rule is often made use of to elicit facts

[1] See 99 J. P. Jo. 386.

[2] *Rex* v. *Birch* (1924), 93 L. J. K. B. 385.

[3] *Greenough* v. *Eccles* (1859), 5 C. B. (N. S.) 803; cf. 8 Bing. 50.

[4] But not by cross-examining *another* witness about him.

[5] But the party *producing* a witness cannot put to him discrediting questions, though he may if the witness prove hostile obtain leave to cross-examine him as to relevant facts.

[6] This power of putting painful questions, which may revive even long-forgotten frailties, would be intolerable but for the high sense of responsibility traditional at the English bar.

which are admissible for this purpose, with the real purpose of employing them to bear upon the main issue in the case; though that bearing is too remote to render them legally admissible on the ground of relevancy to it. Thus on an indictment for ravishing *A*, a letter written to the prisoner immediately afterwards by *A*'s father, demanding a pecuniary compensation, cannot be put in evidence to discredit *A* herself (unless there be legal proof that she authorised its being written). But, if her father be called as a witness he can be asked about it, to discredit him; and it will thus effect, indirectly, the more important result of discrediting her.

It must be noted that the answers which a witness gives to questions that are put merely to discredit him, are "final"; *i.e.* the cross-examiner cannot call evidence to disprove them, for thus to digress into the determination of side-issues might render a trial interminable.[1] (The legislature has, however, created an exception in one case, in which the disproof is peculiarly simple and peculiarly important. For by 28 and 29 Vict. c. 18, if a witness denies, or refuses to answer about, having been convicted of a crime, evidence of that conviction may be given.) If, however, the discreditable act were relevant not merely to credit but also directly to the actual issue in the litigation, evidence might of course be given, in regard to it, in contradiction of the witness; for such evidence would have been intrinsically admissible even if he had never been examined. For instance, on an indictment for rape, if the prosecutrix be cross-examined as to her unchastity with third persons, and deny it, she cannot be contradicted; and consequently, witnesses to her good character cannot be called by the prosecution to confirm her denial. But if the question had related to her

[1] Hence if to a cross-examiner's question "Did you once seduce a woman?" the witness *A* has answered "No", a subsequent witness *cannot* be asked, even in cross-examination, "Did *A* once tell you that he had seduced *B*?"

previous unchastity with the prisoner himself, or to her being a common prostitute, her denial might be contradicted. For these facts, if true, would not merely affect her credit but would be relevant to an essential part of the issue, viz. whether the act now complained of took place against her will. Similarly, if in cross-examination a witness denies having been drunk at the time when he watched the events that are in issue, he may be contradicted on this point by direct evidence.

Thus evidence cannot be called to contradict a witness, except as to his answers about (1) his bias,[1] or (2) his own previous inconsistent statements, or (3) facts which the opposite party could have proved as part of his own case.

Rule VI. The best evidence must be given or its absence must be accounted for.

The rule is still usually stated in this traditional and general form; but its actual application[2] is limited to one particular case, viz. the proof of the contents of a written document. The mere fact that the document has actually been drawn up, or the mere condition of it, may be proved by secondary evidence; that is, by the production, not of the document itself, but of remoter evidence derived from it through some intermediate channel (the recollections, for instance, of a witness who has seen it). But if, on the other hand, it is desired to prove what the actual contents of the document were, then the rule now under discussion excludes—even in cross-examination—all mere secondary evidence. A witness must not be asked on what day an unproduced letter was dated; but he can be asked on what day he received it. So where it is sought to give the contents of a message sent by telegram in evidence against the sender of it (*e.g.* when the surgeon, whom it summoned, sues for his fee), the original paper handed in

[1] *E.g.* if he has denied having expressed hostility to the prisoner.

[2] See Wigmore, *Evidence*, §§ 1173, 1287; Chamberlayne, *Evidence*, § 480; Thayer, p. 488.

by him at the post-office must be produced. The subsequent paper, which the telegraph boy delivered, cannot be given in evidence for this purpose (unless it be proved that the first-mentioned paper has been destroyed or lost). It, however, would be otherwise if the object were to prove not what message was sent, but what message was in fact received (*e.g.* when the surgeon summoned is sued for negligence); for then the positions would be reversed, and the paper brought by the boy would be the necessary "best evidence".

Accordingly when, in any litigation, a witness is asked, "Was any bargain made on this subject?" the opposing counsel will probably interpose by asking, "Was it made in writing?" For if it were embodied in written words, the witness must not give parol evidence about them. Thus a witness, as Lord Eldon said, "may be asked whether a particular house was purchased and conveyed; but, if he states that it was conveyed by a written instrument, then the examination must stop there". Similarly it would not be permissible to ask, "Did you write a note to your master asking to be taken back into service?" for that would be to elicit the contents of the note without producing it. The utmost that the examiner can do will be to ask, "After leaving your master's service did you write to him?" and, on getting an affirmative answer, to proceed: "After so writing were you taken back into his service?"

But the rule only applies where the object desired is to prove what actually were the contents of a document. Hence where words have been uttered orally, by a person who apparently read them out from a paper, if the object be to shew, not what the words of the document itself were, but what he actually did utter, any persons who heard him may narrate what they heard, and his paper need not be produced. For the words he uttered may have varied from the written ones.[1] Similarly, such a question

[1] *Rex* v. *Sheridan* (1811), 31 St. Tr. 673–674; cf. 1 St. Tr. (N. S.) 558.

as, "What did you tell your clerk to state in the letter?" would be quite permissible, if the point to be proved be not the actual contents of the letter, but merely what the witness intended those contents to be (as, for instance, where the only object is to shew his knowledge of the matters thus mentioned by him to the clerk).

It will, however, sometimes happen that no primary evidence is available. In that case the production of the document will be dispensed with, and secondary evidence may take its place. The following are the most frequent instances in which this occurs:

(1) When the writing has been destroyed; or where, after proper search having been made for it, it cannot be found.[1] Thus on a trial for forgery the contents of the note, which was alleged to have been forged, were allowed to be proved by parol evidence, because the prisoner had himself swallowed the note.[2]

(2) When its nature is such that it is physically impossible to produce it; as in the case of a placard posted on a wall,[3] or of a tombstone. This has at times been extended to cases where it was not absolutely impossible, but only extremely inconvenient, to produce the writing; as when, in *Rex* v. *Hunt*,[4] parol evidence was admitted of the inscriptions on the banners and flags that had been displayed at a meeting. Similarly, if the possessor of the document has, and insists on, a legal privilege to withhold it (cf. pp. 448, 449 *post*).

(3) When the writing is in the possession of the opposite party[5] and, though notice[6] has been given to him to

[1] See the remarkable case of Lord St Leonards' lost Will; 1 P. D. 154.

[2] 14 East 276. Similarly when the ledgers, which a witness was about to produce, were stolen from him at the porch of the Central Criminal Court (*ante*, p. 241) oral testimony became admissible instead.

[3] *Rex* v. *Fursey* (1833), 6 C. and P. at p. 84 (K. S. C. 384).

[4] (1820), 3 B. and Ald. 566.

[5] A private prosecutor is not a "party".

[6] The student must distinguish (1) this notice to Produce, given by one party to the other, to secure the right to tender secondary evidence,

produce it, he fails to do so. Sometimes the very nature of the litigation (*e.g.* an indictment for stealing this very document) is of itself a sufficient notice to him that he is expected to produce it.[1]

(4) When the secondary evidence which is tendered consists of an admission, by the opposite party himself, as to what the contents of the document were.[2]

(5) When the original is a "public" document, it is now provided by statute that it may be proved by means of an examined copy.[3]

(6) When the original is an entry in a banker's book it is now provided by statute that it may be proved by a copy of the entry, if verified by some officer of the bank, either orally or even by mere affidavit.[4]

The rule of Best Evidence goes no further than simply to postpone all secondary evidence whatever of the contents of documents to the primary evidence of them. It takes no heed of the different degrees of value of various kinds of secondary evidence. For instance, it will allow a witness to give his mere recollections of the contents of a document, even when some attested copy of it is available. And the rule ceases to have any operation at all,

from (2) the notice to Admit, given similarly, to save the expense of proving the genuineness of documents, and (3) a Subpœna *duces tecum*, issued by the court, to compel a witness to bring a document to the trial.

[1] Where a motorist is required to shew his licence to a police officer it is not necessary to give notice to produce the licence in order to give evidence in subsequent proceedings of its contents, *Marshall* v. *Ford* (1908), 72 J. P. 480; cf. *Williams* v. *Russell* (1933), 49 T. L. R. 315 (certificate of insurance). The production of a licence by a driver is evidence that the driver is the person named in the licence, *Martin* v. *White*, [1910] 1 K. B. 665.

[2] *Earle* v. *Picken* (1833), 5 C. and P. 542.

[3] 14 and 15 Vict. c. 99, s. 14. Copies are of various kinds. "Exemplified", under the seal of a tribunal; "Official", signed by the custodian-officer; "Attested", bearing a certificate from someone who has checked it; "Plain" (but perhaps examined with the original by a witness who can swear to it).

[4] 42 and 43 Vict. c. 11.

where the Thing under discussion is not a written document. For where, in any litigation, the quality or condition of some chattel is in dispute, the law does not similarly require the chattel itself to be produced in court for actual inspection.[1] If the purchaser of a horse, or of a diamond ring, or of corn, refuses payment of the price because the animal is unsound, or the jewel is false, or the grain does not come up to sample, he need not produce the horse, or the ring, or the sample (though he will arouse suspicion by not producing it). Similarly, in an action to recover compensation for the damage sustained by a bicycle which a cart has run down, it will not be technically necessary at the trial to produce the bicycle. Equally little is any principle of Best Evidence applied to the proof of handwriting; for it is not essential that the party, who is alleged to have signed a document, should himself be called to prove, or (as at a trial for forgery) to disprove, his handwriting. And to prove that a person holds a public office (*e.g.* that of a justice of the peace or of a solicitor), it is sufficient to shew that he is in the habit of acting as a holder of it, without producing his written commission which conferred the office (*ante*, p. 389).

Finally it may be noted, as a further illustration of the limited application of the "best evidence" principle, that the law does not prescribe any preference between different species of Primary evidence. Thus the testimony of

[1] So difficulty may arise if a "document" be offered in evidence—not as a Statement, but—merely as an identificatory mark on a Thing. In *Reg.* v. *Pierce* (45 C. C. C., Sess. Pap. at p. 377) Willes, J. and Martin, B. allowed a witness to identify two debentures by stating their numbers, without producing them; just as oral evidence of the brand on an ox or the number of a cab would be similarly receivable. For identification Martin B. had allowed a witness to describe even the indorsement on a deed; and had been approved by the Queen's Bench. Cf. 3 Adam 143 (Scotch); contrast 33 C. C. C., Sess. Pap. 253. But even mere ticks in a stockbook, against items sold, need production if tendered as Statements; 38 C. C. C. Sess. Pap. 126.

a witness who had watched through a telescope an assault which took place a mile away, would not be postponed to the testimony of the actual victim of the attack.

Rule VII. Hearsay evidence is inadmissible. That is to say, a witness who has received from some one else a narrative of facts, even though they be the very *facta probanda*, is not allowed to give this narrative in evidence.

The untrustworthiness of mere Hearsay was recognised in England as early as 1202; and in the same century Bracton repeatedly disapproved of all such "testimonium de auditu alieno".[1] Yet when the procedure of trial by jury and witnesses became established, hearsay evidence was at first freely admitted. Thus, in 1603, on the trial of Sir Walter Raleigh, a witness was allowed to narrate that "Mr Brooke told me he had heard of a most dangerous plot". But in 1660, we find hearsay only received after direct evidence has been given, and merely to corroborate it; and thus not admissible of itself (5 St. Tr. 1195). And within another generation the full modern principle of exclusion had become accepted—probably before any other rule of evidence. For in 1683, the one caution which Algernon Sidney's counsel could furnish him with was to bid him, "Desire that evidence of Hearsay from witnesses may not be given; and *suffer it not* to be given." Accordingly in 1684 (9 St. Tr. 1189) Lord Jeffreys, C.J., ruled that what a witness heard from a woman was no evidence. "If she were here herself, if she did say it, and would not swear to it, we could not hear her; how then can her saying be an evidence before us? I wonder to hear any man that wears a gown, to make a doubt of it!" Hence is it that a witness cannot prove the date of his own birth[2]

[1] Pollock and Maitland, II, 620. The Romans recognised its defects even in the time of Plautus: "Pluris est oculatus testis unus quam auriti decem: qui audiunt, audita dicunt; qui vident, plane sciunt"; *Trucul.* II, 6. Yet in 1598 even Bodin said, "In cases of witchcraft, common repute is almost infallible" (*Démonomanie*, IV, 4).

[2] But see 98 J. P. Jo. 698.

(*Reg.* v. *Rishworth* (1842));[1] though the American courts, sacrificing logic to convenience, do permit this. Yet he may prove that his birthday has always been kept on the date mentioned in the birth certificate of a person of his name.

But in continental countries, even now, hearsay evidence remains acceptable. In the Dreyfus case the great bulk of the evidence given was the merest hearsay.[2] For on the continent, as in Scotland, trial by jury was not introduced until so late an epoch that the admission of hearsay had become a practice too inveterate to be shaken. Before that introduction it was comparatively innocent, for when trained judges are to determine the facts in dispute they can trust themselves to give hearsay evidence only its due weight.

The peculiarly emphatic exclusion of hearsay in England is due to its untrustworthiness; since it is derived ultimately from an absent witness who was not on oath and did not undergo cross-examination.[3] The exclusion of hearsay often involves the exclusion of testimony of much probative worth. The fundamental reason for its exclusion is lack of opportunity of an adequate cross-examination.[4]

Hearsay usually appears in the shape of some other person's statements, written or oral; but evidence of his mere conduct, unaccompanied by any statement, will be rejected on the same principle, if it be adduced for the same purpose, viz. that of shewing his state of mind with regard to some fact which it is sought thereby to prove.

[1] 2 Q. B. 476; 9 C. and P. 722.

[2] In a famous Belgian trial (1901) the following fifth-hand evidence was received, "He told me that Mme Lagasse had heard from a lady that Van Steen told her he knew the prisoners were guilty." In the great French case of Calas, A.D. 1762 (*Encyc. Britannica*, Art. *Calas*), his threat to murder was only proved at *sixth*-hand.

[3] Hence "Did you find, *as a result of your inquiries*, that he had done much business?" is not a lawful question.

[4] See "Hearsay and Non-Hearsay", Edmund M. Morgan, *Harvard Law Review*, XLVIII, p. 1138.

As was said by Baron Parke, the conduct of some deceased sea-captain, who examined every part of a vessel and then deliberately embarked in her with his family, cannot be given in evidence to shew that she must have been seaworthy.[1]

It is important to notice that the rule only excludes evidence about such statements or conduct as are merely narratives of a fact that is in dispute in the litigation; but not evidence about such statements or conduct as actually constitute such a fact, *i.e.* when "saying is doing". Thus in an action for slander, a witness can of course narrate the defamatory words which he heard the defendant utter; they are in issue. And, similarly, evidence may be given of any statement which, though not itself constituting a fact relevant to the issue, nevertheless accompanied and explained[2] some relevant act. For such a statement throws light upon the character and purpose of this act, and so is itself a part of the *res gestae*. Thus a slap may have been accompanied by a greeting or by a curse. A gas-fitter rushes excitedly off a landing-stage, exclaiming, "My God! the landing-stage is on fire. I did it."[3] Probably the statement need not in law have been uttered by the very person who did the act. It is sufficient if it were uttered in his hearing and he can be taken to have assented to it; as when evidence was given against Lord George Gordon of the various seditious cries uttered by the rioters whom he led (21 St. Tr. 535). Similarly not only the remarks made by persons engaged in drilling, but also those made by persons who were watching them drill, have been allowed to be given in evidence against

[1] 7 A. and E. at p. 388.

[2] But if a witness say "He came with a letter in his hand", he must not add "and he said 'My father is dead'". For these words explain no *act*. In *Tracey* v. *Kelly* (1930), W. C. and Ins. Rep. 214, a workman's statement to his comrades on leaving a shed was admitted as evidence that he had left the shed for the purpose of relieving nature.

[3] This utterance secured a verdict for £200,000 against the Liverpool Gas Company; *The Times*, Aug. 23, 1875.

the former to shew the illegal purpose of the drilling.[1] And when a libellous picture has been exhibited in public, remarks uttered by the spectators whilst looking at the picture may be given in evidence to shew whom the figures in it were meant to represent.[2] But the rule probably ought to be confined to utterances that are strictly simultaneous with the *res gestae*:[3] and even such as are made only a few minutes after the transaction is over will be regarded as mere narratives, and excluded.[4] In *Rex* v. *Podmore*[5] (1930), contents of documents found near the body of a murdered man were held admissible as part of the surrounding circumstances.

In some criminal cases a complaint, not uttered till some time after the conduct complained of, is admitted in evidence. But this is only allowed after the person complaining has given testimony as a witness in the case,[6] and, even then, only for the purpose of supporting[7] that testimony (by shewing the complainant's consistency of conduct), and not as being intrinsically any evidence[8] of the alleged act complained of. A complaint is not corroboration of the complainant's evidence for it comes from the person to be corroborated.[7] In a wife's suit for judicial separation, on the ground of cruelty, the question, "Did the petitioner complain to you of her husband's cruelty?" is always allowed to be put, even by the examiner-in-chief, to such of her witnesses as are examined subsequently to herself. Thus, in cases of violent sexual assault

[1] 1 St. Tr. (N.S. 1071).

[2] *Du Bost* v. *Beresford* (1810), 2 Camp. 511 (K. S. C. 497).

[3] *Aveson* v. *Lord Kinnaird* (1805), 6 East 198 (K. S. C. 498).

[4] *Reg.* v. *Bedingfield* (1879), 14 Cox 341 (K. S. C. 501). Cf. *Rex* v. *Christie*, [1914] A. C. at pp. 556, 566; and Phipson, *Evidence* (7th ed.), pp. 78–79. A dumb man's *fingered* narrative is "Hearsay", not an Act. C. C. C. Sess. Pap. x, 979.

[5] 46 T. L. R. 365; 22 Cr. App. R. 36.

[6] Hence not at all, if he die before giving evidence.

[7] 18 Cr. App. R. 123. Cf. p. 460 n. 3, *post*.

[8] Hence any details in it, not repeated by him at the trial, are not evidence at all.

on a female, evidence that she complained about it, on the first reasonable opportunity, will be admitted in criminal (but not in civil) proceedings if she has been examined as a witness.[1] And, besides the fact of the complaint's having been made, even the details[2] uttered in it are now held admissible. The whole rule is now extended even to sexual offences against males.[3] But in non-sexual crimes the details of a complaint certainly cannot be admitted; and the more recent authorities deny that even the bare fact that a complaint has been made can be admitted. In ordinary civil cases the strict rule against Hearsay clearly excludes that fact.[4]

There are, however, some well-ascertained and much more important cases in which mere hearsay (*i.e.* a narrative of the past) is freely and fully admitted as evidence. Of these exceptions we may now discuss such as are accepted equally in civil and criminal tribunals (postponing for the present some others which only concern the latter). The following deserve careful attention:

(1) Admissions made by, or by the authority of, the party against whom they are produced.[5] (The term "admission" is here used in the wide sense which it always bears in civil cases; though in criminal cases it is usually applied only to those individual details of fact which do not involve the guilty intent, an admission of full guilt

[1] This illogically lax criminal rule is a survival from the old "Appeals" of Rape, before the law of Evidence arose; great importance being attached in them to prompt complaint.

[2] *Reg.* v. *Lillyman*, [1896] 2 K. B. 167 (K. S. C. 503). The complaint must not be caused by *leading* questions. *Rex* v. *Osborne*, [1905] 1 K. B. 551 shews that the admissibility of details is *not* limited to those sexual crimes in which Consent would be a defence.

[3] *Rex* v. *Camelleri*, [1922] 2 K. B. 122.

[4] *Beatty* v. *Cullingworth* (1897), 60 J. P. 740; (C. A.) *The Times*, Jan. 17, 1897.

[5] The admission is, of course, evidence only against that party and not against others whom he may accuse in it. *E.g.* an adulterous wife's diary is evidence against herself but not against her adulterer; a landlord's notice to quit on a day named is evidence against him that the years of tenancy end on *that* day, but not against the tenant.

being styled a "confession".) The authority to make it need not expressly relate to the particular statement; so a man will be responsible for admissions made on his behalf in the ordinary course of business by his partner or his agent, or even by some one to whom he has referred a third person for information on the topic.[1]

An admission may be made either expressly, in words (either spoken or written), or tacitly, by mere silent conduct. An instance of an express admission is furnished by the case of *Maltby* v. *Christie* (1795).[2] One party to the case, who was an auctioneer, had issued a catalogue in which he described certain goods as being the property of a bankrupt; and this fact was held to render it unnecessary for the other party to produce any further proof that the person to whom they belonged had really become bankrupt. A tacit admission arises when, at a policeman's demand, a motorist produces a licence; thereby implying that he is the person named in it.[3] A less simple but more frequent illustration is afforded whenever a statement is uttered in the presence of some one who would naturally contradict it if it were not true, and who nevertheless remains silent. *Qui tacet consentire videtur*; he impliedly admits its truth. In this way, hearsay is often rendered admissible by the question, "Was the other party [to this litigation] present, within hearing, when you heard that man say this?" Thus in an action for breach of promise of marriage, if the plaintiff was heard to say to the defendant, "You always promised to marry me", his mere silence is sufficient corroboration of her statement.[4] Yet the mere fact of the other party's having been present will not let in this evidence, if the circumstances were such as to make it unlikely that he would contradict the state-

[1] *Williams* v. *Innes* (1808), 1 Camp. 364 (K. S. C. 507).
[2] 1 Esp. 340 (K. S. C. 506).
[3] See p. 433 *ante*, note 1.
[4] *Bessela* v. *Stern* (1877), 2 C. P. D. 265. Similarly on being accused of crime; 14 Cr. App. R. 1; contrast 21 Cr. App. R. 23. Cf. p. 410 *ante*.

ment even if he knew it to be false. And since the act of admission lies purely in his demeanor (*e.g.* his silence), and the statement uttered before him only becomes admissible as accompanying and explaining that demeanor, it follows that if his conduct involves no admission[1]—*e.g.* usually, if he denies the truth of the assertions—then, though uttered in his presence, they cannot be taken as evidence against him.[2] And even without his going so far as to deny it, his demeanor may fall short of constituting any such admission as will render it evidence. Thus when a magistrate brought a prisoner into the presence of his dying victim, who then made a statement to the magistrate about the crime, which the prisoner did not contradict, this statement was nevertheless held to be inadmissible.[3] For the prisoner might well have been kept silent by his respect for the magistrate, and his silence therefore raised no fair inference of his assent. In the same way, if a person, after having received a letter asserting that he had made a promise of marriage or accusing him of having committed a crime, should never send any reply to the letter, this inaction will be no proof that he admitted the promise or the accusation, and consequently will not enable his opponent to put in the letter as evidence against him.[4] Yet it would be different in the case of any letter—such as a mercantile one—which it would be the ordinary course of business to contradict at once, if the recipient dissented from the statements it contained. So the fact that, to a letter which contained a statement of accounts, no reply was sent, is

[1] It is for the judge to say if there is evidence of conduct that *might* involve it; and then for the jury to say if it *did* involve it.

[2] *Rex* v. *Christie*, [1914] A. C. 545; contrast 14 Cr. App. R. 1 and 19 Cr. App. R. 27 and cf. *Chanter* v. *Bromley* (1921), 14 B. W. C. C. 14.

[3] *Reg.* v. *Gilligan* (1844), 3 Crawford and Dix 175; cf. *Child* v. *Grace* (1826), 2 C. and P. 193. See p. 461 *post* as to its admissibility as a "Dying Declaration".

[4] *Wiedemann* v. *Walpole*, [1891] 2 Q. B. 534. Cf. *Thomas* v. *Jones*, [1921] 1 K. B. 22 (a letter taxing the recipient with paternity of a child).

some evidence of the correctness of those accounts; though weaker than silence when *spoken to* about them (14 Q. B. 664). In like manner, when papers are found in a person's possession, even though they were not written *by* but *to* him, they may be evidence against him. For his conduct in having preserved them affords some evidence that the contents of them had reached his knowledge; and also some (though weaker) evidence that he approved of them.

It must be remembered (see p. 414) that when an admission is given in evidence against a party, he can demand that the whole statement, and not merely the inculpating part, shall be brought out. And if this statement was qualified or explained by any other statement made at the same time, or if it referred expressly or impliedly to any previous statement, such statements may be incorporated with the inculpating statement.

(2) When in examination-in-chief a witness has said, "In consequence of what I heard or read, I did so and so", the cross-examiner will be entitled (though the party calling the witness was not) to ask what the witness heard, or to call for the document which he read. For otherwise the witness's evidence would be left incomplete.

Thus if, on *A*'s trial for murdering *B*, *A* supports his defence of suicide by evidence of *B*'s saying "I have taken poison", the Crown can elicit by cross-examination the remaining words "which *A* sent me". A re-examiner may similarly supplement a cross-examination (cf. p. 414).

(3) A man's bodily sensations, or his state of mind, may be proved by narrating the description he gave to the witness, provided that he gave it simultaneously with the feeling.[1] *E.g.* telling a doctor "I have a pain here"; or Lord St Leonards' declaration, p. 432 n., as to legacies he meant to insert in his will; but probably not his subsequent statements as to what he had inserted—a matter of Fact, not of Intention, see [1924] P. 221.

[1] *Rex* v. *Black* (1921), 16 Cr. App. R. 118.

Four other exceptions arise in cases of Death.

(4) Thus, one exception is, that in questions of Pedigree or in legitimacy suits,[1] evidence is allowed to be given of statements that were made, before any dispute arose, by deceased members of the family,[2] as to births, marriages or deaths (or the dates when these events occurred), or as to relationships. The deceased person must have been an actual member of the family, not a mere servant or friend.[3] And he must have made his statement before any dispute on the matter had arisen, as that might have tainted him with some bias. But he need not have spoken from personal knowledge of the fact he narrated; family tradition is sufficient.

The introduction of this exception is due to the difficulty of obtaining any first-hand evidence of events after intervals of time so long as those over which disputed genealogies often extend. It is, however (for no very obvious reason), restricted to cases strictly genealogical; so that if a defendant, sued for the price of jewellery, sets up a plea of Infancy, he cannot support it by merely proving what his deceased mother said as to the date when he was born.[4]

(5) A similar exception is recognised in regard to disputes as to Public Rights, which may concern all the King's subjects (*e.g.* the existence of a highway), and even as to General Rights, which concern only some large class of people (*e.g.* the customs of a manor, or the boundaries of a parish). For in all such cases—unlike disputes as to a private right of way or the boundaries of a private person's estate—evidence of mere Repute is admissible. And it may be given even by narrating statements that were made (whether orally or in writing) before any dis-

[1] *In the matter of A. H. Davy*, [1935] P. 1.

[2] Including the reputed father of an illegitimate child, *In the matter of A. H. Davy, supra.*

[3] But in *conveyancing* the statutory declaration of a stranger is readily accepted, even in his lifetime, to establish matters of pedigree.

[4] *Figg* v. *Wedderburne* (1841), 6 Jur. 218.

pute arose, by deceased persons who were likely to have a competent knowledge of the subject.[1] But such statements can only be given in evidence so far as they do relate to current Repute. They cannot be adduced to shew any particular facts that would bear on the question,[2] *e.g.* the fact of the deceased person's having seen boys whipped or cakes distributed at a particular place, by some person who wished thereby to commemorate its being a parish-boundary.

(6) Declarations made by a person, now deceased, against his pecuniary or proprietary interest are admissible. Thus a declaration of a deceased person as to the terms of his tenancy of a house has been admitted as sufficient both to rebut the presumption of law (*ante*, p. 390) that the person in possession of real property holds it in fee simple, and also to establish the actual amount of rent which the deceased paid.[3] And when any such declaration is admitted, all details which form part of the same statement will be admitted, even though they were in no way against the deceased man's interests.[4] Thus the fact of a life estate having been surrendered has been proved by the entry in a deceased solicitor's ledger of his having been paid for carrying out the surrender; and the date of a child's birth by a similar entry, in the accoucheur's accounts, of the payment of his fee for his attendance.[5] This class of evidence usually takes the form of written entries made by the deceased; but it is none the less admissible if the declaration were oral.[6]

[1] *E.g.* "*X*, who died twenty years ago, used to say that no one dared lock the gate of that road."

[2] *Rex* v. *Bliss* (1837), 7 A. and E. 550. The Royal Commission on the Despatch of Business at Common Law (1936, Cmd. 5065, p. 78) suggests that in civil cases the judge should have discretion to admit any documents coming into existence before a dispute arose.

[3] *Reg.* v. *Birmingham* (*Churchwardens of*) (1861), 1 B. and S. 763 (K. S. C. 512).

[4] *Warren* v. *Greenville* (1740), 2 Strange 1129 (K. S. C. 511); *Homes* v. *Newman*, [1931] 2 Ch. 112.

[5] *Higham* v. *Ridgway* (1808), 1 East 109.

[6] 27 T. L. R. 202.

Since this principle only admits declarations against the pecuniary or proprietary interests of the deceased man, his declaration that he—and not the suspected persons—committed a crime would not be admissible, on behalf of those persons should they be indicted for that crime.[1] So statements made by a deceased woman that she had operated upon herself were held not admissible in favour of a person accused of operating illegally upon her.[2]

(7) A similar privilege is extended to statements (whether written or oral) made by a person, now deceased, in the discharge of a *duty* (mere habit does not suffice) which he owed to an employer, in the ordinary course of his employment;[3] even though they may be actually in favour of his own interests. Thus the fact that a man was served with a writ may be proved by the indorsement made on it by the deceased clerk who served it,[4] and the note entered by a deceased drayman, in a book kept for that purpose, of having made delivery of certain goods is evidence that those goods were so delivered.[5] But, as the mere routine of business affords a less effective guarantee for accuracy than does self-interest, this privilege is restricted by limitations that were not imposed upon the one which we last explained. Thus a statement is not rendered admissible by having been made in the course of employment, unless it was made at the time of the occurrence to which it relates—*i.e.* within so few hours of it as to be practically a part of the transaction.[6] Moreover the admission of such a statement will be limited strictly to its mention of those circumstances which were essential to the performance of the duty; and will not, as in the case of a statement made against interest, cover the

[1] 11 Cl. and F. at p. 112.
[2] *Rex* v. *Thompson*, [1912] 3 K. B. 19.
[3] *Reg.* v. *Buckley* (1873), 13 Cox 293; a case of *oral* statement.
[4] *Poole* v. *Dicas* (1835), 1 Bing. (N. C.) 649 (K. S. C. 514).
[5] *Price* v. *Torrington* (*Earl*) (1835), 1 Salk. 283 (K. S. C. 514).
[6] 29 T. L. R. 28.

collateral details which may have been added. A third limitation is that it must record, not mere hearsay, but the personal knowledge of the person recording.[1]

Rule VIII. The judges of the eighteenth century went far in excluding the testimony of witnesses who seemed to them to be likely, from personal interest in the case or other causes, to give but untrustworthy evidence. But a reaction was initiated by Jeremy Bentham. He pointed out that even the stupidest jurymen are on the alert to suspect bias in a witness; and moreover that from every witness's evidence, whether true or false, instructive inferences may be drawn—the very fact that he thinks it worth while to lie being itself a suggestive one. The influence of Bentham has brought about legislative reforms which have removed almost all objections to the competency of witnesses on the ground of Bias[2] or of Character; it being left to the jury to take account of these considerations when deciding upon the value of their testimony.

But an adequate degree of *Understanding* is, of course, necessary in a witness; and, on the ground of want of understanding, children or insane persons may be excluded if the judge finds, on investigation, that they are incapable of comprehending the facts about which they are to testify. Yet a lunatic is not necessarily incompetent to give evidence.[3] The arbitrary rule treating children

[1] Cf. *Ryan* v. *Ring* (1889), 25 Ir. Ch. 185. Here a deceased Irish priest had had—unlike Anglican clergymen—the duty, when registering a baptism, of stating if the child had been born in wedlock. He had therefore recorded it as child of "J. H. and H. F. *his wife*". The register, though evidence of the baptism, was held not to be evidence of the wife-hood; for it was not shewn that he had "personal knowledge" of the wedding ceremony.

[2] In 1843, Lord Denman's Act made mere interest cease to be a disqualification; and in 1846 and 1851 Lord Brougham's Acts qualified even the parties to a suit to give evidence.

[3] *Reg.* v. *Hill* (1851), 2 Den. 254. At Leeds Assizes on Dec. 2, 1914, in *Rex* v. *Firth*, before Shearman, J., an asylum attendant was convicted, on a lunatic's evidence, of assaulting her. It was ruled by the Supreme

under eight years of age as necessarily too young for criminal liability has, however, no counterpart in the law of Evidence, it being now settled that competency depends not upon the precise age but upon the actual intelligence of the witness.[1]

The value added to testimony by its being given under supernatural sanctions is frequently so great that the law formerly made it essential to the competency of every witness that he should know and accept the religious obligation of an *Oath*. (Increased intercourse with the East led in the seventeenth century to the recognition of Muhammadans, and in the eighteenth to that of Hindus, as satisfying this condition, and being entitled to be sworn with their own sacred ceremonies.) But now, even in the case of adult witnesses, the requirement is no longer universal; for, by the Oaths Act, 1888,[2] "Every person objecting to be sworn, on the ground either that he has no religious belief or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation in all places and for all purposes where an oath shall be required by law." And a "child of tender years", who has not yet learned the nature of an oath, may in criminal cases give evidence unsworn,[3] if it is of sufficient intelligence and "understands the duty of speaking the truth". But the accused is not to be convicted on such evidence unless it be corroborated by

Court of the United States (107 U. S. 419), that it is for the judge, after hearing evidence as to the mental condition of the witness, to decide whether or not his insanity extends so far as to prevent "his giving a perfectly accurate and lucid statement as to what he has seen and heard". Cf. C. C. C. Sess. Pap. LII, 617.

[1] *Rex* v. *Brasier* (1777), 1 Leach 199. Five is usually too young; 2 Cr. App. R. 283. In old days the minimum age was twelve; it now seems to be about six. But even at twelve corroboration is desirable; 19 Cr. App. R. 29.

[2] 51 and 52 Vict. c. 46; replacing a more limited Act of 1869.

[3] 4 and 5 Geo. 5, c. 58, s. 28 (2). In *Rex* v. *Wilson* (1924) the C. C. A. (18 Cr. App. R. 108) recognised that the judge has still a right to question a boy of thirteen as to his religious belief and practice; even at the end of his evidence.

material evidence which implicates him (cf. p. 458). Although it is for the judge alone to determine whether a child of tender years is capable of giving evidence, it has been held that any questions put by the judge for this purpose must be put in open court in the presence of the jury.[1]

Rule IX. There are some questions which it is quite legal to ask, but which a witness may, if he think fit, equally legally refuse to answer. Such a privilege arises, for instance, in the following cases:

(1) A witness cannot be compelled to answer any question, or produce any document,[2] which tends to criminate him.[3] He must pledge his oath that his answer would have this effect; and it will then be for the Court to decide whether the question seems to be one which, under all the circumstances of the case, it would really endanger the witness to answer. For a merely remote possibility of criminal prosecution[4] will not be regarded as sufficient to entitle a witness to withhold information.[5] Yet even a man who has already been tried for an offence and been acquitted may still be in risk of criminating himself in connection with the very same crime, *e.g.* by admitting his having been an accessory after the fact.

[1] *Rex* v. *Dunne* (1929), 21 Cr. App. R. 176; 143 L. T. 120. For a criticism of this case see 46 L. Q. R. 137.

[2] *E.g.* the bill of sale whereby he disposed of an armed ship to a belligerent. But his refusal lets in secondary evidence; 2 E. and B. 940; *ante*, p. 433.

[3] "One of the most sacred principles of the law of this country"; Lord Eldon (Buck, 540). But a prisoner *giving evidence* on his own trial has no privilege against criminating himself as to *that* accusation; p. 475.

[4] *Reg.* v. *Boyes* (1861), 1 B. and S. 311 (K. S. C. 535).

[5] By 24 and 25 Vict. c. 96, s. 85, in a few peculiar offences of Misappropriation, *e.g.* by agents, custodians, directors, etc. (*ante*, p. 273), a witness has no privilege in any *civil* court against criminating himself in respect of such an offence; but he is exempted from prosecution for it if he "first disclosed" it when thus under compulsory examination. See also 6 and 7 Geo. 5, c. 50, s. 43. Cf. 4 and 5 Geo. 5, c. 59, s. 166, as to compulsory admissions in bankruptcy.

(2) A witness cannot be compelled to produce his title deeds for inspection. If however he is himself a party to the particular litigation, he does not enjoy this privilege; except for deeds that are irrelevant to his opponent's case.

(3) A husband or wife cannot be compelled to disclose any communications made to him or her, during the coverture, by his or her wife or husband. This rule is based on the importance of preserving the confidences of married life.

(4) Counsel and solicitors cannot be compelled—and indeed are not even permitted—to disclose facts confided to them by[1] or on behalf[2] of a client, or to produce any documents received by them from a client in their professional capacity, unless the client consents to waive this privilege; for it is his, and not theirs. No such protection, however, exists if the adviser was being consulted, not merely in order to protect his client against the results of a past criminal act, but to facilitate the commission of some future one. Nor does the privilege cover facts merely collateral to the confidence, *e.g.* that he saw his client sign the perjured affidavit (Cowper 845).

There is no similar privilege[3] for confidences entrusted to a medical[4] or even to a clerical adviser;[5] nor for business secrets (*e.g.* the secret marks upon bank-notes).

[1] *Rex* v. *Withers* (1811), 2 Camp. 578 (K. S. C. 534). But a third party, who overheard the confidence, has no such privilege.

[2] *E.g.* the statements made to them by a witness as to what evidence he can give in a litigation contemplated, even though not yet commenced. Such statements are taken down in writing (and often then signed by the witness); his "proof".

[3] Nor even an exemption from the—theoretical—law of Misprision (*ante*, p. 320).

[4] But any other disclosure of those confidences would be an actionable breach of the doctor's obligation to secrecy.

[5] *Rex* v. *Gibbons* (1823), 1 C. and P. 97 (K. S. C. 524); cf. 17 Ch. D. at p. 681. Yet see Phillimore's *Ecclesiastical Law*, 2nd ed., p. 543.

(5) By a still stricter rule, one of Exclusion rather than of Privilege, a witness cannot be compelled, and indeed will not be permitted,[1] to answer any question which involves a disclosure of any official communications (whether written or oral) which are such that—in the opinion of the judge—disclosure of them would be contrary to public policy.[2] Hence in the case of prosecutions so important as to have been (not merely nominally but actually) instituted by the executive government, the name of the informer need not be disclosed by a witness, nor can he be asked if he were himself the informer.[3] But it would seem that this rule does not extend to the case of communications made to a private prosecutor, even where the prosecution is practically in the hands of the police; all that can be done is to postpone the question until the course of the trial may make manifest its importance.

Where any of these privileges is waived by a person who is at liberty to waive it, the answer he gives will be perfectly good evidence, even against himself; both in the proceedings in which it is given and in any subsequent litigation. But if, on the other hand, he claims his privilege, and yet is illegally compelled to answer, his answer will not be evidence against him as an admission, either then or in any subsequent litigation. Yet against other parties it is evidence (since the privilege is only his and not theirs); and consequently, if he were not himself a party to the particular litigation, the validity of the trial will not be affected by the reception of his answer.

Rule X. Where a document is tendered as evidence the necessary proof of its genuineness varies with its age.

(1) If the document be less than thirty years old, express

[1] *Rex* v. *Hardy* (1794), 24 St. Tr. at pp. 818, 820. The exclusion will not let secondary evidence in, as it does in other cases of Privilege.

[2] *E.g.* a captain's report to the Admiralty about a naval collision.

[3] *Marks* v. *Beyfus* (1890), 25 Q. B. D. 494. As to reports made to a Superintendent of Police by his constables, see 65 J. P. 209.

evidence of its genuineness must be adduced.[1] In ordinary cases, it is not necessary to do more than to shew that the document or the signature to it is in the handwriting of the person by whom it purports to have been executed. Handwriting may be proved by any witness who from knowing the person's handwriting can swear to the genuineness of the document; or under a modern statute,[2] even by merely letting the jury compare the document in question "with any writing proved, to the satisfaction of the judge, to be genuine", *e.g.* a signature made by the person whilst actually in the witness-box before them. The function of a handwriting expert is to point out similarities and differences and to leave the jury to draw their own conclusions.[3]

But there are some instruments to whose validity some further circumstance is essential; and in such cases, that circumstance must also be proved. Thus where attestation by witnesses is essential to the document (as in the case of a bill of sale) it must be shewn to have been duly attested. To establish this fact one of those witnesses must, if possible, be produced. But if none of the attesting witnesses can be found, the handwriting of one of them must be proved; and some evidence must be given as to the identity of the person who actually executed the instrument with the person who is under discussion in the litigation, unless the attestation clause itself sufficiently identifies him. Again, in the case of deeds the further ceremony of sealing[4] is necessary; but where there is an attestation clause the courts will, if the signature be

[1] But conveyancers do not require any such proof on a sale of real property, even for recent documents; the genuineness being sufficiently corroborated by the fact that the vendor is in possession of the property.

[2] 17 and 18 Vict. c. 125, s. 27; extended to criminal cases by 28 and 29 Vict. c. 18, s. 8.

[3] 90 L. J. P. C. 174.

[4] Any act suffices by which the party adopts the affixed seal.

proved, accept this clause as sufficient evidence of the sealing and delivery.[1]

(2) In the case of documents more than thirty years old, just as in questions of pedigree (*ante*, p. 443), the law of evidence is relaxed to meet the difficulties produced by the lapse of time.[2] Such documents, if produced from a proper custody, "prove themselves", *i.e.* no express evidence of their genuineness need be adduced. Nor is it necessary that the custody from which such instruments come should be the most proper custody for them to be in. It is sufficient that the custody, though not the best, is a natural one, *i.e.* one which, under the circumstances of the particular case, appears to the judge to be one naturally consistent with the genuineness of the document. Thus, although papers relating to an episcopal see properly pass on the death of one bishop to his successor in office, yet an ancient document would be allowed to "prove itself", if it were produced from the custody of a deceased bishop's descendants.[3]

[1] *In re Sandilands* (1871), 6 C. P. 411. Cf. 7 Taunt. 253.

[2] "Time with his scythe is ever mowing down the evidences of title; wherefore the law places in his other hand an hour-glass by which he metes out periods of duration that shall supply the place of the muniments his scythe has destroyed" (Lord Plunket).

[3] *Meath* v. *Winchester* (1836), 3 Bing. (N. C.) 183.

CHAPTER XXVI

RULES OF EVIDENCE PECULIAR TO CRIMINAL LAW

In criminal cases the general principles of Evidence are supplemented by some rules, and modified by others, which do not hold good in civil litigation. Of these the following deserve explanation here.

Rule I. A larger minimum of proof is necessary to support an accusation of crime than will suffice when the charge is only of a civil nature.[1]

Even in the latter case, *e.g.* in actions of debt, a mere scintilla of evidence would not warrant the jury in finding a verdict for the plaintiff; for there must (as we have seen[2]) be so much evidence that a reasonable man might accept it as establishing the issue. But in criminal cases the presumption of innocence is still stronger,[3] and accordingly a still higher minimum of evidence is required; and the more heinous the crime the higher will be this minimum of necessary proof.[4] The progressive increase in the difficulty of proof as the gravity of the accusation to be proved increases, is vividly illustrated in Lord Brougham's memorable words in his defence of Queen Caroline: "The evidence before us", he said, "is inadequate even to prove a debt—impotent to deprive of a civil right—ridiculous for convicting of the pettiest

[1] "It is not enough that Justice should be morally certain. She must be immorally certain—that is, certain *legally*" (Charles Dickens).

[2] *Ante*, p. 407.

[3] *Ante*, p. 387.

[4] The practical working of this is well shewn by the fact that whereas the average percentage of convictions on criminal indictments in general is about eighty, it is little more than fifty per cent. on indictments for murder (even after deducting the cases in which insanity is proved).

offence—scandalous if brought forward to support a charge of any grave character—monstrous if to ruin the honour of an English Queen."[1]

It was formerly considered that this higher minimum was required on account of the peculiarities of criminal procedure, such, for instance, as the impossibility of a new trial, and (in those times) the refusal to allow felons to be defended by counsel and to allow any prisoners to give evidence; and consequently that it was required only in criminal tribunals. This view is still taken in America; but in England it was more usually considered that the rule is founded on the very nature of the issue, and therefore applies without distinction of tribunal;[2] *e.g.* if arson be the defence to an action on a fire-policy, or forgery to one on a promissory note; see Stephen's *Digest of Evidence*, art. 94, Taylor's *Evidence*, 12th ed. § 112. But the American view was taken by Lush, J. in *Hurst* v. *Evans*, [1917] 1 K. B. at p. 357, and is taken by Mr Phipson (*Evidence*, 7th ed., p. 10). Cf. 10 Moo. P.C. 502.

History shews how necessary is some such rule, emphatic and universal, in order to protect prisoners from the credulity which the shifting currents of prejudice will inspire about any offence, or class of offences, that may for the moment have aroused popular indignation. No less enlightened a jurist than Bodin maintained, in an elaborate treatise,[3] that persons accused of witchcraft ought to be convicted without further proof, unless they could demonstrate themselves to be innocent—"for to adhere, in a trial for witchcraft, to ordinary rules of procedure, would result in defeating the law of both God and man".[4]

[1] *Speeches*, I, 227.

[2] *Statham* v. *Statham*, [1929] P. 131. But see p. 387 n. *ante*.

[3] *Démonomanie*, ed. 1598; bk. IV, ch. IV.

[4] Similarly when in 1899 Esterhazy confessed in the *Observer* newspaper that he had forged the famous "bordereau", in order that the suspicions against Capt. Dreyfus might be eked out by some item of actual evidence,

Whenever, therefore, an allegation of crime is made, it is the duty of the jury—to borrow Lord Kenyon's homely phrase—"if the scales of evidence hang anything like even, to throw into them some grains of mercy"; or, as it is more commonly put, to give the prisoner the benefit of any reasonable doubt. Not, be it noted, of every doubt, but only of a doubt for which reasons can be given; for everything relative to human affairs and dependent on human evidence is open to some possible or imaginary doubts. "It is the condition of mind which exists when the jurors cannot say that they feel an abiding conviction, a moral certainty, of the truth of the charge. For it is not sufficient for the prosecutor to establish a probability, even though a strong one according to the doctrine of chances; he must establish the fact to a moral certainty[1]—a certainty that convinces the understanding, satisfies the reason, and directs the judgment. But were the law to go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether."[2] As was said by Cockburn, C.J., in the *Tichborne Case*, "It must not be the mere doubt of a vacillating mind that has not the moral courage to decide upon a difficult and complicated question, and therefore takes shelter in an idle scepticism." Or as the same truth was expressed by a great Irish judge, "To warrant an acquittal the doubt must not be light or capricious, such as timidity or passion prompts, and weakness or corruption readily adopts. It must be such a doubt as, upon a calm view of the whole evidence, a rational understanding will suggest to an honest heart; the conscientious hesitation of minds that

he justified himself by the plea that "on the trial of Spies, it is always necessary to forge some documentary evidence [fabriquer des preuves matérielles], or no spy would ever be convicted".

[1] See 13 Cr. App. R. 211 for a case of "the very gravest suspicion" yet not beyond reasonable doubt.

[2] *Per* Shaw, C.J., on the trial of Prof. Webster (*ante*, p. 403), 5 Cushing 295.

are not influenced by party, preoccupied by prejudice, or subdued by fear."[1]

Accordingly, a verdict of acquittal does not necessarily mean that the jury are satisfied of the prisoner's innocence;[2] it states no more than that they do not regard the evidence as legally sufficient to establish his guilt.[3] There is therefore a fallacy in the old forensic argument of prosecutors, "you must convict the prisoner unless you think my witnesses ought to be convicted of perjury". For the jury may well be in utter doubt as to the soundness of either alternative.

This abstract, and therefore necessarily vague, direction—that they must be satisfied "beyond reasonable doubt"—is the only restriction which, in ordinary cases, English criminal law imposes upon the discretion of juries in pronouncing upon the sufficiency of evidence.[4] The civil and the canon law, on the other hand (like the Mosaic,[5] the Roman,[6] and the modern Scottish[7]), required at least two witnesses,[8] and, from the frequent difficulty of

[1] Kendal Bushe, C.J., *Dublin Univ. Mag.* XVIII, 85.

[2] *Ante*, p. 409.

[3] Moreover "the acquittal of the whole offence is not an acquittal of every part of it, but only an acquittal of it as a *whole*"; Pollock, L.C.B. (C. C. C. Sess. Pap. XLVI, 886).

[4] *Rex* v. *Nash* (1911), 6 Cr. App. R. 225, deserves study as a case where there was just enough circumstantial evidence to support a conviction for murder. Contrast 23 Cr. App. R. 32.

[5] Deut. xix. 15.

[6] Testis unus, testis nullus.

[7] 6 Justiciary Rep. 128.

[8] See Ayliffe's *Parergon*, p. 541. In some cases indeed (see Best, *Evidence*, 11th ed., p. 37) the canon law exacted far higher degrees of proof; as when it provided that no cardinal was to be convicted of unchastity unless there were at least seven—or in Fortescue's time, according to him (*De Laudibus*, c. 32), twelve—witnesses. This requirement was rendered the harder to comply with by the further rule of canon law, that in criminal cases a woman could not be a witness. The result may well have been the same as was produced by the similar rule of the Koran, requiring all accusations of adultery to be supported by four eye-witnesses; namely, that (according to Sir William Muir) "the threat of punishment became almost inoperative". For by introducing artificial rules of proof into the law of evidence it is easy to affect a modification

obtaining these, had to fall back upon confessions extorted by torture. The English common law, by avoiding the unreasonable rule, escaped the cruel consequence.[1]

The cases are rare indeed in which English law exacts any defined minimum of proof for even a criminal charge.[2] But the following are important ones.

(1) In treason and in misprision of treason, it is provided by statute[3] that a prisoner is not to be convicted except upon the evidence of two lawful witnesses, deposing either to the same overt act or at least to separate overt acts of the same kind of treason; or upon his own voluntary confession in open court. To secure the benefit of this rule the oath by which persons were admitted, in Ireland, into the Fenian society was always administered by a single one of its members, with no third person present.

(2) Upon an indictment for perjury or subornation of perjury, or for any of the cognate offences created by the Perjury Act, 1911 (though the taking of the oath, or the giving of the false evidence, may be proved by one witness), the falsity of that evidence itself cannot be legally established merely by the testimony of one witness;[4] for that would be only oath against oath. On each "assignment" of perjury the contradicting witness must be corroborated; and on some material point. The question whether a point is sufficiently material is for the judge,

of the substantive law, whilst appearing to modify merely the adjective law; the disguise being closely akin to that under which the Praetores Urbani succeeded in surreptitiously reforming the laws of Rome (Maine's *Ancient Law*, ch. III).

[1] Pollock and Maitland, II, 657.

[2] Only in two instances is corroboration required by statute in *civil* courts; viz. in bastardy proceedings and in actions for breach of promise of marriage. As to Divorce, see [1907] P. p. 334; and p. 460 *post*. Claims against a dead man's estate are viewed jealously if the claimant is not corroborated (31 Ch. D. 1).

[3] 1 Edw. 6, c. 12, s. 22; modified by 7 and 8 Will. 3, c. 3, s. 2; *ante*, p. 318. But in most *treason-felonies* one witness suffices.

[4] 1 and 2 Geo. 5, c. 6, s. 13. See p. 356 *ante*.

not the jury, to decide. It is not necessary that the corroborating fact should be so important that from it, standing alone, the falsity of the perjured statement could have been inferred. The corroboration may be by a second witness, or documentary evidence, or an admission by the prisoner,[1] or some other similar circumstance.[2] But merely to shew that the supposed perjurer has made statements directly contradictory of each other (even though both of them were made on oath)[3] will not suffice. For this leaves it still utterly uncertain which of the two statements was the false one; and the indictment cannot be framed in a merely alternative form.

(3) Under the Criminal Law Amendment Act, 1885, it is provided in regard to certain offences against women and children that no person shall be convicted of these upon the evidence of one witness alone, unless such witness be corroborated in some material particular, and by evidence which implicates the accused.

(4) Similar corroboration is required in those cases in which under the Criminal Justice Administration Act, 1914 (*ante*, p. 447), a very young child is allowed to give evidence without being sworn.[4] The precaution is wise; for a tribunal of adults is apt to place undue reliance upon these little people; forgetting that, though less fraudulent than adults, they are more imaginative. Hence the judge should

[1] *Reg.* v. *Hook* (1858), D. and B. 606 (K. S. C. 422). In some American cases, perjury has been proved without any witness, by a combination of two evidentiary documents; *e.g.* where both a letter written by the prisoner *and* an invoice written to and preserved by him, contradicted him as to the ownership of property. Such proof would probably be held sufficient in England also.

[2] *Reg.* v. *Parker* (1842), C. and M. 639.

[3] *Rex* v. *Harris* (1822), 5 B. and Ald. 926.

[4] Cf. *Rex* v. *Davies* (1916), 85 L. J. K. B. 208. Moreover a child who thus gives evidence without being sworn is not adequately corroborated by the *unsworn* evidence given by other similar children, *Rex* v. *Coyle*, (N. I. [1926] 208); *Rex* v. *Manser* (1934), 25 Cr. App. R. 18. Nor is any complaint, which this child has made, an adequate corroboration. For a complaint is (see p. 438 *ante*) proof merely of the complainant's consistency of conduct; and not evidence at all of the facts alleged in it.

caution the jury. "Children are a most untrustworthy class of witnesses; for, as our common experience teaches us, they often, when of a tender age, mistake dreams for reality, repeat glibly as of their own knowledge what they have heard from others, and are greatly influenced by fear of punishment, by hope of reward, and by desire for notoriety."[1] They are both "suggestionable" and even "auto-suggestionable".

(5) Where a witness was[2] himself an Accomplice[3] in the very crime[4] to which the indictment relates, it is the duty of the judge to caution the jury strongly as to the invariable danger of convicting upon such evidence without corroboration.[5] Moreover this corroboration must confirm not merely a[6] material particular of the witness's story, but some particular which connects the prisoner himself[7] with it.[8] For, as the accomplice knows the whole history of the crime, he may tell a true tale, capable of thorough corroboration, and yet may easily insert in it the name of an innocent man, in place of one of the actual offenders. Hence it is not enough that an accom-

[1] Mr Inderwick, K.C.

[2] In the opinion of the jury.

[3] Even if merely as accessory *after* the fact.

[4] But if *A* and *B* steal a horse, and *B* sells it to *C*, and *C* is tried for receiving, *A* would not need corroboration at *C*'s trial.

[5] A like caution is given when a charge of *sexual* crime is supported by an adult complainant alone; for there "corroboration, though not essential in law, is always required in practice", 18 Cr. App. R. 121. But if the judge has given the due caution, a conviction will be upheld, *Rex* v. *Crocker* (1922), 17 Cr. App. R. 45; *Rex* v. *Jones* (1925), 19 Cr. App. R. 40; and where there is in fact corroboration a conviction may be upheld in the absence of a warning, *Rex* v. *Gregg* (1932), 102 L. J. K. B. 120; 24 Cr. App. R. 13. See also p. 589 *post*.

[6] Not *every* material particular; for were it so there would never be any need for the accomplice's evidence.

[7] Hence in Affiliation proceedings the mere fact of Parturition is not corroboration enough.

[8] *Rex* v. *Baskerville*, [1916] 2 K. B. 658. *E.g.* that at prisoner's house a knife was found, stamped with the same private house-address as was stamped on one which the burglar had dropped; C. C. C. Sess. Pap. CXLVII, 683. Or the prisoner's silence when accused may corroborate (14 Cr. App. R. 1); but contrast 19 Cr. App. R. 27. Cf. p. 440 *ante*.

plice is corroborated as to the weather on the night of the burglary and the number of windows broken through.[1] And if there are two prisoners, and the accomplice's evidence is corroborated as regards one of them only, this will not suffice to dispense with the warning as regards the other. Opportunity alone is not corroboration, but opportunity coupled with suspicious circumstances may be.[2] So too in bastardy proceedings the mere fact that the alleged father has made a false statement is not corroboration of the mother's evidence unless the statement is of such a nature and made in such circumstances as to lead to an inference in support of the mother's evidence.[2]

Corroboration by another accomplice, or even by several accomplices,[3] does not suffice. But a spy, since his complicity extends only to the *actus reus* and not to the *mens rea*, is not truly an accomplice, and so does not need corroboration.[4]

But these common-law rules as to the necessity of corroborating accomplices amount (as we have said) only to a caution and not to a command.[5] Accordingly even in capital cases verdicts of conviction, based solely on the uncorroborated evidence of an accomplice, have upon appeal been held good. And even the urgency of the

[1] So in the Divorce Court (where this sort of corroboration is always required for the evidence of private detectives) if such a detective says, "I saw respondent and co-respondent enter the hotel together, and I called this policeman's attention to it", it is no sufficient corroboration for the policeman to say merely, "He did shew me *a* man and *a* woman entering that hotel".

[2] *Jones* v. *Thomas*, [1934] 1 K. B. 323.

[3] *Rex* v. *Gay* (1909), 2 Cr. App. R. 327. "A jury is no more bound to believe two informers than one", said Whiteside, C.J. Cf. 15 Cr. App. R. 177. It is doubtful how far an accomplice may be corroborated by his wife, *Rex* v. *Payne* (1913), 8 Cr. App. R. 171.

[4] *Rex* v. *Bickley* (1909), 2 Cr. App. R. 53; *Reg.* v. *Mullins* (1848), 3 Cox 526. Yet a man who has thus taken up falsehood as his trade must be peculiarly untrustworthy.

[5] "Not a rule of law, a rule of prudence"; 12 Cr. App. R. 17, 45–6, 81; 14 Cr. App. R. 121. But where it is by *Statute* that corroboration is required, the case must be withdrawn from the jury if there be no corroboration.

caution may vary according to the consistency of the accomplice's story, the extent of his complicity, and the heinousness of the crime. Thus the caution may be withheld altogether in cases where the charge implies so little moral guilt as not to taint a man's credibility at all; *e.g.* in the case of non-repair of a highway.[1]

(6) The Road Traffic Act, 1930, s. 10, in making it an offence for certain vehicles to exceed speed limits on any public highway, provides that no conviction for it is to take place "solely on the evidence of one witness" as to the rate of speed. But a single witness does suffice if he speaks, not to his mere "opinion", but to a Fact which he has ascertained by stop-watch and measured distance.[2]

Rule II. To the doctrine which excludes Hearsay evidence there are—besides the general exceptions which we mentioned along with it—some further ones which are peculiar to criminal cases. Three of these deserve careful consideration.

(1) The admission of the complaints made by victims of sexual offences; *ante*, p. 438.

(2) Upon an indictment for Homicide,[3] the *dying declarations* of the slain man respecting the cause of his death are admitted under certain circumstances. This exception seems to have been fully recognised as early as 1697. At the Old Bailey, in that year, whilst it was held, in one trial for murder, that evidence could not be received as to the murdered man having said beforehand that he and the prisoner were going to fight a duel, yet in another, where a painter in Lincoln's Inn Fields was indicted for having killed two bailiffs, their "dying words" were admitted as evidence against him.[4] Such declara-

[1] *Reg.* v. *Boyes* (1861), 1 B. and S. 311 (K. S. C. 535).

[2] *Plancq* v. *Marks* (1906), 70 J. P. 216.

[3] *Rex* v. *Mead* (1824), 2 B. and C. 605 (K. S. C. 519). For this is the one crime where it is certain that the victim will be unable to be a witness at the trial of the man who wronged him.

[4] Hargrave MSS. in British Museum, No. 146, p. 162.

tions are admitted because the religious awe inspired by the approach of death is deemed fully equal to the sanction of any judicial oath.[1] Hence the rule has been held to be inapplicable to declarations made by a child of the age of four.[2] And, similarly, it will not apply unless the deceased thought his death quite imminent. It is not sufficient that he was "in fear of death"[3] or "thought he was going to die".[4] He must have felt nothing short of "a settled, hopeless expectation of death".[5] If, however, he had thus abandoned all hope of recovery when he made the declaration, the fact that his medical attendants were not equally hopeless, or that he did actually survive for several days after making it, will not render the declaration inadmissible. The present tendency, however, is to reject dying declarations except in the clearest cases, testing them (as Byles, J. put it) with "scrupulous, and I had almost said with superstitious, care".[6] The declaration may even exculpate the prisoner, *e.g.* be a confession of suicide, intentional or accidental.

It should be carefully remembered that the rule is limited, not merely to trials for crime, but to trials for Homicide; and thus will not apply when the person who caused a death is under trial, not for it, but only for some earlier crime (perhaps an abortion or a violent robbery) of which the death was a result.[7] Moreover the dying declaration is only admissible in relation to the immediate circumstances of the death.[8]

[1] *Rex* v. *Woodcock* (1789), 1 Leach 500. "They are an exception to all rule; but they always produce the greatest effect"; Coleridge, J., in 1845.

[2] Cf. *Reg.* v. *Jenkins* (1869), 1. C. C. R. 187 (K. S. C. 515).

[3] C. C. C. Sess. Pap. CXXVI, 841.

[4] *Reg.* v. *Neill* (1892), C. C. C. Sess. Pap. CXVI, 1417 (K. S. C. 483).

[5] *Reg.* v. *Peele* (1860), 2 F. and F. 21; *Reg.* v. *Gloster* (1888), C. C. C. Sess. Pap. CVIII, 647 (K. S. C. 518). "I think I am dying" was, after objection, held sufficient by Lush, J., in *Rex* v. *Klaproth* (C. C. C., Feb. 21, 1921).

[6] *Reg.* v. *Jenkins* (1869), 1 C. C. R. 187, 193 (K. S. C. 515).

[7] *Reg.* v. *Hind* (1860), Bell 253.

[8] See 1. *Toronto Law Journal*, 379.

(3) When a witness (whether for the prosecution or the defence) has made a *Deposition* before the justice who sent the case for trial,[1] it may be used at the trial, instead of calling the witness himself, if he has died in the interval, or has become insane, or is too ill to travel, or is being kept away by, or on behalf of, the prisoner.[2] But it is well to notice that if the witness has merely gone abroad, it cannot be used; except perhaps in misdemeanors, and even then only by consent of the opposite party.

A deposition must bear the signatures both of the witness and of at least one of the committing magistrates; but it is not necessary to call any evidence to prove their genuineness. If the witness refuse or be physically unable to sign it would appear that this signature may be dispensed with.[3] When a deposition is put in as evidence, it must be proved (i) that the absence of the witness is due to one of the grave causes which we have mentioned; and that the prisoner[4] (ii) was present when the witness gave the evidence which it embodies, and (iii) had an opportunity of cross-examining him.[5]

A witness's deposition will not be thus available as evidence at a trial, unless the offence for which the prisoner is being tried is substantially the same as—or arises out of the same set of circumstances as[6]—that for which he was committed.

[1] Criminal Justice Act, 1925, s. 13.

[2] *Rex* v. *Harrison* (1692), 12 St. Tr. 834. Cf. *The Times*, March 7, 1855; and C. C. C. Sess. Pap. cvii, 581. As to children or young persons see 23 Geo. 5, c. 12, s. 38. See also p. 539 *post*.

[3] *Rex* v. *Holloway* (1901), 65 J. P. 712.

[4] Facts (ii) and (iii) are often proved by a policeman whom the committing justice has bound over to prosecute. The Criminal Justice Act, 1925, s. 13 (3), allows them to be proved by a certificate from the committing justice or his clerk.

[5] I have known a deposition excluded on the trial of a foreigner, because the witness to its admissibility, being ignorant of the foreign language, could not prove that the interpreter's words had really informed the prisoner of this opportunity.

[6] *E.g.* a murder, and a wounding with intent to murder; 2 Cr. App. R. 257.

Rule III. Evidence of the prisoner's *good character* is always admissible on his behalf in criminal courts. Yet evidence of his *bad* character is usually excluded there (p. 420 *ante*); and in civil proceedings all evidence of character is excluded.[1] Hence this exceptional admissibility is only intelligible as a relic of the Anglo-Saxon exculpation by the oaths of compurgators (see Pollock and Maitland, II, 634).

But, ancient and well-established as is this rule, opinion has been considerably divided as to its exact scope. Is the "character", which the witnesses are thus allowed to describe, the disposition or the reputation of the accused person? In *Reg.* v. *Rowton* (1865) the Court for Crown Cases Reserved adopted, though only by a majority, the latter alternative.[2] Accordingly, in strictness, no evidence ought to be given about the prisoner's disposition, and still less about any particular acts of his. The witness, therefore, to borrow Erskine's words,[3] is not to say "what *A*, *B*, or *C* told him about the man's character, but what is the *general* opinion concerning him. For 'character' is the slow-spreading influence of opinion, arising from a man's deportment in society, and extending itself in one circle beyond another till it unites in one general opinion. That general opinion is allowed to be given in evidence".

But, as Lord Ellenborough long ago said, "No branch of evidence is so little attended to";[4] and this strict rule of law is still constantly and humanely disregarded in practice. For the present conditions of busy life in crowded cities often render it impossible for a man's conduct to have been under the continuous observation of many persons for so long a time as would enable any

[1] Except where directly relevant, *e.g.* in actions of defamation. The character of the prosecutor is similarly generally irrelevant in criminal cases, but evidence of the general bad character of the prosecutrix may be given in defence in cases of rape or indecent assault. Cf. p. 429 *ante*. *Rex* v. *Clarke* (1817), 2 Starkie 241.

[2] L. and C. 520 (K. S. C. 528); American courts also adopt it.

[3] In his speech in defence of Hardy.

[4] *Rex* v. *Jones* (1809), 31 St. Tr. at p. 310.

"general opinion" about it to grow up. Even neighbours and customers of his know nothing about him beyond their personal experience. Yet a departure from the strict rule opens out an inconveniently wide field of inquiry. For a witness's individual opinion of his neighbour's disposition may have to be supported or tested by protracted consideration of the innumerable facts which led him to form it. But evidence of a man's general reputation affords terse and summary proof of his disposition. On the other hand, this briefer and more technically correct mode of proof has the disadvantage of excluding all evidence (such as perhaps might have been obtained from the very same witness who proves the good reputation) of a deep-rooted evil disposition that rendered the man utterly unworthy of the good reputation which he enjoyed.

Either method of proof, however, would admit that negative evidence which in practice is so frequent, "I never heard anything against him." Such negative testimony may be the best of all tributes to a man's disposition; for most men are little talked of until fault is found with them.[1]

Evidence of good character is thus peculiar in its nature, as being a case in which the witness speaks as to other people's knowledge, instead of as to his own. And the forensic procedure in regard to it is also peculiar. For the opposite party has no right to make a speech in reply upon it; nor ought he even to cross-examine upon it, unless he knows that he can thereby elicit a definite charge against the prisoner, *e.g.* his having committed other similar offences. But evidence of good character even though obtained only by cross-examination of the Crown witnesses, or given by himself alone, can be rebutted by evidence of a bad reputation;[2] but not by evidence of bad disposition, still less of particular bad acts

[1] Cf. Cockburn, L.C.J., in *Reg.* v. *Rowton* (1865), L. and C. 520 (K. S. C. 533).

[2] But such evidence is so rare that neither Cockburn, L.C.J., nor Coleridge, L.C.J., had ever seen it given (C. C. C. Sess. Pap. cxv, 170).

(except that it sometimes may be rebutted by evidence of previous convictions).[1]

A defendant's counsel must not assert his client's good character unless he is going to call evidence of it. On the other hand, if he do not call any, the prosecution ought never to make any comment upon this omission.

The probative value of evidence to character must not be overrated.[2] It is not sufficient ground for disbelieving solid evidence of facts. Were it so, no one would be convicted; for every criminal had a good character until he lost it. But it may be of great importance where mistaken identity is the defence. Or again determining which of two inferences should be drawn from a fact; and consequently in all questions of *mens rea*, since they must always be matters of mere inference. It thus is very useful in cases where a man is found in possession of recently stolen goods. At a charity-bazaar at Lincoln, about 1900, when an alarm was raised that a purse had been stolen, the thief slipped it into the coat-pocket of a bishop who was present; but any suspicions that might have been aroused by its being found in this pocket were effectually rebutted by the episcopal character of the wearer. Yet, even for such purposes, evidence of good character is, by a curious paradox, of least avail where it is most needed; namely in offences of great heinousness. For "in any case of atrocious criminality the act is so much out of the ordinary course of things, that, if perpetrated, it must have been produced by motives not frequently operating on the human mind. Therefore evidence as to the character of a man's habitual conduct in common circumstances will here become far inferior in efficacy to what it is in the case of accusations of a slighter guilt".[3]

[1] See p. 478 *post*.

[2] "If you feel a doubt, you are entitled to take character into account. But only if the evidence has left your mind in doubt should you give any weight to testimonies to character" (Avory, J., at C. C. C. 1922).

[3] *Per* Shaw, C.J., at the trial of Prof. Webster; *ante*, p. 403. See a good review of the effect of evidence of Character in 13 Cr. App. R. 125.

After conviction, however, evidence of character will always be of great importance in determining what punishment should be inflicted on an offender; and even before conviction evidence of other offences may be intrinsically admissible in certain circumstances (*ante*, p. 421, *post*, p. 477).

Rule IV. In criminal proceedings Admissions made by (or on behalf of) a party to the litigation are received in evidence less readily than in civil cases.

In civil tribunals, any admissions which have been made by the plaintiff, or the defendant, or the duly authorised agent of either, can be given in evidence quite freely. But in criminal cases, the admissions of the prosecutor cannot, as such, be given in evidence; for, technically speaking, he is no party at all to the proceedings, they being brought in the name of the Crown itself. And even the admissions, or—to use the term commonly applied to full admissions of criminal guilt—the Confessions (*ante*, p. 439), made by the person accused are not allowed to be given in evidence unless it appears that they were quite voluntary.[1] (Whether or not they were so is a question for the judge, not the jury, to decide.[2]) Even though no circumstances raise any doubt as to the character of the confession, it is now held to be the duty of the prosecutor to bring evidence of its having been given voluntarily.[3]

For though a litigant's own admissions might at first sight well appear to be the most satisfactory of all forms of

[1] A similar doctrine prevails in the United States. Yet many scandals do arise there from the police putting arrested persons through "the Third Degree" by protracted questioning (*e.g.* 9 p.m. to 4 a.m.), or withholding of water, or even blows; cf. the "Sweat-box Case", *The State* v. *Ammons* (1901), 80 Mississippi 592. The Supreme Court rebuked these practices in December, 1924. Yet in 1925, in New Jersey, Harrison Noel, arrested for murder, was questioned by the police for eleven hours, and then, after two hours of sleep, for ten hours; *i.e.* for twenty-one hours out of twenty-three. He then made a confession. Of what value?

[2] *Reg.* v. *Warringham* (1851), 2 Den. at p. 448.

[3] *Ibrahim* v. *R.*, [1914] A. C. 599.

evidence—and indeed were so regarded in the civil and the canon law[1]—experience has now shewn them to be open, especially in serious criminal charges, to two serious hazards of error. For (i) eagerness to secure the punishment of a hateful offence may lead a witness to exaggerate, even unconsciously, what was said to him by the person accused; and (ii) eagerness to propitiate those in authority may lead the accused person himself to make untrue admissions;[2] and (iii) he often means guilty only of the act, not of the evil intent. Hence English criminal lawyers have long[3] recognised that "hasty confessions are the weakest and most suspicious of all evidence".[4]

The rule may be stated thus: a confession must be excluded if it was made (i) in consequence of (ii) any inducement (iii) that was of a temporal character and (iv) connected with this accusation, and (v) that was held out to the accused by a person who had some authority over the accusation.

[1] Lord Stowell said: "A confession generally ranks highest in the scale of evidence;...it is taken as indubitable truth,...a demonstration, unless indirect motives can be assigned to it" (2 Hag. Con. 316). But now the Divorce Court will not act upon an uncorroborated confession except "with the utmost circumspection and caution". It may be due to morbid self-deception; or to a desire for divorce; or even to mere craving for notoriety. Cf. [1907] P. 334; and 27 T. L. R. 9.

[2] A desire to shield an accused friend often leads convicts under sentence for some other offence, knowing that they are not likely to be again prosecuted, to make false confessions of having committed the crime which he is accused of.

[3] The (now) indubitable falsity of the confessions made by many persons who suffered death for witchcraft, has done much to bring about this change in the legal estimate of the probative value of such evidence. Mr Inderwick (*Side-Lights on the Stuarts*, p. 164) cites two instances of women who confessed, although they declared privately that their confessions were false; their motive being an actual desire to be put to death, in order to escape the obloquy under which they lived.

[4] Sir Michael Foster's *Crown Law*, p. 234. Yet in French law, great importance is still attached to them. Thus on the prosecution of the Abbé Auriol, in 1881, for the murder of two of his parishioners, when the questions of the examining magistrate failed to elicit from him any incriminating admission, the Abbé was shut up in complete isolation for thirty-seven days. On the thirty-seventh he at last made a full confession. See H. B. Irving's *Studies of French Criminals*.

(i) *In consequence of.* The confession will only be inadmissible if it was due to the inducement. Where therefore the inducement has been deprived of all influence, as by lapse of time or by some intervening warning (*e.g.* a magistrate's statutory caution), the confession will stand.

(ii) *Any inducement.* It is not necessary that the prisoner should have been pressed to confess guilt; it is sufficient if he were pressed to say anything whatever. Thus, "It might be better for you to tell the truth and not a lie",[1] will suffice to exclude a confession; although "Speak the truth *if you speak at all*", is harmless.

It is immaterial whether the inducement consisted in a threat of evil or in a promise of good.[2] Thus the admonitions, "Tell the truth, or I'll send for the police", and, "Tell the truth and it will be better for you", are equally objectionable; and either inducement will be fatal to the admissibility of any confession which it may elicit. Although at one time the courts were ingenious[3] in so construing colourless words as to detect a hint of some inducement, it is now clear that the words of any alleged inducement must be construed only in their natural and obvious meaning.[4]

(iii) *Temporal.* An inducement will not exclude confessions produced by it, unless it were of a temporal character. To urge that it is a moral or religious duty to speak out, is not likely to cause a man to say what is untrue; and therefore will not affect the admissibility of what he says. Hence where a prisoner had been urged by the prosecutor to tell the truth "so that, if you have committed a fault, you may not add to it by stating what is untrue"[2]—and similarly where the mother of one of two boys said to them, "You had better, *as good boys*, tell the

[1] *Reg.* v. *Bate* (1871), 11 Cox 686.
[2] *Reg.* v. *Jarvis* (1867), 1 C. C. R. 96 (K. S. C. 525).
[3] Cf. 8 C. and P. 140. [4] *Reg.* v. *Baldry* (1852), 2 Den. 430.

truth"[1]—the confessions which ensued were received as legal evidence.

(iv) *Connected with the accusation.* If the inducement had no bearing upon the legal proceedings connected with the accusation, it will not exclude the confession. Thus a confession was admitted in spite of its having been obtained by the promise, "If you will tell where the property is, you shall see your wife."[2] And if even an objectionable inducement to confess one crime should produce also a confession of some second and unsuspected offence, such confession will be admissible upon a trial that is only for the latter crime.

(v) *By a person in authority.* A person in authority means one who had some opportunity of influencing the course of the prosecution;[3] *e.g.* a magistrate or a constable,[4] or even a private person if he is prosecuting or is likely to prosecute. Thus if an accusation be made against a servant, and she make a confession to her master or mistress in consequence of some inducement held out by him or her, it would be excluded if the charge were one of stealing their property; whilst if it were a charge of killing her own child, they would have no such "authority" in the matter as to give any disabling effect to the inducement.[5] It is sufficient if the person in authority is present, silently acquiescing, when some third party spontaneously holds out the inducement.

But the mere fact that it was to a constable (or other

[1] *Reg.* v. *Reeve* (1872), 1 C. C. R. 362. Similarly the exhortation—"With the profession you make [of being a Christian], it is only right for you to clear the innocent ones", has been held not to exclude the consequent confession (C. C. C. Sess. Pap. CXXVII, 209). Cf. *Rex* v. *Stanton* (1911), 6 Cr. App. R. 198.

[2] *Rex* v. *Lloyd* (1834), 6 C. and P. 393 (K. S. C. 527). The decision that "Tell and you shall have some gin" will exclude a confession, is a ruling of very little authority; see Russell on Crimes, 8th ed., p. 2021 n.

[3] *Rex* v. *Gibbons* (1823), 1 C. and P. 97 (K. S. C. 524).

[4] A person who has the prisoner in custody, even though not a constable, is "in authority", *e.g.* a searcher of female prisoners, *Reg.* v. *Windsor* (1864), 4 F. and F. 361.

[5] *Reg.* v. *Moore* (1852), 2 Den. 522.

person in official authority) that a confession was made, will not cause it to be rejected, when no inducement was held out. And this will be so even if no preliminary warning had been given to the accused who made it; and even though he made it in answer to questions put to him by this person in authority. But questions thus asked are viewed jealously by the judges; and in 1918 they formulated instructions about them (26 Cox 230). These lay it down that "when a police-officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person, *whether suspected or not*, from whom he thinks that useful information can be obtained". Yet this questioning must not be hostile or oppressive. But "whenever a police-officer has made up his mind[1] to charge a person with a crime, he should first caution such person before asking any (or any further) questions". Hence persons "in custody" should not be questioned—nor even be allowed to volunteer a statement—until after being cautioned. And when a voluntary statement is made, no questions must follow it "except for the purpose of removing ambiguity in what he has actually said".[2] The usual caution (*post*, p. 533) should be ended with "be given in evidence", omitting the deterrent words "against you". "After arresting, a constable"—said Lord Brampton—"should keep his mouth shut, but his ears open." Neither should the police suggest to a person in custody that they have evidence of his guilt. Answers to such a suggestion are not admissible in evidence.[3] Prisoners should not be confronted with one another in order to obtain admissions, nor with that object should the statement of one prisoner be read to another. Statements obtained in contravention of the "Judges' Rules" may be rejected in evidence,[4] and where an

[1] Cf. 18 Cr. App. R. 47.
[2] *Rex* v. *Mills* (1936), 25 Cr. App. R. 138 at p. 139.
[3] *Rex* v. *Brown and Bruce* (1931), 23 Cr. App. R. 56.
[4] *Rex* v. *Voisin*, [1918] 1 K. B. 531.

admission is obtained by objectionable means the Court of Criminal Appeal will quash a conviction unless without the admission the jury must have convicted.[1]

Even, however, when English law regards a confession as being rendered inadmissible by some inducement, it does not exclude evidence of any *acts* that may have been performed along with, or in consequence of, the giving of this excluded confession; *e.g.* the surrender, or the discovery, of stolen property. Moreover it does not exclude confessions themselves when not obtained by an inducement, even though they may have been obtained by some underhand means; *e.g.* by intoxicating the prisoner,[2] or by abusing his confidence (as by a gaoler appropriating a letter which he had promised the prisoner to put into the post[3]), or by artifice (as by falsely asserting that some of the prisoner's accomplices are already in custody[4]). In such cases, however, the judge will warn the jury not to attach to the confession too much weight.

A further difference between civil and criminal courts, in their treatment of admissions, concerns such admissions as are made by mere agents. In civil proceedings, wherever the acts of an agent will bind the principal his admissions will also bind him, if made in the same affair and at the same time, so as to constitute a part of the transaction.[5] But criminal law does not adopt this wide rule; it never holds a principal liable for admissions made by his agents except when he has authorised them expressly. Accordingly an admission made by a prisoner

[1] *Rex* v. *Pilley* (1922), 16 Cr. App. R. 138.

[2] *Rex* v. *Spilsbury* (1835), 7 C. and P. 187.

[3] *Rex* v. *Derrington* (1826), 2 C. and P. 418.

[4] *Rex* v. *Burley* (1818), Phillips and Arnold on Evidence, 10th ed., vol. i, p. 420.

[5] Thus, in an action against a railway company by a passenger for the loss of his luggage, the admissions of the station-master as to the way in which the loss took place, made by him the next day after the loss, in answer to inquiries for the luggage, are good evidence against the company, *Morse* v. *C. R. Railroad* (1856), 6 Gray 450.

will not be evidence against his accomplices in the crime, unless it had been expressly authorised by them.[1] Yet, as we have seen (*ante*, p. 341), so soon as a common criminal purpose has been shewn, evidence of the *acts* of one accomplice, though done in the absence of the others, will be admissible against all of them.

Rule V. The principles relating to the Competency of witnesses are not identical in civil and in criminal courts.

We have already mentioned (*ante*, p. 447) the cases in which recent statutes have permitted evidence to be given in criminal proceedings by children who do not understand the nature of an oath, if they be sufficiently intelligent and be aware of the duty of speaking the truth. A converse and far more important peculiarity in the criminal rules of evidence is that by which (A) accused persons, and (B) the wives or husbands of accused persons, are entitled to refuse to give evidence (and, until very recently, were indeed entirely incompetent to give it).

(A) The common law disqualified every person who had an interest in the result of any legal proceeding—whether civil or criminal—from giving evidence in it. Hence, of course, the actual parties to that proceeding, since they had the strongest interest of all, were disqualified; plaintiffs and defendants in civil cases, and prisoners in criminal ones. (But the prosecutor in a criminal case could give evidence; for technically he is no party to the proceedings, the Crown being the *dominus litis*.) Prisoners, however, until early in the eighteenth century, were usually questioned (though not upon oath) by the judge himself, at the conclusion of the Crown evidence, in order to elicit their defences.[2] And this often was of great assistance to them; especially as no felon could then be defended by counsel. On the other hand, it gave wide

[1] *Reg.* v. *Swinnerton* (1842), C. and M. 593.

[2] See *Harrison's Case* in 1692, 12 St. Tr. at p. 859.

scope for judicial cruelty, as was too often shewn by Lord Jeffreys and other judges in the Stuart period.[1]

In civil cases the evidence of the parties was rendered admissible in 1851.[2] Subsequently in 1872 there began a series of legislative enactments which enabled prisoners to give evidence in the case of a few particular crimes. The judicial experience of the working of these exceptional privileges proved so favourable that ultimately a general enactment was passed[3]—the Criminal Evidence Act, 1898.

By it:

1. The person charged is made a competent (but not compellable) witness for the defence[4] at every stage of the proceedings,[5] whether he be charged solely, or jointly with some other person. The judge should inform him of his right to give evidence. It is to be given from the box and not from the dock.

2. (*a*) On committal for trial, he gives his evidence immediately after the magistrate has delivered the usual statutory caution as to the ultimate use that may be made at trial of anything he may say.

(*b*) At trial, he gives it immediately after the Crown witnesses; unless he is going to call some witness[6] of his own (other than a mere witness to character). When he thus does not call a witness, the fact of his having himself given evidence creates no right of reply; so that, if he be undefended by counsel the Crown counsel will have no

[1] And by Page, J., even so late as 1741. See in *Tom Jones*, bk. VIII, ch. XI, Fielding's vivid picture of Page's satirical questioning of a prisoner until "everybody fell a-laughing. It is indeed charming sport to hear trials upon life and death! But I own I thought it hard that there should be so many of them—my lord and the jury and the counsellors and the witnesses—all upon one poor man, and he too in chains. He was hanged; as, to be sure, it could be no otherwise".

[2] Lord Brougham's Act; 14 and 15 Vict. c. 99.

[3] 61 and 62 Vict. c. 36.

[4] Not merely of himself, but of fellow-prisoners also.

[5] This includes evidence given between a plea of guilty and sentence, *Rex* v. *Wheeler*, [1917] 1 K. B. 283. If co-prisoners wish to give evidence, they give it in the order in which their names stand in the indictment.

[6] If he do call witnesses, his evidence usually comes *before* theirs.

opportunity at all of commenting upon the evidence he gives.

3. A prisoner witness must not in general be asked any question tending to shew that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged or that he is of bad character.[1] In certain circumstances, however, as we have seen (p. 421 *ante*), evidence of other similar offences is relevant to shew guilt, and where such evidence could be given a prisoner witness may under the Criminal Evidence Act, 1898, in exactly the same circumstances be cross-examined to shew that he has committed or been convicted of other offences which (p. 421 *ante*) would have been admissible as evidence-in-chief to show his guilt in respect of the offence charged.[2] In three cases the cross-examination may be even wider: (*a*) where the prisoner or his counsel has asked questions of the witnesses for the prosecution in order to establish his good character, or has given evidence of his good character;[3] (*b*) where the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor[4] or of the witnesses for the prosecution;[5] (*c*) where he has given evidence against another person

[1] Thus a prisoner must not in general be cross-examined to shew that he is a person likely to have committed the offence charged, *e.g.* a man charged with a sexual offence must not be asked whether he is a single man, *Rex* v. *Coulman* (1927), 20 Cr. App. R. 106. Conversely to ask such a prisoner in examination-in-chief whether he is not a married man puts his character in issue and renders him liable to be cross-examined *to credit*, *Rex* v. *Baldwin* (1925), 133 L. T. 191; 18 Cr. App. R. 175.

[2] A conviction against a schoolmaster for assault upon a scholar was quashed because the defendant had been asked whether he had been previously convicted of a similar assault on another scholar, *Charnock* v. *Merchant*, [1900] 1 Q. B. 474. Had the previous assault been on the *same* scholar, the evidence would probably have been admissible.

[3] But not where one of his witnesses has merely volunteered an eulogy of him unasked, 17 Cr. App. R. 36.

[4] A living prosecutor; *e.g.* not the murdered victim, 14 Cr. App. R. 87.

[5] But not by merely denying, even violently, the truth of the evidence against him, 39 T. L. R. 457. Study *Rex* v. *Preston*, [1909] 1 K. B. 568 and *Rex* v. *Hudson*, [1912] 2 K. B. 465. The imputations need not be as

charged with the same offence.[1] In these three cases a prisoner may be asked questions relating to matters which would not be admissible as evidence in chief against him at common law. Thus he may be asked questions as to previous offences, convictions or charges or to shew that he is of bad character, provided that the questions are relevant. A question may in those cases be relevant because it relates to his credibility as a witness, and probably also merely because it tends to show that he is of bad character and so likely to have committed the offence with which he is charged.[2] The fact that a prisoner has previously been charged and acquitted of an offence is normally,[3] however, not relevant evidence against him. Thus in *Maxwell* v. *Director of Public Prosecutions*,[4] the House of Lords quashed a conviction where a prisoner charged with performing an illegal operation had been asked about an occasion seven years before when he had been charged with a similar offence and acquitted. The leave of the judge must be asked before cross-examination

to general character. It is sufficient if the defence suggests *e.g.* that a witness is committing perjury for the sake of revenge, *Rex* v. *Dunkley*, [1927] 1 K. B. 323. A prisoner must not be cross-examined so as to involve him inadvertently in an attack upon Crown witnesses, *Rex* v. *Eidinow* (1932), 23 Cr. App. R. 145.

[1] The offence charged must be *the same*, *Rex* v. *Roberts* (1936), 52 T. L. R. 234; 25 Cr. App. R. 158. He is liable to be cross-examined by or on behalf of any co-defendant whom he has prejudiced by his evidence. But if questions be put to him for a co-defendant whom his evidence has *not* prejudiced, this will give the Crown a right to a speech in reply as against that prisoner, *Rex* v. *Paget* (1900), 64 J. P. 281. Cross-examination by or for a co-defendant should precede the Crown's cross-examination.

[2] It is arguable that such cross-examination may only go to attack credibility and not to shew a bad disposition. The distinction is not, however, one that can be easily drawn in practice. See on the whole question, Julius Stone, *Cross-Examination by the Prosecution*, 51 L. Q. R. 443. See also 84 J. P. 92.

[3] A previous charge may be relevant apart from its result in some circumstances, *e.g.* a previous charge of receiving stolen goods might be relevant to shew that the accused must have been put on enquiry in the case now charged as to goods received out of the ordinary course of business, *Rex* v. *Waldman* (1934), 24 Cr. App. R. 204.

[4] (1934), 50 T. L. R. 499; 24 Cr. App. R. 152.

to credit is embarked upon.[1] Where a previous conviction is lawfully put to an accused in cross-examination and denied, evidence of the conviction may be given.[2]

4. The prosecutor must not comment on the fact of a prisoner's having refused to give evidence.[3] But the court is not placed (as in the United States[4] it is) under any such restriction.[5] Experience, however, seems to shew that juries now, without the help of any comment, readily draw for themselves a hostile inference from the prisoner's refusal. (Cf. 3 Cr. App. R. 230.)

It will be convenient here to summarise the various rules as to the admissibility of evidence as to a prisoner's previous conduct, character and previous convictions. Evidence of his past or subsequent similar conduct may be given as explained (pp. 421 *et seq. ante*) either when directly connected with the offence charged or in order to shew his state of mind when committing the offence charged. When a prisoner's conduct would in this way be admissible as evidence-in-chief he may be cross-examined upon it; he may also be cross-examined upon his previous conduct, character or previous convictions when he sets up his own good character, assails the character of the prosecutor or his witnesses, or gives evidence against a co-defendant. The prisoner may always set up his own good character (p. 464 *ante*) and, when such evidence is given, the prosecution may give evidence to rebut it.[6] Evidence-in-chief may also be given of the prisoner's bad character under the Official Secrets Acts,[7] upon a charge of being an habitual criminal under the Prevention of Crimes Act,

[1] *Rex* v. *McLean* (1926), 134 L. T. 640.

[2] *See* p. 478, note 2 *post*.

[3] Criminal Evidence Act, 1898, s. 1 (*b*).

[4] Mr C. H. Tuttle described this rule as the result of "a fetish all too superstitiously worshipped"; Records of American Bar Association, 1934.

[5] Such comment by the court is "in some cases unwise, in others absolutely necessary"; *Reg.* v. *Rhodes*, [1899] 1 Q. B. 77.

[6] As to the nature of such rebutting evidence, see p. 465 *ante*.

[7] P. 326 *ante*.

1908,[1] and upon a charge of vagrancy in order to shew intent to commit felony.[2] Evidence may be given of a prisoner's previous convictions,[3] (*a*) where he has denied them upon cross-examination when lawfully put to him,[4] (*b*) when directly relevant,[5] (*c*) in cases of receiving (p. 425 *ante*) or upon a charge of vagrancy in order to shew intent to commit felony,[2] (*d*) after conviction in order to guide the court as to sentence.[6]

Experience has already shewn that the Criminal Evidence Act, 1898, though so great a departure from what had been a fundamental principle in English criminal procedure, has worked admirably. Lord Brampton[7] found it "a danger to the guilty, but of the utmost importance to the innocent" (*Reminiscences*, ch. 46). We may add that there is also in force another statute which departs even further from the ancient principles; viz. the Evidence Act, 1877.[8] Under this, whenever criminal proceedings are taken merely to test or to enforce some *civil* right, *e.g.* the repair of a highway or the abatement of a nuisance, the party charged is not only competent but even compellable to give evidence, and either for the defence or even for the prosecution.

The prisoner had at common law a right (at any rate

[1] 8 Ed. 7, c. 59, see p. 597 *post*.

[2] Prevention of Crimes Act, 1871 (34 and 35 Vict. c. 112, s. 15).

[3] For method of proof of previous convictions see Prevention of Crimes Act, 1871 (34 and 35 Vict. c. 112) and *Martin* v. *White*, [1910] 1 K. B. 665. A certificate is produced and some evidence of identity must be given.

[4] 28 and 29 Vict. c. 18, s. 6.

[5] *E.g.* an offence punishable more severely after a previous conviction, but the subsequent offence must first be proved; or upon a charge of being an habitual criminal, see note 1 *ante*.

[6] After conviction the previous record of a prisoner should be stated accurately and with precision. Strict proof need not be given unless the evidence is challenged or contested, *Rex* v. *Campbell* (1911), 27 T. L. R. 56; 6 Cr. App. R. 131.

[7] See the testimony of no less competent a critic than Sir H. B. Poland, in *A Century of Law Reform*, ed. 1901, p. 54. But it has no doubt led to much perjury; Grantham, J., thought by nine in every ten, Rowlatt, J. (in 1920) by three in every four, of prisoner witnesses.

[8] 40 and 41 Vict. c. 14.

when undefended by counsel[1]) to make a statement in his own defence without being sworn. And the Criminal Evidence Act, 1898, expressly provides[2] that "nothing in this Act shall affect. . . any right of the person charged to make a statement without being sworn". This proviso seems intended to operate even in the case of a prisoner who does give evidence on oath; enabling him to add to it an argumentative unsworn statement.[3] If the prisoner is defended, his unsworn statement should be made before the speech of prosecuting counsel summing up the evidence.[4]

If any persons who took part with the prisoner in his crime should be indicted along with him for it, they would nevertheless, even at common law, be competent (and indeed compellable) to give evidence, either for him or for the prosecution, unless they were put up for actual *trial* along with him. Accordingly, a prisoner who desired to call any co-prisoners as witnesses would request a separate trial; if he obtained it, he then could call them although their own trial had not yet taken place. Sometimes the Crown calls one of a group of prisoners as "King's evidence"; but it often takes a formal verdict of acquittal before calling him, to enhance the weight of his evidence. To render co-defendants (or except as provided by statute their consorts, see p. 482 *post*) competent to be called by the prosecution, they must have been acquitted, or have obtained a *nolle prosequi*, or have pleaded guilty, or must be tried separately.[5]

[1] And probably even when defended, *Reg.* v. *Shimmin* (1882), 15 Cox 122; *Rex* v. *Bernay* (*The Times*, June 3, 1907).

[2] s. 1 (*h*).

[3] Allegations of Fact made by him in it are, of course, not "evidence"; as they would be if he took the option of swearing to them and facing cross-examination. Hence as against co-prisoners, they must be disregarded; but as regards himself the jury are allowed to give them whatever weight they may think fit.

[4] *Rex* v. *Sherriff* (1903), 20 Cox 334.

[5] See Archbold, *Criminal Pleading*, 28th ed., p. 477.

Even since the Act which rendered accused persons competent to give evidence, a prisoner will still sometimes apply thus to be tried apart from those indicted along with him. For some fellow-prisoner, whom he wishes to give evidence on his behalf, may—perhaps from the dread of cross-examination—be unwilling (although now competent) to do so at his own trial.[1] Or the applicant may desire to avoid the danger of the jury's taking into account against himself some evidence which, legally, is only admissible against some fellow-prisoner.

(B) The common law imposed an incompetency to give evidence, not only upon the person under accusation, but also upon that person's wife or husband.[2] Thus, if several prisoners were tried together, not only all of them but also all their spouses were thus disqualified from giving evidence (even though each one of them was charged in an entirely separate count). The rule produced strange results. Serjeant Ballantine, in his *Reminiscences*, mentions having once prosecuted a man who obtained an acquittal by calling his mistress to prove an *alibi*, viz. his having been away at the races with her. Had he, instead, taken his wife, she could not have thus given evidence for him. On the other hand, Rush (the Norfolk murderer of 1848) was hanged on the testimony of his mistress. He had promised to marry her; and, had he kept his word, it would have saved his life.

An exceptional competency was, however, almost of necessity, conceded in those cases where the crime consisted in some act of personal violence committed by the prisoner upon the wife or husband. And, in recent years,

[1] Even though *A* may have been bound over, by the magistrate who committed *B*, to give evidence for *B*'s defence, he cannot be compelled to give such evidence if he be himself indicted *and tried* along with *B*.

[2] Yet no other relationship, not even that of parent and child, was regarded as producing sufficient community of interest with a prisoner to create any incompetency. The author saw, in 1909, a woman tried for murder on the evidence of her two brothers and her mother.

a few statutes created further exceptions in the case of those crimes in which prisoners themselves were being rendered competent. But the whole doctrine has now been thrown into a new form by the Criminal Evidence Act, 1898.[1] The changes thus effected may be summarised as follows.

(I) In all *ordinary* criminal cases:

1. The husband or wife of the party charged is now competent to give evidence, but only for the defence, and only on the application of the party charged[2] (and is not compellable[3] to give evidence).

2. And this husband or wife has the full liability of an ordinary witness to be cross-examined as to credit; not merely the (very limited) liability of a prisoner who becomes a witness under this Act.[4]

3. A prisoner's omission to call the husband or wife is not to be commented upon by the prosecution.[5]

4. To call the husband or wife has the same effect as calling any ordinary witness for the defence, in giving the Crown the right of reply.

(II) Moreover, in the following *exceptional* cases, the husband or wife of the party charged is a competent witness for either the defence or even the prosecution, and quite irrespectively of the consent of the party charged.[6]

1. Cases where the common law itself recognised an exception to the general rule;[7] viz. upon charges of personal violence committed against the husband or wife in question.[8] This covers assault or attempt to murder; but not crimes that involve no actual violence, like bigamy or libel.

2. Cases where, under the Married Women's Property

[1] 61 and 62 Vict. c. 36. [2] s. 1 (*a*).

[3] *Leach* v. *Director of Public Prosecutions*, [1912] A. C. 305 (K. S. C. 579). Not even for the defence. As to polygamously married spouses see 48 L. Q. R. 341 and cases there cited.

[4] *Ante*, p. 475. [5] s. 1 (*b*). [6] s. 4.

[7] *Ante*, p. 480. [8] s. 4 (1).

Act, 1882,[1] the husband or wife is taking criminal proceedings for an offence committed against his or her property by the prisoner.

3. Cases of the sexual offences dealt with by sections 48–55 of the Offences against the Person Act, 1861, or by the Criminal Law Amendment Act, 1885; Incest;[2] Bigamy.[3]

4. Cases specified in Part I of the Children and Young Persons Act, 1933,[4] *e.g.* offences involving bodily injury to a person under seventeen.

5. Cases of persons charged under the Vagrancy Act[5] with neglecting to maintain (or with deserting) their families; or with being *souteneurs*.

6. Cases where criminal proceedings are taken to test or to enforce a *civil* right.[6]

Even before the Act of 1898 the husband or wife was already *compellable* to give evidence in nos. 2 and 6, but it was doubtful whether they were compellable in no. 1. It was decided in *Rex* v. *Lapworth*, [1931] 1 K. B. 117[7] that they were in such cases both competent and compellable at Common Law. In the other three cases, nos. 3, 4 and 5, the husband or wife is, though a competent witness, not a compellable one, *Leach* v. *Director of Public Prosecutions*, [1912] A. C. 305. Where the husband or wife of a prisoner is not competent to give evidence for the prosecution the exclusion applies also to the husband or wife of a co-defendant, unless the co-defendant would himself be competent[8] (see p. 479 *ante*).

Rule VI. Documents which require to be stamped are treated differently in civil and in criminal courts.

For purposes of revenue an artificial restriction upon the admissibility of documents as evidence has been

[1] 45 and 46 Vict. c. 75, ss. 12, 16; *ante*, p. 211.
[2] 8 Edw. 7, c. 45.
[3] 4 and 5 Geo. 5, c. 58, s. 28 (3).
[4] 23 Geo. 5, c. 12, s. 15.
[5] 5 Geo. 4, c. 83; *ante*, pp. 381, 383.
[6] Evidence Act, 1877, s. 6 (1); *ante*, p. 478.
[7] K. S. C. 580.
[8] *Rex* v. *Mount and Metcalfe* (1934), 24 Cr. App. R. 135.

created by the imposition of Stamp Duties upon certain classes of them. Familiar instances are the stamp upon receipts for the amount of £2 or over; the sixpenny stamp upon a written agreement whose subject is of the value of £5; and the *ad valorem* stamp of 2*s.* 6*d.* per £100 on mortgages and bonds. Under the earlier Stamp Acts, a document that ought to bear a stamp, and yet bore none, was incapable of being used as evidence in any court whatever, whether civil or criminal. Thus on the trial of a man for having burned down his shop, with intent to defraud the Insurance Company of the sum for which he had insured it, it was held that the absence of any stamp on the policy of insurance rendered it inadmissible in evidence, even though it was tendered for the mere purpose of proving the particular intent alleged in the indictment.[1]

Hence such duties formed a conspicuous example of taxes on Litigation; which Bentham condemned as "the worst of all taxes, being denials of justice, co-operating with every injury and with every crime, and directly violating that first of statutes, Magna Charta—'Justice shall be sold to no man'".[2] But the severity of their operation was greatly mitigated in 1854, when an enactment (now replaced by the Stamp Act, 1891[3]) established with respect to them an important difference between civil and criminal courts. For whilst in civil proceedings unstamped documents are still incapable of being given in evidence, without at least the payment of penalties,[4] the absence of a stamp no longer prevents any document from being given in evidence in criminal proceedings.

Rule VII. The testimony of witnesses who are abroad

[1] *Rex* v. *Gilson* (1807), 2 Leach 1007; R. and R. 138.

[2] *Works*, IV, 582.

[3] 54 and 55 Vict. c. 39, s. 14 (4).

[4] And some instruments (*e.g.* bills of exchange and bills of lading) can only be stamped at the time of execution; so that, if not stamped then, they cannot be rendered admissible as evidence even by payment of penalty.

can be made available much more easily in civil than in criminal courts.

The fundamental principle which, as we have seen, excludes hearsay evidence rendered it impossible for such persons to give their testimony by merely sending letters or affidavits, without coming to England to appear in court in person. Even an official telegram from the Madras Government in answer to an inquiry addressed to it by the India Office cannot be given in evidence.[1] But in civil courts this difficulty has now been overcome by making a general provision for taking the evidence of such witnesses upon oath, with full formalities, in the foreign country where they reside;[2] by granting a commission or appointing a special examiner.

But in criminal courts no such general rule prevails.[3] In some exceptional instances, however, statutes have sanctioned the taking of evidence abroad for use in criminal cases. The most important of these provisions is one, contained in the Merchant Shipping Act, 1894,[4] which provides for all cases in which an accused person is himself in the foreign country where the witness is (as may well happen if the crime be committed at sea, or abroad). For it permits any deposition on oath made outside the United Kingdom before a proper official—a magistrate if in a British possession, or a British consular officer if in a foreign country—*in the presence of the accused* to be given in evidence in any criminal proceedings here to whose subject-matter it relates, if, at the time of using it, the witness is not in the United Kingdom.[5]

[1] C. C. C. Sess. Pap. cxx, at p. 916.

[2] *Rules of the Supreme Court*, Order xxxvii, rule 5.

[3] Accordingly in the Tichborne proceedings, the witnesses from Chile, whose evidence had been taken in that country for the civil action, had to come to England to give evidence in person at the criminal trial.

[4] 57 and 58 Vict. c. 60, s. 691.

[5] The other statutes are of a less general character. In extradition proceedings, the Extradition Act, 1870 (33 and 34 Vict. c. 52), allows written depositions taken abroad to be given in evidence.

BOOK IV

CRIMINAL PROCEDURE

CHAPTER XXVII

LIMITATIONS ON CRIMINAL JURISDICTION

WE have now explained the Substantive law of crime; and also that portion of the Adjective law which regulates the evidence by which crimes are to be proved. We have, finally, to consider the remaining portion of adjective law; that which regulates the procedure by which offenders who have committed crime are brought to punishment. We may begin by mentioning some limitations upon the exercise of this procedure; and then go on to describe the various courts in which it is exercised.

LIMITATION BY TIME

To civil actions, lapse of time may often operate as a bar; *Vigilantibus, non dormientibus, jura subveniunt.* But it can rarely affect a criminal prosecution. For the King could do no wrong; and consequently it was impossible that his delay in pressing his claims, whether civil or criminal, could be due to any blameable negligence. Accordingly at common law it was a rule that those claims remained unaffected by lapse of time; *nullum tempus occurrit regi.* And though, as regards civil claims, this kingly privilege has now been subjected to grave limitations by 9 Geo. 3, c. 16, it still operates almost unimpaired in criminal prosecutions. Hence, in several noteworthy cases, offenders have been brought to justice many years after the commission of their crimes. In 1905 John Appleton received sentence of death (afterwards com-

muted) on his own confession of a murder committed in 1882 (*The Times*, July 15, 1905). The trial of Governor Wall (1802)[1] took place nineteen years, that of Edward Shippey (1871)[2] thirty years, and that of William Horne[3] thirty-five years after the respective murders of which they were accused. Stephen,[4] indeed, mentions a prosecution in 1863 for the theft of a leaf from a parish register no less than sixty years previously.

But this rule, that lapse of time is no bar to criminal justice, is subject to a few statutory exceptions. Of these the following are the chief:[5]

(i) A prosecution for treason or misprision of treason must be brought within three years from the commission of the crime; unless the treason either consists of an actual plot to assassinate the Sovereign, or was committed abroad.[6]

(ii) Offenders against the Riot Act[7] must be prosecuted within twelve months.

(iii) A prosecution for the misdemeanor of carnally knowing (or attempting to know) a girl between the ages of thirteen and sixteen must be brought within twelve months.[8]

(iv) A prosecution by indictment under the Perjury Act, 1911 (s. 4), for making a false statement in registering a birth or death, must be brought within three years.

(v) And for the innumerable offences which are punishable on summary conviction the prosecution must be within six months.[9] For the rare exceptions, see Stone's *Justices' Manual*, Index, "Limitation".

[1] 28 St. Tr. 51; *ante*, p. 149. [2] 12 Cox 161.

[3] *Annual Register*, II, 368; *Gentleman's Magazine* for 1759, pp. 604, 627.

[4] *History of Criminal Law*, II, 2.

[5] Others are mentioned in Stephen, *History of Criminal Law*, II, 2.

[6] 7 and 8 Will. 3, c. 3, ss. 5, 6; *ante*, p. 318.

[7] 1 Geo. 1, st. 2, c. 5; *ante*, p. 332.

[8] 18 and 19 Geo. 5, c. 42, s. 1.

[9] 11 and 12 Vict. c. 43, s. 11.

Limitation by Territory

According to International Law, a State ought only to exercise jurisdiction over such persons and property as are within its territory.[1] And in criminal matters it does not always exercise jurisdiction over an offender even though he actually be within its territory. For many States hold the view that a State may not try foreigners for offences committed outside its territorial jurisdiction.[2] One unique exception is, indeed, universally allowed. For persons guilty of any act of "Piracy *jure gentium*"[3] are treated as the common enemies of all mankind, and any nation that can arrest them may exercise jurisdiction over them,[4] whatsoever their nationality, and wheresoever their crime may have been committed, even within the territorial waters of some other nation.[5]

Hence the activity of a nation's criminal courts is frequently confined to those persons[6] who have committed offences on its own soil[7] or on one of its own ships.

[1] For the claim of Italy to try foreigners not in the State territory for political offences committed abroad, and to try foreigners found in the State territory for any crimes committed abroad on the request of the Ministry of Justice or the complaint of the injured party, see *Journal of Comparative Legislation and International Law*, xv, 185–187. On the whole question see W. E. Beckett in *British Year Book of International Law*, vol. vi.

[2] See Oppenheim's *International Law*, 4th ed., Pt. i, 282.

[3] *Ante*, p. 375.

[4] As to Conspiracy here for piracy on the high seas, see *Reg.* v. *Kohn* (1864), 4 F. and F. 68. Conspiracy abroad to kill here is not triable here.

[5] *The Marianna Flora* (1826), 11 Wheaton at p. 41; *In re Tivnan* (1864), 5 B. and S. at p. 677. But this would not cover acts which, like trading in slaves, are made piracy by local laws alone. For one country — or even several countries — cannot add to International Law. The right to exercise extra-territorial jurisdiction in criminal matters may be conceded to one State by another, *e.g.* Conventions relating to White Slave Traffic.

[6] But it covers such persons even though they be aliens, *Courteen's Case* (1618), Hobart 270; *Re Barronet* (1853), 1 E. and B. 1.

[7] As to "territorial waters", see 41 and 42 Vict. c. 73. In our Atlantic island of Ascension a manslaughter was committed in 1851 but no competent tribunal existed there. Hence a special commission was issued for a trial at Winchester (cf. p. 164 *ante*); thirteen witnesses were brought from Ascension (*The Times*, March 5, 1852). English law claims

Accordingly, persons who come into a State's territory, after having committed a crime elsewhere, usually incur no risk of being punished by the courts of their new home for what they did in their old one. In modern times, however, to counterbalance this immunity, almost all civilised countries have concluded Extradition treaties; mutual arrangements whereby any person who betakes himself abroad after he has perpetrated a serious offence may be arrested, and then sent back to take his trial in the country where his offence was committed, if it were not a "political" crime.[1] Since 1870 England has made such treaties with almost all foreign countries. Most of them provide for the mutual optional extradition of nationals.[2] The foreign offender is surrendered under a warrant from the Home Secretary, after an investigation (under an order from him) by a magistrate at Bow Street.

Extradition transmits an offender from the territory of one nation to that of another. But even within a nation's own territory, if her constitution be a federated or quasi-federated one, some similar provision may be necessary, in order to transmit offenders from one of the component local jurisdictions to another. Thus within the British Empire, the Fugitive Offenders Act, 1881,[3] provides for a surrender, akin to an extradition by a foreign nation, where a person who has committed an offence in one part of the King's dominions[4] has fled to another part of them.

concurrent jurisdiction with the flag state over foreign merchant ships in British ports; so too probably in the case of aircraft; as to crimes connected with air navigation see Air Navigation Act, 1920 (10 and 11 Geo. 5, c. 80).

[1] See *Re Castioni*, [1891] 1 Q. B. 149. The crime must be incidental to and form part of a political disturbance.

[2] Italy, which will not extradite its own nationals, is prepared to try them in its own courts for offences committed abroad, see *J. C. L. and I. L.* xv, 62.

[3] 44 and 45 Vict. c. 69. As to Protectorates, see 5 and 6 Geo. 5, c. 39.

[4] In consequence of the annexation of the Transvaal, the question was very quickly raised whether this Act applies only when the territory in which the offence was committed formed part of the King's dominions at the date of the offence, or will apply even though the territory did not

The range of crimes for which such a person may be thus surrendered is naturally much wider than in the case of extradition to a foreign country. It comprises all offences that are punishable (in the territory where they are committed) with not less than twelve months' imprisonment with hard labour. The statute moreover applies even though the conduct with which the fugitive is charged would have constituted no offence at all if committed in that part of the King's dominions to which he has fled.

International Law, whatever view be taken of the right to exercise criminal jurisdiction over foreigners for offences committed by them outside the territorial jurisdiction, nevertheless leaves unlimited a State's power to punish its own subjects. Yet nations vary in their readiness to exercise this power in respect of crimes which their subjects have committed whilst away from their native soil. Great Britain (like France and the United States) prefers, in nearly all cases, to adhere to the principle that crimes are local matters, to be dealt with where they are committed. But to this general rule she has by modern statutes made a few exceptions; empowering her courts to exercise jurisdiction over English subjects who commit certain specified offences even upon foreign soil.[1]

become incorporated into these dominions until after the crime. Contradictory decisions on this point have been given in South Africa.

[1] This is the case with, as we have seen, homicide (24 and 25 Vict. c. 100, s. 9, *ante*, p. 164) and bigamy (*ibid.* s. 57, *ante*, p. 360); and piracy (*ante*, p. 487). So is it with treason and misprision of treason (35 Hen. 8, c. 2, s. 1); with offences other than felonies committed by colonial governors (11 Wm. 3, c. 12; see *Reg.* v. *Eyre* (*Governor*) (1868), L. R. 3 Q. B. 487); with (*ante*, p. 378) unneutral foreign enlistment (33 and 34 Vict. c. 90, s. 4); with offences against the Ballot Act, 1872, or the Corrupt Practices Act, 1883; or the Official Secrets Acts, 1911 and 1920; and with some offences against the Explosive Substances Act, 1883 (46 and 47 Vict. c. 3). And by the Merchant Shipping Act, 1894 (57 and 58 Vict. c. 60, s. 687), with any offence against property or person by any master, seaman or apprentice who at the time when the offence was committed or within three months previously was employed in a British ship. This is the only statute giving English courts jurisdiction over foreigners for offences committed in foreign territory (see W. T. S. Stallybrass in *J. C. L. and I. L.* xv, 81).

Doubt has arisen as to whether, even when a man is in England, he would commit any offence against English law by conspiring to commit—or being accessory to the commission of—a crime in some country abroad.[1] For as English courts have no official knowledge of foreign law they cannot be sure that the act, however wicked, is actually a crime by the law of the particular foreign country concerned. Similarly, if a thing stolen abroad were brought to this country by a man who had knowingly received it abroad, and persons knowingly received it from him here, it appeared to lawyers to be doubtful whether they could be punished here.[2] The general principle still remains unsettled, but particular cases have been dealt with by statute. Conspiracy (or incitement) here to commit a *murder* abroad has been made indictable.[3] And the offence of dealing in this country with goods stolen abroad has been dealt with by the Larceny Act, 1916;[4] which provides that it shall be an offence, punishable with seven years' penal servitude, to receive, or to have[5] in possession, in this country, without lawful excuse, any property stolen outside the United Kingdom, knowing such property to have been stolen. Property is to be deemed to be "stolen" whenever it has been obtained under such circumstances that if the act had been committed in the United Kingdom it would have constituted an indictable offence, even though not a larceny. The Act applies not only to cases of receiving in England goods stolen abroad by other persons, but even

[1] This doubt was debated hotly in 1858; when various persons had conspired in London to assist Orsini in his project of assassinating Napoleon III in Paris. Orsini's attempt was made on January 14th, 1858, the Emperor escaping unhurt; but ten of the spectators being killed, and a hundred and fifty-six wounded. The three bombs inflicted 516 wounds.

[2] Cf. C. C. C. Sess. Pap. LXXXIV, 295; LXXXVIII, 638.

[3] 24 and 25 Vict. c. 100, s. 4; *Reg.* v. *Most* (1881), 7 Q. B. D. 244.

[4] s. 33 (4).

[5] Thus covering cases in which not only the act of stealing, but even that of receiving, took place abroad.

to cases where the thief himself is found in possession of the goods in England.

A person, although himself abroad, may by the hands of an innocent agent commit a crime in England; *e.g.* by posting in France a libellous letter or a forged telegram, which the postman will deliver for him in London. If the Frenchman come to England, he may be tried here. Similarly,[1] if money be sent in a letter from England to Holland, in consequence of a false pretence made in London, there is an "obtaining" here, sufficient to give jurisdiction to our courts; for the Dutch criminal has made the English postmaster his agent[2] to receive the missive. It is, however, necessary, before the English courts can claim jurisdiction, either that the direct results of the crime take place in England, or that an overt act be committed in England. If a foreigner strikes someone abroad who dies of the blow in England, the English courts do not claim jurisdiction;[3] nor is a negligent blow (*e.g.* by a ship) regarded as taking place where it falls, though the opposite view is taken in international law.[4]

[1] *Rex* v. *Stoddart* (1909), 2 Cr. App. R. 217.

[2] Conversely, a man who without quitting England posts forged bills from here to a foreign country may be held guilty of uttering them *there*. And the very wide definition of "fugitive" in the Extradition Act renders it possible for him to be even extradited by us for trial there, as a "fugitive criminal"; *Rex* v. *Godfrey*, [1923] 1 K. B. 24.

[3] *Reg.* v. *Lewis* (1857), 7 Cox 277. For jurisdiction of English courts over British subjects in such cases see 24 and 25 Vict. c. 100, s. 10.

[4] *Reg.* v. *Keyn* (1876), 2 Ex. D. 63, see W. T. S. Stallybrass in *J. C. L. and I. L.* xv, 83, and W. E. Beckett in *British Year Book of International Law*, vol. VIII.

CHAPTER XXVIII

CRIMINAL COURTS

We may now proceed to describe the various courts that possess a general criminal jurisdiction; considering them in the order of their dignity.

I. *The High Court of the King in Parliament.*

This is the highest court in the realm. Its title must not mislead the student into supposing either that the King sits there in person, or that the word "Parliament" is used in the usual modern sense, as including the House of Commons. But a Parliament, when deprived of the Sovereign and of the Commons, becomes simply the House of Lords; by which, accordingly, the jurisdiction of this court is exercised. That jurisdiction is twofold: (A) as a Court of Appeal, and (B) as a Court of First Instance.

(A) In civil matters the House of Lords is the only final court of appeal on all questions of law from English secular tribunals. But in criminal causes it is only one, and far the less active, of two such courts. Until 1907 its functions of appeal were limited to those extremely rare errors of law which are apparent on the record itself.[1] Such an error would appear in any indictment that disclosed no crime. But the Act of 1907[2] which created the new Court of Criminal Appeal provides that from it there

[1] Chitty says that the record contains (*inter alia*) the judge's commission, the indictment by the Grand Jury, the arraignment, plea, issue, award of jury, verdict, judgment (*Practical Treatise on Criminal Law*, I, 720). But it never shews the evidence, or the rulings of the judge as to admission or rejection of evidence, or his statements in his summing up to the jury.

[2] 7 Edw. 7, c. 23. *Post*, p. 586.

may be an appeal to the House of Lords by either the prosecution or defence on any point of law which the Attorney-General certifies to be of such exceptional *public* importance that it is desirable to have the highest decision on it. A sitting of "Parliament" for legal appeals differs very greatly from an ordinary sitting of the House of Lords. For, by the Appellate Jurisdiction Act, 1876, there must be present at least three "Lords of Appeal";[1] and, on the other hand, by a rule of constitutional etiquette which has prevailed since *O'Connell's Case* in 1844,[2] all peers who are not lawyers abstain from giving a vote. Moreover, under the Act of 1876, the Lords of Appeal may be allowed by the House of Lords to hold these sittings after the prorogation of Parliament; and the Crown may authorise them to sit even after Parliament has been dissolved.

(B) The House of Lords is also a court of first instance. In this capacity, unlike that already mentioned, it can try questions of fact as well as of law;[3] and the modern rule of etiquette excluding non-legal peers has no application here. But as the early Chancellors, being ecclesiastics, could take no part in capital trials, it became the practice for the Crown to appoint some peer (it will now probably be the Lord Chancellor himself) as Lord High Steward, to preside. Criminal cases may deserve to be tried before this august tribunal, on account of the dignity of either (1) the accused or (2) the accusers.

(1) Peers when accused of treason, or felony, or the misprision of either, must be tried by their noble peers.[4]

[1] 39 and 40 Vict. c. 59. These may be either Lords of Appeal "in Ordinary" (*i.e.* salaried life peers appointed by virtue of the Appellate Jurisdiction Act, 1876), or peers of the realm who have held high judicial office.

[2] Wade and Phillips, *Constitutional Law*, 2nd ed., p. 249.

[3] It thus forms the nearest surviving approach "to the old *judicium parium*" (Holdsworth, I, 389).

[4] Pollock and Maitland, I, 410. But for mere misdemeanors a peer is tried by an ordinary jury of commoners.

This privilege depends upon nobility of blood, not upon the right to a seat in the House of Lords; and accordingly is possessed by peeresses in their own right, wives of peers, infant peers, and non-representative Scottish or Irish peers. The weight of authority is decidedly in favour of the view that a peer cannot waive the privilege,[1] cumbrous and inconvenient though the form of procedure is,[2] as was vividly shewn by the trial of Earl Russell for bigamy ([1901] A. C. 446). All prosecutions of peers are, however, commenced in one of the ordinary courts, by an indictment; this indictment being subsequently removed into the House of Lords (or into the Lord High Steward's Court) by a writ of *certiorari*.

Bishops cannot be tried by the House of Lords. No bishop has ever been so tried; and Archbishop Cranmer and Bishop Fisher were tried by ordinary juries.[3] Bishops may however sit at the trial of a secular peer, until the final moment when the lords come to the vote of "guilty", or "not guilty". This disqualification for pronouncing judgment doubtless arose from the rule of canon law which forbade clerks to take part in any sentence of death; though it also has been explained by the doctrine of "ennobled blood".[4]

After a trial and acquittal in 1936 for manslaughter the Lord Chancellor introduced the Trial of Peers (Abolition of Privilege) Bill, which was passed by the House of Lords and will in all probability become law.

(2) Any person, whether peer or commoner, who is impeached by the House of Commons must be tried by the

[1] See Hansard, cccx, 245 (Jan. 31, 1887).

[2] It will be found vividly described in *Blackwood's Magazine*, Dec. 1850, in an account of the trial of Lord Cardigan in 1841 (4 St. Tr. (N.S.) 601), for firing at Capt. Tuckett in a duel.

[3] Yet the Resolution of the House of Lords excluding bishops from trial by the peers (Lords S.O., No. 61), depends upon the doctrine of "ennobled blood"; which Bishop Stubbs regards as historically a mere absurdity.

[4] Anson, *Law and Custom of the Constitution*, I, 238.

House of Lords. A peer may be thus impeached for any crime; and so may a commoner for, at any rate, any high misdemeanor.[1] But as the House of Commons is itself now able to exercise directly an effective political control over the proceedings of the great officers of state, judicial procedure by impeachment has fallen into utter disuse. Its inconveniences[2] were vividly manifested in the proceedings against Warren Hastings; which lasted from 1786 until 1795. Since Lord Melville's impeachment in 1805[3] there has been no instance of it; and none is likely to arise. For impeachment, as Lord Macaulay says, "is a fine ceremony, which may have been useful in the seventeenth century, but not one from which much good can be expected now".

II. *The Court of the Lord High Steward of the United Kingdom.*

This court differs in name, rather than in substance, from the tribunal first mentioned. It sits for the purpose of trying peers for treason, or felony, or misprision of either, if the recess or the dissolution of Parliament makes it impossible to have recourse to the House of Lords in its technical form. But it has never sat since 1686. The court consists of such temporal peers as the Lord High Steward[4] may summon. But they must not be fewer than twenty-three; since the court decides by a majority, and there cannot be a valid vote of guilty or not guilty unless twelve concur in it. On trials for treason or misprision of treason,

[1] On the controversy whether a commoner can also be impeached for felony and for treason, or may for these crimes insist on being tried by "his peers", the conflicting cases from 1330 to 1689 are collected in Hatsell's *Precedents* (IV, 397). It is now generally thought that he *is* impeachable even for these graver crimes. See Wade and Phillips, *Constitutional Law*, 2nd ed., p. 251.

[2] For an account of the cumbrous process of impeachment, see Anson, *Law and Custom of the Constitution*, I, 384.

[3] 29 St. Tr. 550. It was described by a lawyer as "not an impeachment of waste, but a waste of impeachment".

[4] Who is appointed only for the particular occasion.

it is provided by 7 and 8 Will. 3, c. 3 that all the peers who have seats in the House of Lords must be summoned. To this court, unlike the High Court of Parliament, no bishop can ever be summoned; hence there is no doubt that a bishop cannot be tried by this court. Again—though in trials by the High Court of Parliament all the members are equally judges of law as well as fact—in this court there is a division of functions akin to that between a judge and a jury. For the Lord High Steward is the sole judge on questions of law, but cannot vote on facts; and the facts are determined by the rest of the court (who are called "the lords triors").

III. *The Court of Criminal Appeal.*

Except for those rare errors of law which are actually (in technical phrase) "apparent on the record", the common law provided no court of appeal in criminal cases, although it made abundant provision for civil appeals. Hence the judges had recourse to the wise practice of holding informal meetings to discuss questions of difficulty which had arisen before any of them at criminal trials. By 11 and 12 Vict. c. 78 these informal meetings were superseded by the establishment of a formal tribunal —the "Court for Crown Cases Reserved"—with power to determine points of law that arose upon the trial of any prisoner at either the Assizes or the Quarter Sessions. By the Judicature Acts, this jurisdiction was transferred to the High Court of Justice, *i.e.* the lower section of the Supreme Court of Judicature. Such appeals could be made by the prisoner only, not by the Crown. But he could not make them as of right; for he could not compel the judge to reserve a point. And only questions of law could be reserved, never questions of fact. The annual number of such appeals averaged only eight.

A more comprehensive principle was established by the Criminal Appeal Act, 1907, which created a general

"Court of Criminal Appeal",[1] that can review any question whether of law or of fact. This Court now consists of the Lord Chief Justice of England along with the judges of the King's Bench Division. It may sit in several divisions; but a sitting requires a quorum of at least three judges.[2] To render impossible an equal balance of opinion, it is enacted that the number of judges present must always be an uneven one. And, further to secure certainty in the law, only a single judgment—as in the Judicial Committee—is usually to be delivered.

This Act of 1907 abolished (s. 20) a very rare form of appeal—the Writ of Error. By this, a decision of the King's Bench Division upon a point of law that was "apparent on the record" of a criminal case might be brought before His Majesty's Court of Appeal (*i.e.* the upper section of the Supreme Court of Judicature), though that Court was debarred, by s. 47 of the Judicature Act, from receiving any other form of appeal in *criminal* matters. Thence the case might be carried up to the House of Lords.

Thus, since 1907, both His Majesty's Court of Appeal[3] and (in its *collective* form) the High Court of Justice have ceased to exercise any jurisdiction as courts of criminal law.

IV. *The King's Bench Division of the High Court of Justice.*

This tribunal exercises the criminal jurisdiction of the ancient *Curia Regis*.[4] Hence, though the Lord Chancellor is the highest of the judicial functionaries of the realm, not he but the Lord Chief Justice (who presides in this

[1] For a full account of its working, see p. 586 *post*.

[2] In *Rex* v. *Norman*, [1924] 2 K. B. 315, *thirteen* sat.

[3] Except that in the *quasi*-criminal offences of obstructing (or not repairing) a highway or bridge or river, the Act of 1907 confers—s. 20 (3)—on the convicted offender the same full rights of appeal as if he were a defendant in a civil action at assizes; apparently including the right of resort to His Majesty's Court of Appeal.

[4] Anson, *Law and Custom of the Constitution*, 4th ed., ch. XII, sect. 1, § 1.

Division) is the head of our criminal judicature. And from it alone is it now usual to select the judges of assize; not from any of the other Divisions of the High Court.

Like the House of Lords, the King's Bench Division has cognisance both of matters of first instance and of matters of appeal.

(A) As a court of first instance the King's Bench Division possesses an original jurisdiction in four classes of offences. It can try (*a*) those offences (see p. 547 *post*) for which indictments are preferred before a Grand Jury of the County of London and County of Middlesex;[1] (*b*) any misdemeanor for which an information (see p. 543 *post*) has been filed by some officer of the Crown; (*c*) any indictable crime that has been committed in Middlesex. No indictments other than those falling under (*a*) have been preferred in the King's Bench Division for many years[2] and a recent committee recommended the abolition of this head of jurisdiction;[3] (*d*) any indictable crime, an indictment for which has been found in some other court (*e.g.* at Assizes) and has since been removed by *certiorari* into the King's Bench Division for trial. The reason for such a removal may be (i) in order to remove to the Central Criminal Court or some other court a case which owing to *e.g.* local prejudice is unlikely to receive a fair trial; (ii) that some question of law of unusual difficulty or importance makes desirable a trial at bar; (iii) that a view of premises by the jury is desirable; or (iv) that a special jury is required. The Business of Courts Committee[4] considered that removal to secure fair trial should

[1] Trial is at bar before three judges usually with a special jury. The Business of Courts Committee (1936 Cmd. 5066) regarded trial at bar as an appropriate procedure, but suggested that the court should have power to direct in suitable cases trial at the Central Criminal Court before three judges or a single judge.

[2] Nor has any "proper officer of the Court" been appointed under the provisions of the Administration of Justice (Miscellaneous Provisions) Act, 1933; see p. 544 *post*.

[3] Cmd. 5066, see n. 1 *supra*.

[4] Cmd. 5066.

in future be direct from one venue to another; that the power to order trial at bar in suitable cases should be preserved; that it should be possible for a jury, without any practical difficulty, to view premises where desirable; that it is unnecessary to preserve the right to a special jury, which is now only available in cases of misdemeanor.[1]

(B) In its appellate functions the King's Bench Division is much more active. They are usually exercised through two (or three) of its judges sitting as a Divisional Court. The appeals are of two kinds.

(1) By a writ of *Certiorari* the proceedings of Quarter Sessions or of any still lower tribunal—but not of Assizes or of the Central Criminal Court—may be brought before it, at the instance of either the prosecutor or the defendant, to be reviewed and, if necessary, quashed for absence of jurisdiction.

(2) By a Case being stated by justices of the peace at Petty Sessions (at the instance of either prosecutor or defendant), any question of law that has arisen before them may be submitted to the King's Bench Division. Courts of Quarter Sessions also may state a case for the consideration of the King's Bench Division, but only in regard to some matter that has come to them on appeal from petty sessions.[2]

V. *The Courts of the Commissioners of Assize.*

These ancient itinerant criminal tribunals are created by two commissions[3] issued two, three, or four times[4] a

[1] Cases removed into the King's Bench Division for trial are usually tried before a single judge, either in London, or at some Assize, but on its civil side (the King's Bench Division having no power over the criminal side of an Assize Court). In such proceedings a special jury may in cases of misdemeanor be had at the instance of either prosecutor or defendant.

[2] Criminal Justice Act, 1925, s. 20.

[3] See Stephen, *History of Criminal Law*, I, 75–144.

[4] The counties are grouped into seven circuits; one of which, the "North and South Wales circuit", has two Divisions. Of the Winter Circuits, some begin as early as Jan. 11; only Manchester, Liverpool, and Leeds have an Easter Circuit; of the Summer Circuits, some begin as

year (according to the county), to judges of the High Court and some eminent members of the bar, authorising them to try the prisoners presented for trial in the several counties for which the Assize is to be held. One criminal commission is that of Oyer and Terminer ("to hear and to determine"); giving authority to try all prisoners committed to a particular Assize. The other is that of General Gaol Delivery, giving authority to try all prisoners who are in gaol or have been released on bail; whatever may have been the Assize at which the bills against them were preferred. There is, in practice, little difference between the lists of prisoners triable under the two commissions; and the two commissions form only one document. The courts thus held, are now, by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 18, to be regarded

early as May 24; of the Autumn Circuits, some begin as early as Oct. 12. The Winter and Summer ones are civil as well as criminal; but at the Autumn one (for which some counties are grouped together) no civil business is usually taken, except in certain large towns. By the Assizes and Quarter Sessions Act, 1908 (8 Edw. 7, c. 41), power is given to dispense with the holding of any Court of Assizes, or of Quarter Sessions, if, on the fifth day before its appointed date, there are not yet any cases for it to try. And the Administration of Justice Act, 1925 (15 and 16 Geo. 5, c. 28, s. 1), empowers the Lord Chief Justice and Lord Chancellor to dispense with the holding of a forthcoming Assize at any place where no substantial amount of business is expected on that occasion. The Business of Courts Committee appointed in 1933 recommended (Cmd. 4471) the amalgamation of the North and South Wales circuits, the abolition of assizes at Appleby, Huntingdon and Oakham and four Welsh towns, and the grouping of certain assize towns for civil work and matrimonial causes. The Royal Commission on Despatch of Business at Common Law recommended (1936) that the county should be retained as the basis of the circuits but that the assize towns should not necessarily remain the same. They considered the grouping of assize towns for civil work only not worth while. They pointed out that thirty-eight out of the fifty greatest towns are excluded from the benefit of assizes and suggested that a committee might be appointed to review the present distribution of assize facilities. They considered that the power to dispense with assizes in the absence of business should be exercised by the circuit judge. They further recommended that circuits should begin at different times in order not to deplete London of judges; that civil business should be taken at all towns on the Autumn Circuit; that Birmingham should be given a fourth assize; and that the Welsh circuits should be amalgamated. See Cmd. 5065.

as branches of the High Court of Justice. They can try any indictable offence whatever, and are the most important of our criminal courts of first instance. But they have no appellate jurisdiction.

In London and its suburbs, for a population of over eight millions, the function of the Assizes is discharged by the Central Criminal Court—a special tribunal created by 4 and 5 Will. 4, c. 36; the Commissions of Oyer and Terminer and of General Gaol Delivery for the metropolitan district being addressed to the Lord Mayor and Aldermen of the City of London, along with all the judges of the High Court, the Recorder, the Common Serjeant, and others. The Lord Mayor is, titularly, the head of the commission. The sittings under these commissions are held monthly. They sometimes proceed in as many as four courts simultaneously (once, in 1911, in five); one or another legal member of the commission presiding in each of these.

VI. *General Quarter Sessions.*[1]

These, in their oldest form, are meetings of the justices of the peace[2] of a particular county; and two at least of such justices must be present. They are held once a quarter,[3] or, by adjournment,[4] oftener. One hundred and sixteen cities and boroughs have also obtained the privilege of a local Court of Quarter Sessions; presided over, however, not by justices of the peace, but by a Recorder, who is the sole judge. He must be a barrister of at least

[1] More technically, "The Courts of the Sessions of the Peace"; quarterly *or other*. Those for London try one-fifth of all the persons indicted in England and Wales and are held twice a month. But the Quarter Sessions of the *City* of London, though sitting to hear appeals, try no jury cases. These, however trivial, go to the Central Criminal Court.

[2] The title "justice of the peace" occurs as early as 1378; Rot. Parl.

[3] Within three weeks before, or after, quarter-day; Criminal Justice Act, 1925, s. 22. See p. 535 *post*.

[4] The Royal Commission on the Despatch of Business at Common Law recommends abolition of the requirement that adjournment must be to a specified date (Cmd. 5065, p. 75).

five years' standing.[1] Every Court of Quarter Sessions, whether for a county, a city or a borough, has both an original and an appellate jurisdiction.

(A) As a court of first instance it can try all indictable offences *except*[2] certain specific offences:

Treason.

Murder.

Felonies punishable with penal servitude for life on a first conviction (other than burglary[3] and offences relating to the stealing or receiving of mail bags and postal packets, which may be tried at Quarter Sessions).

Perjury (though Quarter Sessions may try offences under section 5 of the Perjury Act, 1911 in relation to statutory declarations).[4]

Bigamy.

Offences against the Criminal Law Amendment Act, 1885 (except brothel-keeping, which may be tried at Quarter Sessions).

Concealment of birth.

Libel.

Conspiracy (other than conspiracies to defraud or cheat or to commit an offence triable at Quarter Sessions when committed by one person).

Forgery (though Quarter Sessions may try offences relating to the obtaining of property of not more than £20 value).[5]

For indictable crimes not specifically excepted Courts of Quarter Sessions have a jurisdiction concurrent with that of the Assizes.[6]

[1] In the Quarter Sessions of Counties the Chairman is elected and need have no professional qualification.

[2] See 5 and 6 Vict. c. 38 and Criminal Justice Act, 1925, 15 and 16 Geo. 5, c. 86, s. 18 and Schedule 1.

[3] Larceny Act, 1916, s. 38.

[4] p. 355 *ante*.

[5] See 15 and 16 Geo. 5, c. 86, Schedule 1.

[6] Quarter Sessions of counties and boroughs try more prisoners than the Assizes and the Central Criminal Court combined. Thus in 1933 only 3365 persons were tried at the latter courts, but 5836 at Quarter Sessions.

(B) All Courts of Quarter Sessions have also an appellate[1] jurisdiction (extending to questions not only of law but even of fact) over convictions that have taken place at Petty Sessions. But its details can more conveniently be considered in connection with the latter tribunals (see p. 520).

VII. *The Coroner's Court.*

The Coroner's Court, which has a history stretching back for seven hundred years,[2] is held as a Court of Record for inquests upon cases of homicide or sudden death. But its criminal function is only to accuse and not to try. The finding of a Coroner's inquest, accusing a prisoner of murder or manslaughter or infanticide, is equivalent to an indictment and the Coroner has the same powers as to committing for trial as might be exercised by examining justices if the accused was charged before them.[3] It is the practice however in such cases also to prefer a bill of indictment. Where a person is charged before examining justices with the murder, manslaughter or infanticide of a deceased person, the coroner in the absence of reason to the contrary adjourns the inquest until after the conclusion of the criminal proceedings.[4] He

The recent tendency to enlarge the jurisdiction of Quarter Sessions has lessened the work of the judges of Assize. Many, however, consider that the increased importance of Quarter Sessions necessitates the appointment of chairmen with legal qualifications. In 1936 the Royal Commission on the Despatch of Business at Common Law recommended the enlargement of the jurisdiction of Quarter Sessions provided that legal chairmen were appointed. They noted that out of 136 chairmen and deputy-chairmen 103 had some legal qualifications. They recommended that only barristers of ten years' practice should be eligible as chairmen and that counties should be empowered to pay salaries.

[1] The Quarter Sessions for the City of London, as we have seen (*ante*, p. 501, n. 1), sit only for this appellate work and for civil business.

[2] See Pollock and Maitland, I, 379; and the introduction to the Selden Society's *Select Coroner's Rolls*.

[3] Coroners (Amendment) Act, 1926 (16 and 17 Geo. 5, c. 59), s. 25; for examining justices see p. 535 *post*.

[4] "In coroners' courts, witnesses often do not fully appreciate the responsibilities of their evidence" (Avory, J.). The strict rules as to judicial evidence are habitually relaxed at Coroners' Inquests. For their

may resume the inquest if he is of opinion that there is cause to do so after the conclusion of the criminal proceedings.[1] But if a true bill be found, the accused can be tried upon both the indictment and the inquisition together.

VIII. *Petty Sessions.*[2]

These constitute a noteworthy survival of the mediæval idea of a Popular justice (now generally superseded by the Royal justice, which acts only as Magna Charta provides (s. 45) through professional experts "*qui sciunt leges regni*"). For they are composed of justices of the

proceedings are investigations rather than trials. The coroner "is bound to collect, as far as he can, all information and knowledge from neighbours and others who can throw any light upon the cause of death" (Wills, J.). So hearsay evidence is freely taken but the jury, before finding a verdict that accuses any person of *crime*, should disregard everything except strictly legal evidence; see Jervis on Coroners, pp. 15, 255. A departmental committee on coroners (1936, Cmd. 5070) recommended that the strict rules of evidence should be observed in cases involving criminality and that persons suspected of homicide should only be called at their own desire and should not be cross-examined. They further recommended that a coroner's inquest should be in no way concerned with civil liability.

[1] Coroners (Amendment) Act, 1926 (16 and 17 Geo. 5, c. 59), s. 20. The committee on coroners (*ante*, p. 503 n. 4) recommended that coroners should no longer have power to commit for trial, and that an inquisition should not name any person as guilty of murder, manslaughter or infanticide.

[2] This is a modern term; of somewhat uncertain origin and meaning. "There is some difficulty", said Patteson, J., "in saying what is a Petty Session" (8 C. and P. 440). The current definitions limit it to cases where *two or more* justices are present. But it is difficult to see what other name than it can be given to a court held by a single justice when exercising (*post*, p. 509) his summary jurisdiction. The term "Session" does not itself involve any idea of plurality. For every Recorder, though sitting alone, is said to hold a Session; and an alderman of the City of London, though sitting alone, can constitute a petty sessional court (52 and 53 Vict. c. 63, s. 13 (12)), and therefore, *a fortiori*, a petty session. Some writers, who require two justices, seem to suppose a court of petty sessions to be identical with a petty sessional court; but two justices, if sitting in an "occasional" court-house, would admittedly constitute the former, yet would not constitute the latter. In two statutes relating to Ireland (6 and 7 Will. 4, c. 34, ss. 2, 7, and 14 and 15 Vict. c. 92, s. 1) a *single* justice is spoken of as constituting a Petty Session.

peace, gentlemen or ladies,[1] not necessarily of legal experience, nominated to their office by the Lord Chancellor; who acts on the advice of the Lord Lieutenant assisted by an advisory committee in the case of the county justices, and of separate advisory committees in the case of borough[2] justices. By being held in every locality, and with great frequency, Petty Sessions effectively secure public order and tranquillity. By them mainly is the popular standard of justice educated. In the scale of dignity such sittings of justices of the peace are the lowest of our criminal courts; but the amount of work done by them is so vast that they play a far more important part in our penal system than some tribunals of much greater dignity. "They have to deal with a wider range of subjects and a greater variety of cases than even a judge of the High Court."[3] The vast majority—say, about two-thirds of a million annually—of our criminal cases are entirely disposed of by justices in their Petty Sessions; and the remainder are usually commenced before them. There is an obvious advantage in the association of laymen with the administration of justice, and the State is a gainer from the services performed unpaid by lay magistrates. Moreover the majority of questions falling to be decided by Petty Sessions turn on points of fact not points of law and in handling such cases justices discharge their duties in the main with success. In the view, however, of many people it is an anomaly that persons without any legal training should be called upon to interpret Acts of Parliament and decide points of law.[4] It has been suggested that more stipendiary

[1] See p. 566.

[2] For now the Crown may, on the petition of any borough, grant it a separate commission of the peace. But the persons appointed to act as justices under this are not thereby authorised to act in any Quarter Sessions.

[3] Troup's *Home Office*, p. 79.

[4] For a well-argued statement of this point of view see a paper read to the Law Society by J. S. Walsh, LL.B. reprinted in 180 L. T. Jo. at p. 239.

magistrates[1] should be appointed to deal with major matters and cases involving difficult questions of law.[2] Such stipendiary magistrates might sit on circuit in the same way as County Court judges. Such a change would be of even more importance should the jurisdiction of Petty Sessions be increased yet further (see p. 519 *post*).

In exercising some of their many functions they do not constitute a court of law (although they may have to sit in public, and to take evidence and act on it); as in some of their licensing duties.[3] In others, although they do constitute a court, it is not one of summary jurisdiction; as when conducting a merely preliminary examination into some grave charge, which they will send to be tried by a jury.[4] And even when sitting as a court of summary jurisdiction, to try a charge and adjudicate upon it finally, they do not always constitute a "Petty Sessional Court"; as when sitting in a building which they only occasionally use.[5]

By the Children and Young Persons Act, 1933,[6] a court of summary jurisdiction, when dealing with any case that concerns a person under seventeen, with no adult co-defendant, is called a "Juvenile Court". It (*a*) must sit either in a different room, or else on a different day, from its ordinary one: and (*b*) must exclude all persons, except those directly concerned in the proceedings and the newspaper reporters. Juvenile Courts consist of special panels of suitably qualified justices appointed by the justices of each petty sessional division from their own number. A

[1] See p. 508 *post*, note 3. [2] See p. 505 *ante*, note 4.

[3] For the decision in *Boulter* v. *Justices of Kent*, [1897] A. C. at pp. 563, 573, narrows the wide definition of "court of summary jurisdiction" given in the Interpretation Act, 1889. When sitting thus (*i.e.* not "judicially" but "administratively"), they may act on *un*sworn testimony or on their own knowledge.

[4] *Post*, p. 532.

[5] *Post*, p. 509. Yet they still are a "Petty *Session*".

[6] 23 Geo. 5, c. 12, ss. 45–49. Juvenile Courts were first established by the Children Act, 1908 (8 Edw. 7, c. 67).

regular chairman must be appointed wherever practicable. In the Metropolitan Police Area a juvenile court consists of a metropolitan magistrate specially nominated for the purpose, and two justices, one a woman, chosen from a panel of justices nominated by the Home Secretary. When an offence has been proved or the grounds of an application have been established evidence with certain safeguards may be taken in writing, and the parent or guardian, or the child or young person may be required to withdraw from the court.[1] The words "conviction" and "sentence" may not be used in relation to children or young persons dealt with summarily.[2]

[1] Summary Jurisdiction (Children and Young Persons) Rules, 1933.
[2] 23 Geo. 5, c. 12, s. 59.

CHAPTER XXIX

SUMMARY PROCEDURE

THE summary jurisdiction of justices of the peace is the creation of statutes. Parliament has thus immeasurably extended the common-law powers of justices, whilst at the same time reducing to a minimum[1] their legal responsibility; and the steady tendency of modern legislation is towards giving enhanced importance to these courts of summary jurisdiction. It is advisable, therefore, to consider their procedure somewhat fully.

This summary jurisdiction is not exclusively criminal, but extends also to a few civil cases. It may in some matters be exercised (though even in them only to a limited extent) by a single justice; but in most it is necessary to have either two ordinary justices[2] or a Stipendiary magistrate or a Metropolitan Police magistrate.[3] It is subjected to a stringent limitation of Time; for the proceedings must be begun within the six months following "the time when the matter arose".[4] And for its exercise a prescribed Place of meeting is now made essential, in order to secure ready access for the public. Two classes of such places are recognised.

[1] 11 and 12 Vict. c. 44. See Wade and Phillips, *Constitutional Law*, 2nd ed., pp. 257–258.

[2] If several justices sit, the majority decide; the Chairman has no casting vote. Accordingly if the votes be equal, the matter must either drop in order to be renewed before a different Court, or else one justice must withdraw his vote—perhaps the junior, or one whose vote is opposed to that of the Chairman.

[3] The latter two classes of magistrates must be barristers of several years' standing; each accordingly is empowered to exercise all the power that a full petty-sessional court of two justices would possess. "Stipendiaries" are appointed in some provincial towns; if one sits with other justices, he has only a single vote. But a "Metropolitan Police magistrate"—there are twenty-five such, sitting at fourteen courts—is the sole judge, even though other justices be on the bench with him.

[4] 11 and 12 Vict. c. 43, s. 11. Exceptions are rare. Cf. p. 486 *ante*.

(1) The habitual place of meeting of the justices of the locality—their "petty sessional court-house".[1] *Two* justices, by sitting here, constitute themselves a "Petty Sessional Court"; and such a court alone can exercise the summary jurisdiction to the full. For a single justice, wherever sitting, can only hear certain classes[2] of cases; and even in them he can pass only a limited sentence—an imprisonment of not more than fourteen days, or a fine of (including costs) not more than twenty shillings.[3]

(2) In counties, even the area of a single petty sessional division may be so wide as to make it convenient to provide in it subsidiary places of meeting for use in case of emergency. Such a place is called an "occasional court-house".[4] When sitting in it, even a bench of two or more justices can inflict no greater sentence than that which a single justice could; though they are not limited to his range of cases.[5]

Justices can compel the attendance of any witness in any case before them (alike in their summary jurisdiction,[6] both civil and criminal, and also in their preliminary hearings of indictable offences), by issuing a summons to him to come,[7] or even, in case of need, a warrant to bring him. The hearing of any matter within the summary jurisdiction is commenced by stating to the defendant the substance of the information or complaint.[8] If he denies its truth, the case proceeds. The prosecutor, or complain-

[1] As to "Juvenile Courts", see p. 506 *ante*.
[2] *E.g.* "Found drunk" in a public place; Vagrancy offences.
[3] 42 and 43 Vict. c. 49, ss. 20 (7), 20 (9).
[4] *Ibid.* s. 20 (4).
[5] s. 20 (7).
[6] 11 and 12 Vict. c. 43, s. 7.
[7] Or to produce documents or things; 4 and 5 Geo. 5, c. 58, s. 29.
[8] The "information" (or, similarly, the "complaint") is at once the foundation of the justices' jurisdiction and the definition of the charge (*Reg.* v. *Hughes* (1879), 4 Q. B. D. 614); it is in the nature of an indictment. (The summons or warrant is, on the other hand, a mere process to secure the defendant's presence; and consequently its absence or its illegality does not affect the jurisdiction of the court, so long as he is in fact present

ant, opens his case by a speech; and then calls his witnesses, who are examined in chief, cross-examined, and re-examined. The defendant may then similarly open his case, and his witnesses are similarly heard. The other party may then, if necessary, call rebutting evidence. But neither side has (as at trials before a jury) any right to make a second speech; unless some point of law arises. The decision of the justices is then given. If it be against the defendant, they have power, both in civil and in criminal cases, to adjudge him to pay to his opponent such costs as they shall think fit. If, on the other hand, they dismiss the case, they can similarly direct costs to be paid to the defendant; or by him, if the charge was (see p. 514) proved. There is, however, no power, as in the case of indictable offences (see p. 517 *post*), to order the payment of the costs of the prosecution or defence out of public funds, though where costs are awarded against a police prosecutor they will of course be paid out of police (and so public) funds.

The summary jurisdiction of Petty Sessions covers, as we have said, both civil and criminal cases.

before it to answer to the accusation.) But the charge so defined need not be adhered to with such strictness as an indictment is. For, as Lord Russell said, the hearing is not "of", but only "based on" the information. By 11 and 12 Vict. c. 43, ss. 1, 9 the justices may disregard any small variance between the information (or complaint) and the evidence adduced in support of it, and give judgment against the defendant accordingly; unless he has been so far misled by the variance that it is right to adjourn the proceedings to enable him to meet the charge in the shape it has now assumed. (But they are not authorised actually to "amend" the summons or information or complaint, as is so often done, in order to fit it to the unexpected evidence that is thus given.) This provision, however, only applies to variances in the mere circumstances of the charge; not to evidence which discloses some charge legally different from that alleged in the information or complaint, even though the difference be only that between being "drunk and riotous" and being "drunk", *Martin* v. *Pridgeon* (1859), 1 E. and E. 778. In *Rex* v. *Southampton Justices, ex p. Tweedie* (1932), 48 T. L. R. 636, a conviction was quashed where justices convicted of careless driving where the charge was one of dangerous driving, but see now Road Traffic Act, 1934, s. 35. See also p. 174 *ante*.

(1) The civil jurisdiction is the less important. Amongst the matters coming within it are bastardy[1] proceedings; disputes between employers and workmen; matrimonial separations; claim for District rates, or for contributions due under Public Health Acts from the owners of house property, for making streets or repairing sewers (contributions which are sometimes of large amount).[2] These civil proceedings are commenced by a "complaint". It is never made on oath, and need not be made in writing.[3] Only a summons can in the first instance be issued; though, should the defendant fail to appear in obedience to the summons, a warrant for his arrest may then be issued, if the complainant substantiates his claim upon oath.[4] As in all other civil proceedings, the defendant can be compelled to give evidence on oath. If the case be decided in favour of the plaintiff, there can only be made an order to pay money, which creates a mere "civil debt". Hence payment of it cannot be enforced by imprisonment; except in case of wilful non-payment[5] when the defendant has it in his power to pay; and even then it is only a civil and not a criminal imprisonment.

(2) But in criminal cases the summary jurisdiction covers some hundreds of offences; *e.g.* many forms of dishonesty or of malicious damage, acts of cruelty to animals, transgressions against the by-laws that secure order in streets and highways, numerous motoring offences, and violations of the laws relating to game, intoxicating liquors, adulteration of food, revenue, public health, and education.[6] The proceedings commence with

[1] In 1933 there were 6527 applications for affiliation orders; 5353 of which were successful.

[2] *E.g.* £546 from one estate, *Corbett* v. *Badger*, [1901] 2 K. B. 278.

[3] 11 and 12 Vict. c. 43, s. 8.

[4] *Ibid.* s. 2.

[5] As to bastardy and maintenance orders see Money Payment (Justices Procedure) Act, 1935 (25 and 26 Geo. 5, c. 46), s. 8.

[6] Occasionally a severe pecuniary penalty is possible; *e.g.* that for keeping a gaming-house may amount to £500 (17 and 18 Vict. c. 38, s. 4);

an "information", laid before a justice of the county where the offence was committed,[1] which (unlike a "complaint") must usually be in writing;[2] and may (though it need not) be on oath. Any information or complaint is sufficient if it contains a statement of the specific offence with which the accused is charged together with such particulars as are necessary for giving reasonable information as to the nature of the charge. Technical terms are not required, and the offence is to be described in ordinary language. If the offence is created by statute, the section creating the offence must be referred to.[3] If it be on oath a warrant may, even in the first instance, be issued for the arrest of the defendant.[4] If it be not on oath, only a summons can be issued in the first instance;[5] though if the defendant fails to appear in answer to the summons, a warrant can then be issued.[6]

and so may that upon a railway company which provides any special facilities for conveyance to a prize fight (31 and 32 Vict. c. 119, s. 21). In 1921 fines of £2000 and £2500 were inflicted at Old Street police-court on smugglers.

[1] A justice in whose district there resides or is a person suspected of having committed an offence punishable summarily may issue a warrant, as if the offence had been committed within his jurisdiction; but the warrant should direct that the offender be taken before a court having jurisdiction to deal with the offence. Where a joint trial of two offenders (whether charged with indictable or summary offences) is desirable, a justice within whose jurisdiction one of the offenders is in custody or is being tried may issue a warrant against the other offender (Criminal Justice Act, 1925, s. 31).

[2] You "lay" an Information, but "make" a Complaint.

[3] Criminal Justice Act, 1925, s. 32.

[4] 11 and 12 Vict. c. 43, s. 2.

[5] For the comparative statistics see p. 532 *post*. In London police courts, it is the courteous practice that defendants who appear on a summons stand outside the "dock"; and only those who have been arrested have the humiliation of going inside it.

[6] By the common law anyone accused of crime must appear in person at the bar of the criminal court. But, by statute, courts of summary jurisdiction, as the offences are trivial, may try an offender in his absence, except in London (11 and 12 Vict. c. 43, s. 13). Thus if a defendant who has been served with a summons does not appear at the appointed time, the justices may either issue a warrant to bring him up, or they may instead proceed to hear and determine the case without him.

At the hearing, as the proceedings are criminal, the defendant cannot be compelled to give evidence; though since the Act of 1898 (*ante*, p. 474) he now can do so if he desires. If the hearing results in a conviction the sentence may impose imprisonment (which can only very rarely exceed six months) or a fine; and payment of the fine is enforceable by (criminal) imprisonment.[1] Imprisonment may not be for less than five days. In lieu thereof there may be ordered police custody for a period not exceeding four days or detention for one day in the precincts of the court.[2] Imprisonment for non-payment of a fine may not be ordered forthwith unless the court is satisfied that the person sentenced has means to pay, or unless upon being asked he expresses no desire for time to pay, or has no fixed abode, or unless for some special reason the court expressly directs that no time shall be allowed.[3] When time is allowed the court must not on that occasion impose a period of imprisonment in default of payment unless there are special circumstances, *e.g.* the gravity of the offence or the character of the defendant.[4] On a subsequent occasion imprisonment in default may be imposed but only after an enquiry as to the defendant's means made in his presence.[5] Instead of ordering imprisonment in default of payment the Court may order one day's police custody.[6] Persons given time to pay fines may be placed under supervision,[7] and persons under twenty-one so given time must be placed under supervision unless the court is satisfied that supervision is impracticable or

[1] But without *hard* labour; Criminal Justice Administration Act, 1914, s. 16 (1). A convicted "juvenile adult" (*post*, p. 600) may be sent on to Assizes or Quarter Sessions to be *there* sent to a Borstal institution.

[2] Criminal Justice Act, 1914, ss. 12 and 13.

[3] *Ibid.* s. 1 as amended by 25 and 26 Geo. 5, c. 46.

[4] Money Payment (Justices Procedure) Act, 1935 (25 and 26 Geo. 5, c. 46), s. 1 (1).

[5] *Ibid.* s. 1 (3).

[6] *Ibid.* s. 4.

[7] *Ibid.* s. 5.

undesirable.[1] The justices are invested in these criminal cases with a remarkable statutory power of shewing mercy. For if, though the charge is proved, they think it unwise[2] actually to punish, they may, without necessarily proceeding to conviction,[3] discharge the offender on his giving security to be of good behaviour and appear when called on; or they may even, in spite of the charge being proved, dismiss it altogether. But, in taking either course, they may, if they like, order the defendant to pay to the prosecutor, as damages, any sum up to twenty-five pounds[4] (cf. p. 108 *ante*), and to pay costs.

The summary criminal jurisdiction was originally concerned only with non-indictable offences; but it has since been extended to many cases of indictable ones. Thus, as already mentioned,[5] assaults (when not so grave as to be of a felonious character[6]) may be thus tried, provided that the person assaulted be himself the prosecutor. And, by consent of the accused, charges of libel when brought against the publishers of a *newspaper*[7] may also be tried summarily. And even cases of felony may be thus tried.

By the Summary Jurisdiction Acts, 1879 and 1899,[8]

[1] *Ibid.* s. 9. A person allowed to pay by instalments is a person given time to pay, *ibid.* s. 15.

[2] *E.g.* from the character, antecedents, age, health, or mental state of the offender; or from the triviality of his offence, or the extenuating circumstances. Cf. p. 602 *post.*

[3] The Social Services Committee (1936) considered that a conviction should always be recorded.

[4] 16 and 17 Geo. 5, c. 13, s. 1. Even now "it would be well"—as Lord Brampton said long ago—"if justices oftener bore in mind this power of awarding damages".

[5] *Ante*, p. 185. As to magisterial Orders for matrimonial separation after an *aggravated* assault, see p. 186 *ante*.

[6] 24 and 25 Vict. c. 100, ss. 39, etc. And when not charged as an "affray", *i.e.* fighting in a public place, so as to cause general affright.

[7] 44 and 45 Vict. c. 60, s. 5. But the libel must be only of a trivial character and the only punishment that can be inflicted is a fine (which must not exceed £50).

[8] And *now* the Criminal Justice Act, 1925, s. 24 and Children and Young Persons Act, 1933 (23 Geo. 5, c. 12), Sched. III. See also as to the punishment of children, p. 579 *post.* Six-sevenths of all the trials for indictable offences take place thus.

power was given to Petty Sessional Courts to deal summarily with three large classes of offenders, whom previously they could only have committed for trial by a jury in a higher court. In the case of adults and young persons the power is only to be exercised if the court thinks it expedient, having regard to any representation made by the prosecutor, the character and antecedents of the accused, the nature of the offence and the absence of circumstances rendering the offence one of a grave or serious character. If at any time during the hearing of a charge against an adult or young person the court becomes satisfied that it is expedient to deal with the case summarily the consent of the accused must be obtained.[1] The charge must be reduced into writing and read to the accused who must then be asked: Do you desire to be tried by a jury, or do you consent to the case being dealt with summarily? If the court thinks it desirable, the meaning of summary trial should be explained and the accused should be informed of the assizes or quarter sessions at which he would be tried.[2] Where a case affects the property or affairs of His Majesty or a public body, or the prosecution is being carried on by the Director of Public Prosecutions, the consent of the prosecution is also necessary if the accused is an adult.[3] The three classes who may thus be dealt with are the following:

(i) "Children" under fourteen, when charged with any indictable offence whatever, except homicide. But the punishment must not exceed one month in a remand home or a fine of forty shillings, with or without a whipping; and a whipping may be ordered alone.[4]

[1] Such consent is usually given readily, in order to avoid the risk of imprisonment while awaiting trial, and of receiving a severer sentence than it is possible for the Petty Sessions to inflict. See p. 516 *post*.

[2] Criminal Justice Act, 1925, s. 24 (2) and 42 and 43 Vict. c. 49, s. 11 as amended by 23 Geo. 5, c. 12, Sched. III.

[3] Criminal Justice Act, 1925, s. 24 (1).

[4] 23 Geo. 5, c. 12, s. 54 and Sched. III. Even in cases of felony the child may be merely fined, 4 and 5 Geo. 5, c. 58, s. 15 (3). No whipping for girls. See also p. 579 *post*.

Children charged with offences other than homicide must be dealt with summarily, unless some person other than a child is charged jointly with a child and is committed for trial, in which case, if the interests of justice demand it, the child also may be committed for trial.[1]

(ii) "Young persons", from fourteen until seventeen years of age,[2] when charged with any indictable offence whatever, except homicide. The limit of punishment is, however, extended to three months' imprisonment, with or without hard labour (but only if too unruly or depraved for mere "custody in a remand home"); or, instead, to a fine of £10.[3]

(iii) Adults (*i.e.* those who have reached seventeen) only when charged with certain particular offences (Criminal Justice Act, 1925, s. 24 and Sched. II); the chief ones being:

Simple larceny, thefts punishable like larceny, stealing from the person, stealing fixtures, stealing electricity, stealing by lodgers, stealing in a port or dock, stealing trees or shrubs in private grounds, stealing by a clerk or servant; embezzlement, obtaining by false pretences, obtaining credit by fraud, receiving stolen goods, falsification of accounts; arson of crops, malicious damage (even when over £5); false statutory declarations; assaults occasioning actual bodily harm, inflicting grievous bodily harm, indecent assaults on persons under sixteen, attempts at suicide; procuring, abetting, or inciting to, any offence which can be dealt with summarily.

But the punishment must not exceed six months with hard labour, or a fine of £100, or both. And for merely inciting to commit an offence punishable summarily the maximum punishment must be no greater than for actually committing that offence.

[1] 23 Geo. 5, c. 12, Sched. III.

[2] See 23 Geo. 5, c. 12, Sched. III.

[3] Summary Jurisdiction Act, 1879 (42 and 43 Vict. c. 49), s. 11. See also as to punishment of young persons, p. 579 *post*.

By a converse innovation, the Summary Jurisdiction Act, 1879, has made it possible for the graver of the non-indictable offences to be dealt with, instead, by indictment. For it enacts (s. 17) that (except in the case of children[1]) any offence (except assault) for which, on summary conviction, a sentence of imprisonment for more than three months can be imposed, shall be dealt with by indictment if at the hearing, before the charge has been gone into, the defendant claims to be tried by a jury.[2] Accordingly when any person appears before justices upon a charge of any such offence, they must—before taking any evidence—inform him of his right to be tried by a jury.

When dealing summarily with indictable offences the justices may now order the convicted defendant to pay the costs of the prosecution, or may order the costs of the prosecution or defence to be paid out of public funds (8 Edw. 7, c. 15, s. 1 and 6, see p. 583 *post*). Their consecutive sentences, for his two or more *indictable* offences, must not exceed in the aggregate twelve (for *un*indictable, six) months.[3]

An important restriction upon *all* exercise of summary jurisdiction by justices must be noticed. In consequence of the difficulties of the English law of land, they have immemorially been debarred from dealing with any question which involves the decision of a *bonâ fide* and legally possible claim to real property or to some right therein. Hence if a riotous crowd pull down the fences enclosing a gentleman's estate, which they reasonably, even though erroneously, believe to be common land, the justices cannot try them.

The practical importance of the various powers of justices is vividly shewn by our criminal statistics. Thus,

[1] 23 Geo. 5, c. 12, Sched. III.
[2] 42 and 43 Vict. c. 49, s. 17 (2).
[3] Criminal Justice Administration Act, 1914, s. 18.

in 1933, in addition to all the civil cases and to several thousand merely "quasi-criminal" ones, which they determined, they decided summarily no fewer than 578,431 charges of petty offences,[1] as well as 61,264 charges of indictable offences against persons who elected to be tried summarily; besides committing 9201 persons for trial before jury.[2]

An American observer has described the policy of enlarging the power of the courts of Summary Jurisdiction to hear and determine indictable offences as the most important development in the administration of English criminal justice during the last half century.[3] It has resulted undoubtedly in more expeditious trials and a material saving in expense. But many cases are dealt with summarily which, owing to their importance or difficulty, should be tried before a jury. Moreover, in order to bring cases within the jurisdiction of justices, there is a tendency to ignore the more serious elements

[1] Such charges are proved in about eight cases out of every nine. Of the petty offences proved, only about a thirtieth end in Imprisonment.

[2] A further and a noteworthy (though not a strictly official) service rendered by these courts in London (and sometimes elsewhere) is that of giving advice *in camerâ* to the poor in their difficulties. Sir James Vaughan, the late Chief Magistrate of the Metropolis, says: "To our courts the poor resort with confidence; they come and lay before us their own various troubles and difficulties, and cases of oppression which they have met with; and they ask our advice. The confidence thus engendered amongst the people of a district is such that very many wrongs are redressed without issuing any summons at all, simply by the magistrate's sending a message by a constable to the party complained about." A French eyewitness of these consultations found "quelque chose de frappant à voir la confiance qu'ont les malheureux dans la bonté des magistrats. C'est pourquoi la justice reste toujours populaire". (Franqueville, *Syst. Jud. G.-B.* II, 326.)

Continental observers are moreover surprised to find in every London police-court, and in many provincial ones, both a Poor-box and a Police-court Missionary. In fully four hundred courts of Petty Sessions there are now such Missionaries, male or female—working with a success universally recognised.

[3] *Criminal Justice in England*, by Pendleton Howard (New York, Macmillan Co., 1931), an invaluable description and criticism of English procedure upon which the editor has drawn freely and which every student should read.

and to deal with cases on a less serious basis, *e.g.* housebreaking is treated as larceny.[1] The police are more interested in conviction than punishment. The result of this tendency is that the criminal jury is becoming obsolescent. High Court judges have pointed out that the practice of dealing summarily with indictable offences of a serious nature is becoming far too common. The power should only be exercised when there is an absence of circumstances rendering the offence of a grave or serious character. The importance attached to these criticisms depends upon the value attached to trial by jury. As the same learned writer points out, the antiquity of an institution is no adequate proof of its utility. Trial by jury probably leads to many guilty persons being acquitted, but undoubtedly provides a greater safeguard for an innocent defendant than trial before a bench of lay magistrates. There are, however, many anomalies in the present system which are pointed out by those who advocate the extension of summary jurisdiction. Thus a man who steals jewellery worth a hundred pounds from an open house may be tried summarily, while a man who opens a closed door and steals a packet of cigarettes may not. Similarly a man who steals a valuable motor-car can be dealt with summarily, while a man who fails to account for £5 of his fellow-workmen's money entrusted to him to save must be tried at assizes or sessions.[2]

Appeals from Petty Sessions

There are, as we have already seen (pp. 499, 503), two tribunals by which the summary proceedings of justices may be reviewed; the King's Bench Division and the Quarter Sessions.

[1] For a strong animadversion on this practice see *Rex* v. *Bennett* (1928), 20 Cr. App. R. 188.

[2] See paper read to the Law Society by J. S. Walsh, LL.B., reprinted in 180 L. T. Jo. at p. 239.

(1) The control of the King's Bench Division is exercised in two ways:

(*a*) It may issue a writ of *certiorari* to bring up a conviction, and quash it, if necessary, for some defect of jurisdiction which vitiates it; *e.g.* if the justices have convicted on an "information" that was not laid within the six months.[1]

(*b*) It may determine any case which justices have themselves stated for its decision, as to any point of law that has been determined by them[2] (whether apparent on the face of the proceedings, or not); *e.g.* where they have overruled a defendant's objection that the evidence against him was not legally sufficient to support a conviction. They may state such a case at the instance of either party; not like appeals from trials before juries, which can only be (p. 587 *post*) at the instance of the defendant.[3] A case may probably[4] be stated at the instance of the prosecutor where a defendant is acquitted of an indictable offence tried summarily, but not where examining justices refuse to commit for trial.[5]

(2) The appellate jurisdiction of Quarter Sessions is not, like that of the King's Bench, coextensive with the whole range of the summary jurisdiction of justices. It arose first in the case of particular offences to which it was expressly attached by the respective statutes that prohibited them. And for most of the non-indictable offences such an appeal came to be thus allowed to the defendant; and occasionally even to the prosecutor. But, now, the Criminal Justice Administration Act, 1914, has made a

[1] *Ante*, p. 508. This Division may also intervene to compel justices to perform duties devolving upon them; *e.g.* by granting a Mandamus, or rule, requiring them to issue a summons or to hear and determine a charge.

[2] 20 and 21 Vict. c. 43, s. 2; 42 and 43 Vict. c. 49, s. 33.

[3] Even when justices have refused to state a case, the King's Bench Division may order them to do so (42 and 43 Vict. c. 49, s. 33).

[4] *Hood* v. *Smith* (1933), 98 J. P. 73, but see 98 J. P. Jo. 283.

[5] See 93 J. P. Jo. 280.

general provision that any person aggrieved by any conviction of a court of summary jurisdiction, for any offence,[1] may appeal to Quarter Sessions (unless in the lower court he admitted his guilt when he may only appeal against sentence[2]). On the other hand, these appeals are not—like those to the King's Bench Division—limited to questions of law; for the Quarter Sessions hear the whole case again[3] (even new witnesses, who were not heard at Petty Sessions, being admissible).

The number of appeals to Quarter Sessions from justices was very small. Considerations of expense had much to do with this and in 1933 there was passed the Summary Jurisdiction (Appeals) Act, 1933[4] to amend the law relating to appeals from courts of summary jurisdiction. Under this act the powers and duties of County Quarter Sessions[5] in respect of appeals from courts of summary jurisdiction are to be delegated to a committee of the justices of the county to be known as the appeal committee.[6] The committee acts by a court consisting of not less than three, nor more than twelve members, who sit without a jury. The committee is to be chosen as far as is practicable from justices having special qualifications for the hearing of appeals. Appellants may no longer be compelled to enter into recognizances[7] to pay costs, but only to present their appeal with diligence, and in fixing the

[1] 4 and 5 Geo. 5, c. 58, s. 37 (1). Even for an *indictable* offence; though previously no appeal was allowed in such cases. But there is no similar *general* right of appeal from Petty Sessions in civil cases.

[2] Criminal Justice Act, 1925, s. 25. An appeal is allowed against a Probation Order, *ibid.* s. 7.

[3] Accordingly it is not here, as in appeals in higher courts, for the appellant to shew that the decision of which he complains was wrong; but for the respondent to shew that it was right. Hence, if the prosecutor does not appear, the Quarter Sessions will have to quash the conviction, *Reg.* v. *Surrey Justices*, [1892] 2 Q. B. 719; unless the appeal is against sentence only, *Rex* v. *Kent Justices* (1935), 52 T. L. R. 78.

[4] 23 and 24 Geo. 5, c. 38.

[5] Other than the County of London as to which see *ibid.* s. 8.

[6] *Ibid.* s. 7.

[7] See p. 541 *post.*

amount of recognizances, justices must have regard to the appellant's means.[1] Free legal aid may be given to appellants.[2] In awarding costs to be paid by any party to an appeal regard must be had to his means,[3] and where an appeal is allowed there may be included in the costs to be paid to the appellant the costs properly incurred before Petty Sessions.[4] A case may be stated by the appeal committee for the decision of the King's Bench Division upon a point of law in the same way that justices in Petty Sessions may state a case.[5] The appeal committee may on an appeal award a punishment either greater or less than that awarded by the court of summary jurisdiction.[6]

[1] *Ibid.* s. 1.
[2] *Ibid.* s. 2.
[3] *Ibid.* s. 5 (1).
[4] *Ibid.*
[5] Criminal Justice Act, 1925, s. 20.
[6] 23 and 24 Geo. 5, c. 38, s. 1.

CHAPTER XXX

ORDINARY PROCEDURE

I. Preliminary Steps

From the modern and purely statutory form of procedure which prevails in courts of summary jurisdiction, we now pass to the more ancient form which prevails in those courts where offenders are tried in the common-law manner, that is to say, by a jury. In this procedure—still styled "ordinary", though now far rarer than the summary—there are ten possible stages which call for explanation. These are: 1. Information; 2. Arrest; 3. Commitment for trial; 4. Prosecution, *i.e.* Accusation; 5. Arraignment; 6. Plea and issue; 7. Trial and verdict; 8. Judgment; 9. Reversal of judgment; 10. Reprieve or pardon.

During the greater portion of the history of English criminal law its provisions for the detection and arrest of offenders were,[1] as we have said,[2] very defective. In the earliest times, indeed, excellent provision had been made by the system of Frankpledge.[3] A frankpledge was a group of adult males—sometimes all those within a particular township, sometimes only a "tithing" or group of ten, selected individually—who were liable to amercement if they did not surrender to justice any one of their number who committed a crime (each individual in the group is sometimes also called a "frankpledge"). This institution apparently only existed south of the Humber; but probably arose there as far back as the Anglo-Saxon period. From at least the time of Henry I a "view of

[1] "In 1800, in no department of English government was inefficiency so pronounced as in that of police"; W. L. M. Lee's *History of Police*, p. 214.

[2] *Ante*, p. 339.

[3] Pollock and Maitland, I, 568.

frankpledge" was taken by the sheriff periodically, at which the above-mentioned amercements were collected. After the frankpledges fell into decay in the fourteenth century, England possessed no effective machinery for arresting criminals or for preventing the commission of crime, until the creation, by Sir Robert Peel's energy, of the modern police force. Even in London, as is stated in the preamble to his Act of 1829, "the local establishments of nightly watch and nightly police were found inadequate to the prevention and detection of crime, by reason of the frequent unfitness of the individuals employed, the insufficiency of their number, the limited sphere of their authority, and their want of connection and co-operation with each other". But since the successive establishment of metropolitan, borough, and county police-forces, the detection of offenders has become extremely efficient. In 1933 the Police took proceedings for indictable offences against 72,206 persons and only 7785 were discharged or acquitted.[1]

Rewards are no longer offered officially for information. They are now discredited as creative of false testimony and as impairing the weight of true.

1. *Information.*

Every justice of the peace has by his commission the duty of "conserving the peace" by taking active steps to exact securities from suspected persons, to suppress riots, and to apprehend offenders. These duties he still actively exercises (though the judges of the King's Bench Division, on whom also they are conferred, have long ceased to do so, regarding as more constitutional a differentiation of

[1] "Forty years ago", said Sir C. Mathews in 1912, "it was an everyday occurrence for defendants' counsel, when there was no defence, to attack the credit of the policemen witnesses. To-day this practice has become almost obsolete."

function which keeps the judicial office apart from all the strictly executive work of government).

Hence in ordinary procedure, just as in summary, the first step usually is to lay an "information" before a justice of the peace.[1] It may be laid by any person who is aware of the facts, whether or not he be the person aggrieved. The requirements for an information of an indictable offence are similar to those for an information of a summary offence (see p. 512 *ante*).

2. *Arrest.*

Where there is good ground for supposing—as, for instance, from the gravity of the charge—that a mere summons would not suffice to secure the attendance of an accused person, he should be arrested,[2] in order to bring him before a magistrate. On accusations of indictable offences, a warrant is sometimes obtained—only in about ten per cent. of the arrests for such crimes—in order to authorise the arrest. But the cases in which arrest is legally permissible, without any such special authorisation, are numerous (see p. 528 *post*). In the case of certain crimes, search warrants may be issued.[3] Apart too from

[1] *Ante*, p. 512. The justice may belong either to the county where the offence was committed or to that where the offender is, 11 and 12 Vict. c. 42, s. 1. Do not confuse such informations with the far rarer and more formal "informations" by officials of the Crown, which are a substitute for indictments; *post*, p. 543. As to joint offenders see p. 512, n. 1 *ante*.

[2] See Pollock and Maitland, *Hist. Eng. Law*, II, 582.

[3] *E.g.* the receiving of stolen goods (for full list see Lieck, *Criminal Justices Act*, 1925, Appendix III). Where a judge of the High Court is satisfied by information on oath that there is reasonable ground for suspecting that an offence under the Incitement to Disaffection Act, 1934 (p. 325 *ante*), has been committed, and that evidence of the commission thereof is likely to be found at any premises specified in the information, he may on the application of a police inspector grant a warrant to search the premises, by force if necessary, and to seize anything found on the premises or on any person found therein which there is reasonable ground for suspecting to be evidence of the commission of such an offence, Incitement to Disaffection Act, 1934, s. 2.

specific crimes there is a general right to search arrested persons, and on arrest any property may be taken which is found in the possession of the arrested person and which would form material evidence on the prosecution of any criminal charge against *any* person.[1] Articles or documents taken must be returned on the conclusion of the charge upon which they are material.[1]

I. Special authorisation for arrest always takes in modern times the form of a written warrant.[2] This may be issued in cases of political crime by a Secretary of State or any other Privy Councillor; or, in any criminal case whatever, by a judge of the King's Bench Division or (as usually happens) by a justice of the peace. If issued by an ordinary justice of the peace, it formerly could only be executed within the district to which his commission extended; though it could be executed in any other district as soon as it had been "backed" by any justice commissioned there. But now, by the Criminal Justice Act, 1925, s. 31 (3), any warrant lawfully issued by a justice to compel the appearance of a witness, or to apprehend a person charged with an offence (whether punishable on indictment or summarily), may be executed in any place in England or Wales, although outside the jurisdiction of that justice.

Whenever, in such a manner, a warrant is executed outside the district of the justice who issued it, the

[1] *Elias* v. *Passmore* (1934), 50 T. L. R. 196. This case is criticised by E. C. S. Wade, "Police Search", 50 L. Q. R. 354. It is pointed out that there was previously no authority for seizing articles material on a charge against any person other than the person arrested; and that there is no authority for the search of premises not in the occupation of the person arrested. Mr Wade stresses the need for legislation and suggests that the Police should be given power to remove documents for sorting in cases where seizure is sanctioned.

[2] In early times (Pollock and Maitland, II, 578) it was the duty of anyone who discovered that a grave crime had been committed to raise orally a "hue and cry" (*hue* is an exclamation of pursuit, akin to *hoot*). This gave to all taking part in it the same powers of arrest as a written warrant now-a-days would.

accused is usually taken back to be examined in that district. But it is permissible, in the case of indictable offences, for him to be instead brought before some justice of the place of his arrest (Criminal Justice Act, 1925, s. 11). A warrant authorises the person executing it to arrest the person therein described.[1] When executing the warrant, he (by the Criminal Justice Act, 1925, s. 44) need not now have it with him,[2] but it must, if demanded, be shewn to the person arrested as soon as is practicable. Since the charge is not a civil but a criminal one, he is allowed to break open even the outer doors of a house if he cannot otherwise seize the person who is to be arrested (*e.g.* if those in the house will not give him up). If the charge be one of treason, violent felony, or dangerous wounding, he may, moreover, use any degree of force that may be necessary to effect the arrest, or prevent the escape,[3] of the accused; even to the infliction of wounds or death upon him. If, on the other hand, the accused, knowing the authority or intent of the arrestor, should kill the arrestor he will usually[4] be guilty of murder[3] even if innocent of the charge. But if a constable attempts to arrest offenders illegally (*e.g.* on a void warrant) they will be guilty only of manslaughter if, in resisting such an arrest, they kill the constable, for the wrongful arrest amounts to a gross provocation.[5]

[1] The justice may endorse on it a direction to the police to admit to bail in sums specified; Criminal Justice Administration Act, 1914, s. 21 (1).

[2] This section does not justify arrest under an invalid warrant, *Horsfield* v. *Brown*, [1932] 1 K. B. 355.

[3] For in *felonies* Flight is tantamount to Resistance. But if the warrant were only a charge of *misdemeanor*, though it would equally be murder to kill the arrestor (Foster, p. 311), yet the arrestor would not be justified in killing the accused man merely to prevent his flight. Should, however, the misdemeanant actually resist arrest, the arrestor will be justified in counteracting this resistance by any necessary force, even fatal; *i.e.* he may, and must, stand his ground, instead of first trying to avoid a conflict in the manner that the law requires (*ante*, p. 122) in cases of Chance-medley.

[4] See p. 159 *ante*.

[5] See Stephen, *Digest of Criminal Law*, 7th ed., note VIII. Contrast p. 530, note 8 *post*.

II. Even when no warrant has been issued, the common law often permits an arrest to be effected; a permission accorded not only to a constable but even to private persons. The power has been further extended by modern statutes, especially in the case of constables.

(A) A private person, without any warrant, may arrest

(i) Any person who, *in his presence*, commits a treason or felony or dangerous wounding. The law does not merely permit, but requires, the citizen to do his best to arrest such a criminal.[1] And as he is thus acting not only by a right but under an imperative duty, he may break outer doors in pursuit of the criminal. And for a treason or a violent felony he may use whatever force is necessary for capturing the offender, as, for instance, shooting at him, if he cannot otherwise be prevented from escaping; so that if the felon's death results, the case will be one of justifiable homicide.

(ii) Any person whom he reasonably suspects[2] of having committed a treason or felony or dangerous wounding, provided[3] that this very[4] crime has been actually committed by some one (whether by the arrested person or not). But in this case, as also in all the statutory ones about to be mentioned, the law, though permitting a mere private person to make an arrest (and so making it murder for a guilty man to kill him by resisting it), does not command him to do so; and hence confers no *general* right

[1] 2 Hawkins P. C. c. 12, s. 1. Besides this power to arrest, with a view to permanent detention, a person who actually has committed grave crime, every private citizen has also the right to prevent such crimes, by seizing any man who is *about to* commit a treason or felony or even a breach of the peace, and detaining him *temporarily*, until the danger is over, *Timothy* v. *Simpson* (1835), 1 C. M. and R. 757. To prevent the commission of a felony doors may be broken open, *Handcock* v. *Baker* (1800), 2 Bos. and P. 260.

[2] A felony *unknown* to him will not justify arrest; 3 C. & K. 149.

[3] This proviso is mentioned so early as Y. B. 9 Edw. IV, fo. 26*b*.

[4] See an interesting case, *Walters* v. *Smith*, [1914] 1 K. B. 595. Though the mistake does not justify the arrest, it may defeat any action for malicious prosecution.

to effect it by breaking into a house or by using blows or other violence.[1]

(iii) In addition to these two common-law powers, modern statutes permit any private person to arrest anyone whom he "finds"[2] (α) signalling to a smuggling vessel;[3] or committing any offence under (β) the Vagrancy Act,[4] (γ) the Larceny Act, 1916,[5] or (δ) the Coinage Offences Act, 1861;[6] or (ε) committing *by night* any indictable offence whatever;[7]

(iv) or, if the arrest be authorised by the owner of the property concerned, anyone whom he finds committing any offence against (α) the Malicious Damage Act, 1861,[8] (β) the Night Poaching Act,[9] (γ) the Town Police Clauses Act,[10] or (δ) the Metropolitan Police Act.[11]

(B) A police constable, even when acting without a warrant, has powers still more extensive than those of a private person. Moreover, as his official position renders it in all these cases a duty[12] for him to make the arrest, it will, in any of them, be a duty, even for an innocent person, to submit to him and not resist arrest.[13] He is entitled to call for the assistance of any able-bodied bystander, if necessary, *Reg.* v. *Brown* (1841)[14]. It is doubtful

[1] *I.e.* the private person will be justified for arresting the suspected felon, even by fatal violence, if the suspicion be correct; but an *innocent* man is not bound to submit to a private arrestor, so a killing, by either of them, would be a Manslaughter.

[2] Accordingly, if the offender has completed the offence, even though he has gone "but a single yard" away before detection or even before apprehension, it is too late to arrest him.

[3] 39 and 40 Vict. c. 36, s. 190. [4] 5 Geo. 4, c. 83, s. 6, *ante*, p. 381.

[5] Sec. 41 (1) (except extortion by libelling). Or any one offering stolen goods for sale or pawn; s. 41 (2).

[6] 24 and 25 Vict. c. 99, s. 1. [7] 14 and 15 Vict. c. 19, s. 11.

[8] 24 and 25 Vict. c. 97, s. 61. [9] 9 Geo. 4, c. 69, s. 2.

[10] 10 and 11 Vict. c. 89, s. 15. [11] 2 and 3 Vict. c. 47, s. 66, and c. 71.

[12] But for him to assist a householder in ejecting an intruder, though a kindly act, is no part of his duty; for a mere trespass is no crime. Hence if the intruder resist him, it will be only a common assault, not an assault "on a constable in the execution of his duty".

[13] But as to *needless* handcuffing, see p. 178 n. 2 *ante*.

[14] C. and M. 314.

whether in the case of all crimes for which arrest without warrant is permissible a police officer may enter premises in search of material evidence.[1] In *Thomas* v. *Sawkins* (1935), it was held that a police officer may enter private premises to prevent a breach of the peace, and *per* Lord Hewart, C.J., to prevent the commission of any offence that he believes to be imminent or likely to be committed.[2]

(i) Like a private person he may arrest anyone who commits, in his presence, a treason, or felony, or dangerous wounding; and may break doors or use fatal violence if necessary.[3]

(ii) (Unlike a private person[4]) he probably may arrest, for *permanent* detention, anyone who, in his presence, commits even a mere breach of the peace.[5]

(iii) He may arrest anyone whom he reasonably suspects[6] of treason, or felony, or dangerous wounding, whether (unlike the restriction on such arrest by a private person) the crime has *actually* taken place or not;[7] *e.g.* because he finds a man hurrying away and carrying housebreaking tools. It would seem that in these arrests also he may use any necessary violence even though fatal,[8]

[1] See *Police Search*, E. C. S. Wade, 50 L. Q. R. 351, and *Shepherd* v. *Menzies* (1903), 37 Sc. Law Reporter 355.

[2] 51 T. L. R. 514. For a strong criticism of this case see A. L. Goodhart, "*Thomas v. Sawkins*: A Constitutional Innovation", *Cambridge Law Journal*, VI, No. 1.

[3] Yet in firing at an escaping felon, he will do well to send his first shot into the air and to aim his second one low.

[4] *Ante*, p. 528 n. 1.

[5] 1 Hale P. C. 587; 2 Hale P. C. 90. But see East P. C. c. 5, s. 71.

[6] *M^cArdle* v. *Egan* (1933), 150 L. T. 412. Probably the fact that a man has been guilty of previous offences of a similar character may be given some, though not decisive, weight.

[7] *Lawrence* v. *Hedger* (1810), 3 Taunton 14; *Beckwith* v. *Philby* (1827), 6 B. and C. 635. These cases shew that the constable's privilege, where the supposed crime has not in fact taken place, extends to cases where he acts merely on his own suspicion, without any third person having made the charge. As to its being murder for the supposed felon to kill the constable, even where no felony has actually taken place, see *Rex* v. *Woolmer* (1832), 1 Moody 334.

[8] This power to use violence in arresting felons extends also to the

and may break outer doors; but some authorities limit these powers to cases where the crime has actually taken place.[1]

(iv) Like a private person, he may arrest in the five cases in (A) (iii).

(v) And, even *without* any authorisation of the owner of the property, in the four cases enumerated under (A) (iv).

(vi) He may arrest any person loitering at night in a highway or yard, whom he reasonably suspects of having committed, or even of being about to commit, a felony against the Larceny Act, 1916, the Malicious Damage Act, 1861, or the Offences against the Person Act, 1861.[2]

(vii) In *London*[3] a constable may also arrest (α) any person reasonably suspected of having committed, or even about to commit, *any* indictable offence; and even (β) anyone loitering at night who cannot give a satisfactory account of himself.[4]

As a person who arrests another without waiting to obtain a warrant usually does so because he must act instantly, if he is to act at all, the law on the subject ought to be clear and simple. But as the foregoing summary sufficiently shews, modern legislation has rendered it highly complicated, and (to use the words of a very learned writer) "most unsatisfactory and—to private persons—almost a snare".[5]

preventing of their escape. Hence convicted prisoners who are felons can, under armed supervision, be employed over a wide range of land (as at Dartmoor) in out-door labour; a coveted advantage not so open to misdemeanants, for the risk of their successful flight would be great. See p. 527 *ante*.

[1] See the Children and Young Persons Act, 1933, s. 13, for a constable's power to arrest persons reasonably suspected of certain offences against persons *under seventeen*.

[2] Ss. 41 (3), 57, and 66 of these Acts. [3] 2 and 3 Vict. c. 47, s. 64.

[4] This does not exhaust the list; see *Isaacs* v. *Keech*, [1925] 2 K. B. 354.

[5] Mr C. S. Greaves, Q.C.; *Criminal Law Consolidation Acts* (p. 188).

3. *Commitment for Trial.*[1]

Of the persons who appear before justices of the peace, for preliminary examination upon charges of indictable crime, about thirty per cent. come in mere obedience to a summons.[2] The others are brought up in custody; say, about ten per cent. under warrants, and about ninety per cent. after being arrested without a warrant.[3]

As the summons or warrant is merely a process to secure appearance, the justice must take cognizance of *any* information laid against the defendant when before him (even upon an illegal arrest), and may commit him for trial thereon.[4]

A preliminary examination (unlike most of the summary hearings) never requires the presence of more than a single justice.[5] There is full power of compelling the attendance of witnesses,[6] either by summons or (if necessary) by warrant; and if, on appearing, they refuse to give evidence, the justice may commit them to prison for a week or until earlier submission. At common law the accused could not, as a right, demand the assistance of an advocate, nor could the public insist upon admission.[7] And it would seem[8] that this rule still holds good,

[1] Study in detail ss. 12, 13, 14 of the Criminal Justice Act, 1925.

[2] But of persons tried for non-indictable offences, near eighty per cent. appear on mere summons, about twenty per cent. on arrest without warrant, and only two per cent. under warrants.

[3] A person arrested without a warrant may be—and, if it is impracticable to bring him before a justice within twenty-four hours, *must* be—released on bail by the officer in charge of the police station, unless he thinks the offence serious; Criminal Justice Act, 1925, s. 45.

[4] *Reg.* v. *Hughes* (1879), 4 Q. B. D. 614.

[5] And even if there be two or more they are not a "Petty Sessional Court"; since *it* sits only for summary jurisdiction. The six months limit (p. 486) does not apply to these Examinations.

[6] And production of documents, etc. Cf. p. 509, n. 7, *ante*. But until an actual prosecution has begun, a justice has no power to summon any one to come and afford information. The police have to pursue their inquiries as best they can.

[7] Cf. 11 and 12 Vict. c. 42, s. 19.

[8] *Boulter* v. *Justices of Kent*, [1897] A. C. 556. A contrary view was at one time taken by the law officers of the Crown.

in spite of the wide general language in which recent statutes[1] have required justices to act "in open court"; which, however, must be interpreted as restricted to cases of summary jurisdiction alone. The practice, followed in some rare cases, of communicating only in writing the names and addresses of particular witnesses, and forbidding the accused to put any questions about them openly, is justifiable only in this view of the proceedings as not being necessarily public.

It must be noted that at these preliminary inquiries the presence of the accused is absolutely essential.[2]

The preliminary examination is conducted as follows. The prosecutor "opens his case" by any necessary explanation. Then his witnesses are examined in chief, cross-examined and re-examined; their evidence being taken down in writing at the time by the clerk to the justices. The Crown witnesses having been heard, and their evidence summed up[3] by the prosecutor (if he wishes), the examining justice (or his clerk for him) then reads the charge to the accused, explaining its nature in ordinary language. He then asks him if he has anything to say; telling him he need not say anything unless he likes, and has nothing to hope or fear from any promise or threat, and that whatever he says will be taken down and may be used at his trial.[4] He also asks whether he wishes to be

[1] *E.g.* 42 and 43 Vict. c. 49, s. 20 (1); 52 and 53 Vict. c. 63, s. 13 (11).

[2] 11 and 12 Vict. c. 42, s. 17. Contrast the power given to justices in their summary proceedings to try a defendant in his absence for petty offences, if he fails to appear when summoned; *ante*, p. 512, n. 6.

[3] Oke's *Magisterial Synopsis*, p. 887 (contrast p. 510 *ante*). Any adjournment of the proceedings must be for not more than eight clear days; unless both prosecutor and accused consent to a longer one, Criminal Justice Act, 1914, s. 20. Contrast summary proceedings; there there is no such limit of time.

[4] The old final words "against you" are omitted. But it is only *against* him that this statement is evidence; so it is for the Crown to determine whether or not to put it in at the trial. But it is usual to put it in. It is prudent to do so, for it may become important to the Crown as contradicting evidence given subsequently for the prisoner; and also kind, for

sworn and give evidence; and whether he wishes to call witnesses. The defendant may either remain silent (a frequent course, but for an *innocent* man a most unwise one[1]); or leave it to his advocate to make a statement, or himself make one. Hostile comments should not be made by the trial judge on a prisoner's failure to disclose his defence at the preliminary examination,[2] unless such comment is necessary in the interest of other defendants.[3] The defence of an alibi is, of course, of little value unless disclosed in sufficient time for it to be tested[4] and it appears[5] that there is no objection to a judge pointing this out in summing up. If he do make a statement it is taken down in writing and afterwards read over to him and signed by one of the examining justices. After this, the prisoner's witnesses,[6] if any, are examined, cross-examined, and re-examined; and their evidence is taken down in writing.[7] The "deposition" of each witness, on either side, is read over, to him and the accused, at the end of *his* examination; and is signed by him and by the justice. Even if the accused call witnesses, the prosecutor's advocate has no second speech. The prisoner's solicitor or counsel speaks (*a*) *before* him and his witnesses, should he call any; but (*b*) *after* prisoner's own evidence (if any) should he call no witnesses.

The examining justice (or, if there be more than one, the majority) must then determine (1) whether or not

to make prisoner put it in would give the Crown the final speech. What the prisoner said before the magistrates is not evidence unless the prosecutor make it so.

[1] "The sooner an innocent man discloses his defence, the better for him"; Lord Alverstone, L.C.J. "It is astounding that solicitors should expose innocent clients to such risk as is involved in reserving the defence"; Low, J. See also Wills, J., in 67 J. P. 396.

[2] *Rex* v. *Naylor*, [1932] 1 K. B. 685.

[3] *Rex* v. *Parker*, [1933] 1 K. B. 850.

[4] *Rex* v. *Brown and Bruce* (1931), 23 Cr. App. R. 56.

[5] *Rex* v. *Littleboy*, [1934] 2 K. B. 408. For a criticism see 179 L. T. Jo. 212.

[6] Criminal Justice Act, 1925, s. 12 (5).

[7] It must not be taken down in advance, *Rex* v. *Gee*, [1936] 2 All E. R. 89.

there is a strong enough case[1] to justify committing the accused for trial;[2] and (2) if so, where that trial is to be. If the offence is one which Quarter Sessions are competent to try,[3] the case must be sent thither, unless there are special reasons for preferring a trial at the Assizes.[4]

At common law an offence could only be tried by the court within whose jurisdiction it (or a part of it) was committed, but by section 11 of the Criminal Justices Act, 1925, it is provided that a person charged with any indictable offence may be proceeded against, indicted, tried and punished in any place in which he was apprehended, or is in custody, or has appeared to a summons, on that same charge, just as if the offence had been committed there; unless it appears to the examining justices that the accused would suffer hardship if he were indicted and tried in such place. If the accused raises the issue of hardship, he may appeal to the High Court against the justices' decision on this point. Where an accused is charged with more than one indictable offence all may be

[1] See p. 540 *post*.

[2] If they refuse to commit for trial, this does not bar a subsequent accusation before some other justice. Should they think the charge not merely groundless but malicious, the Costs in Criminal Cases Act, 1908, empowers them to make the prosecutor pay costs, *Rex* v. *Essex Justices, Ex p. Churchill* (1933), 49 T. L. R. 283.

[3] *Ante*, p. 502.

[4] Assizes Relief Act, 1889 (52 and 53 Vict. c. 12). The Business of Courts Committee in 1933 (Cmd. 4471) stated that this Act had not fulfilled its purpose because committing magistrates had treated the fact that Assizes preceded the next practicable Quarter Sessions as a special reason for committing to Assizes. They therefore recommended that an adjourned Quarter Sessions should be held in county areas not more than fourteen or less than seven days before the date fixed for Assizes. The Royal Commission on Despatch of Business at Common Law (1936, Cmd. 5065) did not consider practicable the introduction of any close relation between assize and county sessions dates; but recommended a closer correlation between county and borough sessions. The enlargement of the jurisdiction of Quarter Sessions in order to relieve Assizes was not favourably considered by the Business of Courts Committee (*supra*), but the Royal Commission (*supra*) considered that given legal chairmen (p. 503 *ante*) increased jurisdiction might be feasible and recommended the appointment of a small expert committee to consider the matter.

dealt with where any one of them could be dealt with.[1] Another section of the Criminal Justice Act, 1925 (s. 14), provides that instead of being committed to the assizes or quarter sessions of the locality where he would normally be committed (*i.e.* where the offence was committed or under section 11 of the act where the accused was apprehended or charged), an accused person may be committed to the assizes or sessions[2] of some other place if it appears having regard to the date and place of such other sessions more convenient to commit to them either to expedite trial or save expense. This power is not to be exercised unless the examining justices are satisfied that the next[3] assizes or sessions[2] to which committal would normally be made will not be held within one month[4] of the date of committal, nor in any case in which the accused satisfies the justices that he would, if the power were exercised, suffer hardship.[5] Where any person who is to be committed for trial to a particular sessions is to be admitted to bail, he may, if the next date of such sessions is to be held within five days, be committed to the next sessions but one provided that such next sessions but one are to be held within eight weeks of the date of committal.[6]

Again, (3) if the accused ask to be released on bail[7] the

[1] Criminal Justice Act, 1925, s. 11 (2).

[2] If the offence is within the jurisdiction of Quarter Sessions, see p. 502 *ante*.

[3] "Next" means "next after the date of committal" and the term does not include assizes or sessions already begun at the time of committal, *Rex* v. *Murray* (1935), 52 T. L. R. 141.

[4] The Royal Commission on the Despatch of Business at Common Law recommended (Cmd. 5065, p. 77) the amendment of this provision to allow a judge of assize to transfer work from town to town (see p. 501 *ante*) and suggested that even now a *sessions* case may be transferred to another *sessions* although the normal *assizes* are to take place within a month.

[5] There is no appeal to the High Court as under s. 11 of the Criminal Justice Act, 1925, *supra*.

[6] Criminal Justice Act, 1925, s. 14 (5).

[7] This word means properly (1) the contract whereby the man is "bailed" (*i.e.* delivered) to his surety, but is also applied to (2) that surety

court must determine whether this is to be allowed, and, if it be, on what terms. In cases of treason, however, bail cannot be granted by a justice, but only by a Secretary of State or a judge of the King's Bench Division. But in cases of felony the matter is in the justice's discretion. In misdemeanors he had not, at common law, even a discretion (when once the preliminary examination was over), but was bound[1] to release the accused on his finding adequate bail.[2] But, by statute,[3] he obtained a discretion in those grave misdemeanors for which the costs of prosecution may be charged on the county. As the Act of 1908 (*post*, p. 583) renders all misdemeanors so chargeable[4], the discretion seems to be now equally universal.[5]

The Bill of Rights forbids the requiring of "excessive" bail; but justices must use their own judgment as to what sum is adequate without being excessive.[6] Here, as also in exercising their discretion about admitting to bail at all, they have simply to consider what likelihood there is of the defendant's failing to appear for trial.[7] That likelihood will be affected by (1) the gravity of the charge;[8] (2) the cogency of the evidence; (3) the wealth of the offender

himself. Even now-a-days the surety, if he should desire to discharge himself, is allowed to arrest the defendant (and even to break into his house for the purpose) that he may give him back again into the custody of the court by which he was bailed.

[1] The current but anomalous view that the K. B. D. judges are *still* so bound was negatived in *Rex* v. *Phillips* (1922), 38 T. L. R. 897.

[2] *Ante*, p. 109. [3] 11 and 12 Vict. c. 42, s. 23.

[4] Except mere quasi-criminal ones as to roads and bridges.

[5] By Criminal Justice Administration Act, 1914, s. 23, justices who do not grant bail to a misdemeanant after committal must tell him of his right to apply to the King's Bench Division for it. Until committal the justices have discretion.

[6] In 1925 three London bankers, accused of fraudulent conversion, had to give bail in £10,000 each.

[7] The importance of release on bail was great even as late as the seventeenth century. There was no provision of adequate food for prisoners awaiting trial. Hence, 19 Car. 2, c. 4 recites that "they many times perish before their trial".

[8] Bail has occasionally been allowed even on charges of murder; as where the circumstances pointed to a verdict of justifiable homicide.

(which renders him both more willing to bear the forfeiture of bail and less willing to bear the disgrace of a conviction); (4) whether the proposed sureties are independent or are likely to have been indemnified by the accused;[1] and (5) the probability of the accused tampering with the Crown's witnesses, if he be at large.[2] But experience shews that, on the whole, very few persons admitted to bail fail to appear for trial.[3] Hence of recent years the judges have urged[4] magistrates to grant bail very readily; and (especially if the offence is a small one and the day of trial is distant) to accept the recognizances of the accused himself, even without any sureties, unless they see grave reason to think that he will not appear for trial if left at large.

It will further be the duty of the justices to transmit to the court where the trial is to take place the depositions of the witnesses and the prisoner's statement; of which we have already spoken. The depositions are important for several purposes. (*a*) They enable the opposite party to check the evidence given at the trial, and to cross-examine or contradict a witness whose evidence there varies from that which he gave at the commitment. (*b*) They form a

[1] *Reg.* v. *Butler* (1881), 14 Cox 530. All arrangements, between a person bailed and his sureties, that if he abscond he shall indemnify them for the bail forfeited, are so contrary to public policy that they are void as agreements; and moreover are indictable as conspiracies to pervert the course of justice, even though no intention to pervert it be alleged (*Rex* v. *Porter*, [1910] 1 K. B. 369). But as to surety's *expenses*, see 16 C. B. 614.

[2] Hence bail is less readily granted during a preliminary enquiry, when the depositions have not yet been completed, than after its conclusion. During the preliminary enquiry a magistrate has power to remand the accused in custody for a period not exceeding eight days, by warrant; and for three days, by a verbal order (11 and 12 Vict. c. 42, s. 21).

[3] In 1927, of the 7242 persons committed for trial, only 4084 were sent to prison. Three-sevenths, 3158, thus were bailed; of whom only 29 absconded.

[4] The need of such injunctions is shewn by the fact that many persons sent to prison to await trial are ultimately acquitted (yet not necessarily *innocent*).

substitute[1] for the witness in the event of his being, at the time of the trial, either dead or too ill to travel[2] or to give evidence.[3] But his absence abroad does not suffice to render them admissible.[4] (*c*) They assist the draftsman who has to frame the indictment. (*d*) They enable the judge to learn the difficulties of the case before the trial. And (*e*) they inform the defendant as to the precise case which he has to meet.[5] To him[6] this is obviously an advantage, and it is often an advantage to the public, for if the case thus disclosed be a strong one, the defendant is the more likely to plead guilty. It is, however, to be regretted that our law does not take some measures for securing a reciprocal disclosure of the intended defence. At present it is too easy to raise at the trial some speculative defence, which there is then no opportunity of contradicting, and to support it by witnesses about whom it is too late to make enquiries. The facility has become greater now that the prisoner himself is allowed to come forward as a witness.[7] As has been seen (p. 535 *ante*) the duty of magistrates at a preliminary enquiry is to

[1] Being a legally-required official record they are the "best evidence" (*ante*, p. 430) of what passed at the committal; and cannot be altered by oral evidence. Indeed oral evidence is probably not admissible even merely to supplement their omissions, when they are used as "substantive evidence" (*i.e.* as a substitute for an absent witness); though it is when they are used to contradict a witness who does appear. C. C. C. Sess. Pap. XLVI, 915.

[2] Criminal Justice Act, 1925, s. 13. See also p. 463 *ante*.

[3] *Reg.* v. *Wicker* (1854), 18 Jur. 252.

[4] Except by consent, in cases of misdemeanor; perhaps.

[5] Hence *he* has, after commitment, a statutory right to purchase copies of them at 1½*d.* per ninety words (11 and 12 Vict. c. 42, s. 27); before commitment 6*d.* is charged. But the witness has no such right; and indeed ought not to be supplied with a copy.

[6] As was said by Jessel, M.R., in *Benbow* v. *Low* (1880), 16 Ch. D. 95: "If you give one side the opportunity of knowing the particulars of the evidence that is to be brought against him, then you give a rogue an enormous advantage." Hence in civil proceedings, the defendant, though entitled to know the nature of the claim against him, is not entitled to know by what evidence it will be supported (*Lever* v. *Associated Newspapers Ltd.*, [1907] 2 K. B. 626).

[7] See p. 534 *ante* as to defence of alibi.

determine not whether the accused is guilty, but whether there is a *primâ facie* case against him which requires investigation. The advantages of depositions have been pointed out, but there are disadvantages too in the system. Delay and expense are caused by the necessity of what is really a double hearing. It is not often[1] that a magistrate will take the responsibility of deciding that there is not a *primâ facie* case for trial. In the opinion of many the number of cases where a prisoner is not committed is so small that, even if a committal without a full preliminary hearing were to be a hardship in a few cases, such hardship would be far outweighed by the advantage to the majority.[2] It would of course be necessary for the magistrate to investigate the statements of the principal witnesses before deciding to commit, but such investigation could be brief and private.[2] Another danger of the present system is the prejudice aroused in the minds of those who may be jurors by Press reports of a preliminary examination.

The justice, having already bound over each witness (on signing his deposition) to appear at the trial, now binds over some one, usually a policeman, to prosecute, *i.e.* to prefer a bill of indictment. He may commit to prison anyone who refuses to be thus bound over to give evidence at the trial.[3] Witnesses and prosecutors are only bound over

[1] In 1934, 1245 indictable offences were examined in Leeds Police Court. In only 20 were the accused discharged. See 180 L. T. Jo. 240.

[2] For a criticism of the existing system and proposals for reform, see a paper read to the Law Society by J. S. Walsh, LL.B., reprinted in 180 L. T. Jo. at p. 240. Mr Walsh suggests that the magistrate before deciding whether to commit should scrutinise the statements of material witnesses, or interrogate them briefly in his room. Where the offence is one triable summarily by consent (see p. 515 *ante*) he suggests that the accused should be asked directly he appears whether he wishes to be dealt with summarily, in which case the court should proceed to try the case. At present some courts take depositions in every indictable case until a *primâ facie* case is disclosed, before asking the accused to elect whether he wishes to be tried summarily.

[3] 11 and 12 Vict. c. 42, s. 20.

in their own recognizances; though defendants, as we have seen, are usually required to find one or two sureties also. "A recognizance", says Blackstone,[1] "is an obligation of record, which a man enters into before some court of record, or magistrate duly authorised, with condition to do some particular act, as, to keep the peace." Although the magistrate's court is not a court of record, yet its records are, in this respect, on the same footing as those of the higher courts.[2] A recognizance is a contract not by parol nor by deed, but of record,[3] since, so soon as it is actually enrolled, the record of the court is conclusive evidence as to its existence and terms, and often is the only evidence of them. For the party bound need not sign anything (though in some courts he does); but may merely assent orally to the court's oral question. His assent consists in an admission of his owing to the Crown some specified sum of money to be payable unless a specified condition be fulfilled; *e.g.* unless he appear at the next Assizes. Unlike other contracts (which have to be sued upon) recognizances admit of direct enforcement. For, if the condition be not fulfilled, the recognizance may at once be "estreated"; *i.e.* an extract (Norman-French, *estrait*) shewing the terms of the obligation is copied from the court's record, and is sent to the clerk of the peace; who thereupon directs the sheriff to levy the amount upon the defendant's goods.[4]

A useful innovation has been made by the Criminal Justice Act, 1925, s. 13, with regard to witnesses whose evidence seems likely to be unnecessary at the trial, either because the accused has pleaded guilty or because their evidence is merely of a formal nature. They may be bound

[1] 4 Bl. Comm. 341.

[2] See Brooke's Abridgement, *tit. Recognizance*; pl. 8.

[3] Anson, *Law of Contracts*, 17th ed., ch. IV.

[4] 3 Geo. 4, c. 46, s. 2. See *Reg.* v. *Smith* (1892), 17 Cox 601, as to the difficulty of effectually binding an infant by recognizances, because of his incapacity to contract.

to attend the trial conditionally only; *i.e.* only if they receive from the prosecutor or the accused a notice to attend. Their depositions may be read at the trial, if notice to attend has *not* been given; s. 13 (3) and (4).

Finally the court may, in fit cases, assign to the accused a solicitor and a right to a counsel, under the Poor Prisoners' Defence Act, 1930.[1] This act authorises justices of the peace, upon committing a prisoner for trial, to certify that a solicitor and counsel ought to be assigned to him, and the expenses of his defence defrayed out of public funds. Or a similar certificate may, instead, be given subsequently, at any time after reading the depositions, by a judge of the assize, or the chairman of the quarter sessions, at which he is to be tried.

This power is only to be exercised where (1) the prisoner is too poor to pay for his own defence, and (2) it appears having regard to all the circumstances of the case (including the nature of such defence, if any, as may have been set up), that it is desirable in the interests of justice that legal aid should be granted. There may be mitigating circumstances which should be brought before the court even though no defence is disclosed. In cases of extreme gravity or where the circumstances are exceptional, legal aid may be granted by justices so that a prisoner may be defended before them, whether on summary proceedings or on a preliminary examination. Except where the charge is one of murder only a solicitor is assigned in such cases. The fact that legal aid is not normally given for the preliminary examination often results in unnecessary expense through the committal of persons subsequently acquitted.

[1] 20 and 21 Geo. 5, c. 32.

CHAPTER XXXI

ORDINARY PROCEDURE

II. From Accusation to Sentence

4. *Prosecution.*

The process of commitment by a justice of the peace which we have described, though in actual practice it is adopted in almost every instance, is not legally essential for bringing an accused person to trial before a jury.[1] All that is truly essential is some mode of "Prosecution", *i.e.* of formal accusation. Such an accusation may be made either (1) by a crown official's Information, or (2) by an indictment or (3) in the case of murder, manslaughter or infanticide by a coroner's inquisition.[2]

(1) An *Information* is a written complaint made on behalf of the Crown by one of its officers and filed in the King's Bench Division. Since such a mode of accusation dispenses with any accusing jury, and with any examination before a justice of the peace, it is only allowed in cases of misdemeanor. The Attorney-General has the right, *ex officio*, to file informations at his own discretion, but it has become practically obsolete.[3] The other official who can file them is the Master of the Crown Office; but he can only do it after obtaining an express permission from the

[1] Thus occasionally when a coroner's inquest has occupied an unusually protracted time, the magisterial enquiry is omitted; as in the case of Paine (*The Times*, Feb. 25, 1880), who was indicted for a remarkable manslaughter (by plying with intoxicating liquor) without being taken before a magistrate, the coroner's inquest having lasted five days. See now p. 504 *ante* and note 2 *infra*.

[2] See p. 504 *ante*. A Departmental Committee on Coroners (1936, Cmd. 5070) recommended that coroners should no longer have the power to commit for trial.

[3] But in 1911 one was filed against Mylius for libelling the King; see p. 498 *ante*.

King's Bench Division, and such permission is rarely asked for. It is never granted unless the misdemeanor is of a peculiarly pernicious character. Thus informations are not to be filed for libels unless the prosecutor was attacked in some official capacity, or in outrageous terms. Cf. *Ex parte Bowen* (1910), 27 T. L. R. 180 (assault by police). They are tried at the *civil* sittings.[1]

(2) A *bill of indictment* is a written accusation of crime.[2] Practically every case that comes to a petty jury for trial comes on indictment. A bill of indictment may be preferred (i) when the person charged has been committed for trial[3] *or* (ii) when the bill is preferred by the direction or with the consent of a judge of the High Court,[4] *or* (iii) in the case of perjury by order of a judge or magistrate who is of opinion that in the course of any proceeding before himself any person has been guilty of perjury.[5] A bill of indictment may be preferred by any person and, if satisfied that any of the above three requirements has been satisfied, the proper officer[6] of the court before which the bill is preferred signs the bill which thereupon becomes an indictment. The judge or chairman[7] of the court, if satisfied that any of the above three requirements has been satisfied, may of his own motion or on the application of the prosecution direct the bill to be signed. If none of the three requirements has been satisfied and yet a bill of indictment is

[1] The Business of the Courts Committee in 1936 (Cmd. 5065) recommended the abolition of informations filed by the Master of the Crown Office at the instance of a private prosecutor.

[2] Usually drawn on circuit by the Clerk of Assize or the Clerk of Indictments; at Quarter Sessions by the Clerk of the Peace; see forms in Appendix.

[3] See pp. 535 *et seq. ante* and p. 543 *ante*. The committal must be regular, see *Rex* v. *Gee*, p. 534, n. 7 *ante*.

[4] Administration of Justice (Miscellaneous Provisions) Act, 1933 (22 and 23 Geo. 5, c. 36), s. 2. When no judge is present at Assizes a Commissioner of Assize may act.

[5] *Ibid.* and Perjury Act, 1911 (1 and 2 Geo. 5, c. 6), s. 9.

[6] The Clerk of Assize or the Clerk of the Peace.

[7] Including a deputy-chairman or assistant-chairman.

signed, the indictment is liable to be quashed,[1] but, if the requirements have been satisfied in respect of any count[2] of the indictment, only the counts wrongly included can be quashed on this ground. Where a prisoner is committed for trial by a magistrate, the bill of indictment may include any counts founded on facts or evidence disclosed in any examination or deposition taken before a justice in his presence,[3] being counts which lawfully may be joined in the same indictment,[4] and a charge of being a habitual criminal may be included in a bill of indictment, notwithstanding that it was not included in the committal or in the direction or consent of a judge.[5] An indictment may not be quashed on appeal on the ground that the requirements for preferment have not been satisfied, unless application to quash it was made at the trial.[6]

Until 1933 a bill of indictment had to be laid before a grand jury of from twelve to twenty-three persons. If the grand jury[7] found a true bill, the bill became an indictment and was presented to the petty jury. If the grand jury "ignored" the bill, the accused was discharged.[8] The origin of the grand jury can be found in the Assize of Clarendon of 1166,[9] when Henry II[10] required twelve

[1] See p. 559 *post*.
[2] See p. 548 *post*.
[3] See p. 534 *ante*.
[4] See p. 552 *post*.
[5] 23 and 24 Geo. 5, c. 36, s. 2 (2). See p. 597 *post* for habitual criminals.
[6] *Ibid.* s. 2 (3).
[7] Twelve grand jurors had to agree.
[8] In cases of murder or manslaughter the accused could be tried on a coroner's inquisition (see p. 504 *ante*) but where a grand jury ignored a bill in such cases it was customary to offer no evidence upon the coroner's inquisition.
[9] In Saxon times Ethelred the Unready enacted the Law of Wantage: "Let a moot be held in every Wapentake, let the twelve senior thegns go out, and the reeve with them, and let them swear on a relic that they will accuse no innocent man nor conceal any guilty one", Stubbs, *Select Charters*, 9th ed. by H. W. C. Davis, p. 85; *Constitutional History*, I, 611.
[10] Henry II probably adopted the precedents not of Anglo-Saxon times but of Frankish inquests adopted in Normandy, see Pollock and Maitland, I, 442; Holdsworth, *Hist. Eng. Law*, I, 12.

knights, or other freemen, of every hundred, and four men (who would probably be unfree) of every township, to send in accusations of murder, robbery, larceny and harbouring of criminals. In 1176 arson and forgery were added.[1] The grand jury was established in order to multiply accusations of crime, but its function by a curious inversion became that of revising and thereby diminishing such accusations. Though a grand jury might make a presentment of its own motion and a private prosecutor might, subject to the restrictions imposed by the Vexatious Indictments Act, 1859[2], prefer a "voluntary bill" to a grand jury, the vast majority of bills came before a grand jury as the result of a preliminary enquiry before a justice, and the function of the grand jury was to repeat badly what had already been done well. The grand jury heard the witnesses for the prosecution, but no counsel was present to conduct the examination, or to guard against the possibility of a bill being ignored through some misapprehension of the law. The examination was conducted in private and the grand jury saw neither the defendant nor his witnesses. Their duty was merely to decide whether there was a *primâ facie* case to be investigated by a petit jury. Thus a bad tribunal was laboriously and expensively brought together to revise the work of a better one (the committing magistrates). None the less many supported the retention of grand juries on various grounds, *e.g.* (i) that a grand jury being more independent than magistrates would in times of disturbance act as a protection against groundless political prosecutions; (ii) that especially at Assizes the grand jury was of value in bringing the gentry of the county into touch with the administration of justice; (iii) that there

[1] Stubbs, *Select Charters*, 9th ed. by H. W. C. Davis, Part 4. These ordinances came to fix a line between felonies and mere "trespasses", *i.e.* misdemeanors (*ante*, p. 105).

[2] 22 and 23 Vict. c. 17 repealed by 23 and 24 Geo. 5, c. 36.

ought to be some means of bringing to trial persons whom magistrates—or perhaps a single stipendiary magistrate —refused to commit. A Royal Commission in 1912 reported in favour of the abolition of grand juries both at Assizes and Quarter Sessions, and they were suspended during the War of 1914–1918. In 1933 it was enacted by the Administration of Justice (Miscellaneous Provisions) Act, 1933,[1] that grand juries should be abolished except grand juries of the County of London and County of Middlesex[2] for the purpose of trials of (*a*) treasons committed out of the King's dominions;[3] (*b*) crimes[4] committed by colonial governors in their governorships;[5] (*c*) crimes[4] committed by officials abroad;[6] (*d*) wilful neglect or delay to deliver or transmit writs for the election of members of Parliament;[7] (*e*) offences committed abroad against the Official Secrets Acts.[8] To have altered the procedure in these cases would have involved the amendment of a number of sections of various statutes.

Sir Matthew Hale, under Charles II, described an indictment as "a plain, brief, and certain narrative of an offence committed".[9] The growth of technicalities soon destroyed both the brevity and the plainness. But, happily, the sweeping alterations introduced by the Indictments Act, 1915 (5 and 6 Geo. 5, c. 90) have reduced this

[1] 23 and 24 Geo. 5, c. 36, s. 1.

[2] *Ibid.* s. 1 (4) and First Schedule.

[3] In the King's Bench Division under 35 Hen. 8, c. 2.

[4] Other than felonies, see Wade and Phillips, *Constitutional Law*, 2nd ed., p. 424.

[5] In the King's Bench Division under 11 Will. 3, c. 12.

[6] In the King's Bench Division under 42 Geo. 3, c. 85.

[7] In the King's Bench Division under 53 Geo. 3, c. 89.

[8] In the King's Bench Division or Central Criminal Court under 1 and 2 Geo. 5, c. 28, s. 10.

[9] Hale P. C. 169. Yet in charges of treason, conspiracy, or fraud, indictments were often of remarkable length. Thus the indictment in *O'Connell's Case*, in 1844 (5 St. Tr., N. S., 1), was a hundred yards long. In France the indictment of Landru in Nov. 1921, for murder, took two hours to read aloud!

portion of criminal procedure to a simple and rational system, making it easier for the accused to defend himself, and harder for him to escape by mere technical objections. An indictment now consists of three parts: (1) the commencement; (2) the statement of offence; (3) the particulars of offence. For examples, see p. 623 *post.* The Act abolishes the rhetorical "Conclusion" which previously, in some shape or other—*e.g.* "against the peace of our Lord the King, his crown and dignity"—usually terminated indictments, although rendered superfluous by an Act of 1851.

(1) The *Commencement* states the place of the court's jurisdiction; usually a particular county or borough.

The form of Commencement prescribed by the Act of 1915 (Schedule I, rule 2)[1] is as follows:

"The King *v. A. B.*
Hants Quarter Sessions held at Winchester[2]
A. B. is charged with the following offence [*or* offences]."

(2) Then come one or more[3] paragraphs; each of which is called a "count", and describes an offence whereof the prisoner is accused. If there be more than one paragraph, they must be consecutively numbered. Each count is practically a separate indictment.

The *Statement of offence*, with which every count must begin, merely names the crime charged, *e.g.* "Murder", "Manslaughter", "Cruelty to a child, contrary to section 12 of the Children Act, 1908". Under the Act of 1915 it must use ordinary language, avoiding technical terms as far as possible; and need not set out all the essential elements of the offence. But if the offence be a statutory

[1] Amended by 23 and 24 Geo. 5, c. 36.

[2] Or whatever other tribunal is the "Court of Trial".

[3] There were twenty-four counts in the indictment in 1922 of Horatio Bottomley, M.P., for fraudulent conversion. As to the limitation on plurality of counts, see p. 552 *post.*

one, the statute and the particular section must be specified in the Statement. (Schedule I, rule 4 (3).)

(3) The *Particulars of Offence* follow, in order to inform the accused as to the circumstances—*e.g.* time, place, conduct, subject-matter—of the crime which has thus been alleged against him. Here, again, ordinary language is to be employed, and the use of technical terms is not to be necessary (Schedule I, rule 4 (4).) The particulars may, too, be very brief; *e.g.* "*A. B.* on the first day of July 1916, in the county of Cambridge, murdered *Y. Z.*" But they must be sufficient to indicate to the accused "with reasonable clearness" (Schedule I, rule 9) the occasion and the circumstances of his crime. This is necessary in order that he may be able to know what defence to offer; and, moreover, may be able, should he blunderingly be prosecuted a second time for this same misdeed, to protect himself by shewing—see p. 561 *post*—that the identical charge has already been dealt with.[1] Hence if a count be not detailed enough, but too "general", the judge may quash it; for "generality of accusation is difficulty of defence". A count, for instance, would be too general if it merely alleged the act of "inciting *A* to commit an indictable offence", or of "attempting to induce *A* to contravene the law of the land", without specifying what the particular offence or contravention was. Formerly it was also required that no count should run in the alternative—as by alleging that the prisoner murdered *A or* wounded him; the result being to purchase precision at the cost of prolixity, for a further count was added in order to allege the second of the alternatives. But by the Act of 1915 (Schedule I, rule 5 (1)) in the case of any *statutory* offence which is defined by alternatives—as, for instance, conduct performed with any one of different intentions, or in any one of different capacities,

[1] Hence an indictment should not charge a theft of a coat "and other articles"; 17 Cr. App. R. 131.

or consisting of doing or omitting any one of different acts —a count may now allege the different alternatives which the defining statute sets out. A good instance is afforded in the Act of 1915 itself: "ill-treated *or* neglected the said child, *or* caused *or* procured the said child to be ill-treated *or* neglected, in a manner likely to cause the said child unnecessary suffering *or* injury to its health" (Form 6). A count may, however, still be held bad for duplicity. Thus a conviction was quashed where a prisoner was charged that he "by night unlawfully took or destroyed game or rabbits on land at *C* or was on the said land by night with a gun, net or other instrument for the purpose of unlawfully taking or destroying game". The count was held bad as charging the appellant in one court with two different offences.[1] The section under which the prisoner was charged did not deal with one act in alternative ways but with two different offences. Thus, under the Larceny Act, 1916, a prisoner may be charged with "ripping or cutting or severing or breaking fixtures with intent to steal" but not with "stealing or with intent to steal, ripping, severing or breaking fixtures".[2] A count is bad which charges a man with driving "recklessly or in a manner which was dangerous to the public having regard to all the circumstances of the case including the nature, condition and use of the road and the amount of the traffic".[3] It is possible however to comprise the whole of any *single* transaction in one count, however complex, *e.g.* when *A*, *B*, *C* and *D* have set upon *E* and *F* together and robbed them.[4]

To be good, a count should state in the "Particulars of

[1] *Rex* v. *Disney*, [1933] 2 K. B. 138.
[2] *Rex* v. *Molloy*, [1921] 2 K. B. 334.
[3] *Rex* v. *Wilmot* (1933), 24 Cr. App. R. 63; 49 T. L. R. 427.
[4] *Reg.* v. *Giddins* (1842), C. and M. 634. For the alternative possibility of subdividing a single but complex transaction into separate counts, see *Reg.* v. *Brettell* (1842), C. and M. 609. *E.g.* nine counts for wounding nine cows.

Offence" (i) the party indicted; (ii) the party injured; and (iii) the facts and the intent that are necessary ingredients of the offence. But the Act of 1915 (Schedule I, rules 7, 9) relaxes the precision formerly required in stating them.

(i) The party indicted should be described. But it need only be in such a manner "as is reasonably sufficient to identify him", without necessarily stating his occupation or abode or even his correct name. And if his name is unknown, and he refuses to disclose it, he may be indicted as "a person unknown".

(ii) The party injured should be described; but only with the like reasonable sufficiency. And, if this be impossible, he too may be described as "a person unknown"; as in the case of the murder of some stranger found dead.

(iii) The acts, circumstances, and state of mind constituting the offence should be set out. Here, again, certainty was formerly required. And in some offences the due degree of legal certainty could only be obtained by employing particular technical expressions; *e.g.* in indictments for any treason by saying "traitorously"; for any felony, "feloniously"; for burglary, "feloniously and burglariously". But now, by the Act of 1915 (Schedule I, rule 9), it will usually "be sufficient to describe any place, time, thing, matter, act, or omission whatsoever (to which it is necessary to refer in any indictment) in ordinary language, in such a manner as to indicate with reasonable clearness the place, time, thing, matter, act or omission referred to". In the Appendix the student will find actual forms of Indictments, which will make these rules clearer to him.

In early days no indictment could contain more than one count. This simplicity of statement made inevitable a miscarriage of justice, if the facts proved at the trial happened to deviate even slightly from those alleged in

the indictment. To avoid this danger, a plurality of counts was soon allowed, describing the same crime in many forms, as if there had been so many distinct occurrences.[1] Later practice came to permit even entirely different crimes to be charged in the same indictment; of course in different counts. But all of them had to be of the same grade, *i.e. all* must be treasons or all be felonies or all be misdemeanors.

But the Act of 1915 (s. 4; Schedule I, rule 3) forbids the joinder of several charges in the same indictment, except when[2] all the charges either "are founded on the same facts", or else "form, or are a part of, a series[3] of offences of the same or a similar character". On the other hand, wherever a joinder does thus become permissible, the old prohibition against joining felonies and misdemeanors together is removed.[4] That prohibition was due to the fact that the procedure at a trial for felony is slightly different from that at trials for misdemeanor. But the Act (s. 4) gets over this difficulty by enacting that "where a felony is tried together with any misdemeanor, the jury shall be sworn, and the person accused shall have the same right of challenging jurors, as if *all* the offences charged in the indictment were felonies". The relaxation, however, does not extend so far as to allow a treason to be joined with a

[1] Thus (C. C. C. Sess. Pap. xvi, 233), in a case of murder where only the headless trunk of the victim was found, there were thirty-five counts alleging different modes of death.

[2] Nor even then if embarrassing; *e.g.* adding to *murder* another crime. But when possible it is desirable to multiply counts rather than to multiply indictments, as it saves costs. Two indictments cannot, even by consent, be tried together (15 Cr. App. R. 23).

[3] *E.g.* sixteen separate assaults on sixteen persons (18 Cr. App. R. 42, cf. 59); seventeen makings of *the same* false pretence to seventeen persons, all counts tried at once (C. C. C. February, 1924). The prosecution will usually be required to select certain counts on which to proceed. A separate trial of any count or counts will be ordered where the accused would be embarrassed by their being tried together.

[4] Thus to a count for a woman's felonious bigamy there may be added one for her misdemeanor in obtaining a separation allowance by the false pretence of being the wife of a soldier (the "second husband").

crime of either of the lower grades; the differences in procedure being too great.

By section 5 of the Act of 1915: Where, before trial, or at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment[1] of the indictment as the court thinks necessary to meet the circumstances of the case unless having regard to the merits of the case the required amendments cannot be made without injustice; and may make such order as to the payment of any costs incurred owing to the necessity for amendment as the court thinks fit.

As a logical rule, the evidence should of course establish, and the conviction also be for, the actual offence stated in the count which it concerns. But (1) even by common law, "averments are divisible"; so that if the words in which a count states an offence involve the statement of some minor offence, the petty jury can reject part of the averment and convict of the minor offence alone, though it was not stated separately. Thus a statement of murder will be a statement of manslaughter if the words "of malice aforethought" be omitted; whilst similarly every statement of aggravated larceny includes one of simple larceny. And the legislature has gone still further, in two ways. For (2) in some cases it has enabled juries to convict of the crime which has in fact been proved, although it is not the crime charged in the indictment.[2] Thus on an indictment for any crime the jury may convict

[1] *E.g.* by adding "with intent to defraud" where accidentally omitted, *Rex* v. *Fraser* (1923), 17 Cr. App. R. 182; 40 T. L. R. 81, but not by adding a new false pretence, *Rex* v. *Errington* (1922), 16 Cr. App. R. 148; nor by substituting a representation of an existing fact where the false pretence charged was consistent with mere futurity, *Rex* v. *Hughes* (1927), 20 Cr. App. R. 4.

[2] In one instance, that of Incest, they are allowed to convict of a specified crime even *graver* than that charged; see 8 Edw. 7, c. 45, s. 4 (3).

of an attempt to commit it;[1] and on one for robbery, of an assault with intent to rob;[2] on one for embezzlement, of either stealing as servant or simple stealing; on one for stealing, of embezzlement or[3] false pretences but not of fraudulent conversion;[4] on one for murder, of concealment of birth;[5] and on one for rape, or any felony under section 4 of the Criminal Law Amendment Act, 1885[6] (*e.g.* having carnal knowledge of a girl under thirteen), the jury may instead convict of an indecent assault, or of procuring connection by threats or by false pretences, or of having carnal knowledge of a girl under sixteen.[7] (3) Again, the legislature has in other cases permitted juries to convict of the crime alleged in an indictment, even though a different (but a graver one) has been proved by the evidence. Thus, on an indictment for misdemeanor, if the facts given in evidence prove not only the constituents of the crime alleged, but further elements which constitute some felony in which it has been merged, the prisoner may still be convicted of the misdemeanor,[8] not withstanding its merger; as when a person is indicted for obtaining goods by false pretences, and the false pretences prove to have constituted a felonious forgery. Again, if, on an indictment for obtaining by false pretences, the defendant is proved to have obtained the property by means amounting to stealing, he may be convicted as indicted.[9] A

[1] 14 and 15 Vict. c. 100, s. 9. Yet the crime may be a felony, whilst the attempt is only a misdemeanor.

[2] Larceny Act, 1916, s. 44 (1). [3] *Ibid.* s. 44 (2) and (3).

[4] *Rex* v. *Stevens* (1933), 24 Cr. App. R. 85.

[5] 24 and 25 Vict. c. 100, s. 60. [6] 48 and 49 Vict. c. 69, s. 9.

[7] *I.e.* where the girl, instead of being under thirteen, is found to be between thirteen and sixteen. By the Children and Young Persons Act, 1933 (23 Geo. 5, c. 12), s. 1 (4), on an indictment of a person over sixteen for infanticide or the manslaughter of a person *under* sixteen who was in his charge, the jury may instead convict of any of the numerous offences of cruelty set out in the section. Hence any such indictment will tacitly involve several distinct issues.

[8] 14 and 15 Vict. c. 100, s. 12. Cf. 3 C. and K. 200.

[9] Larceny Act, 1916, s. 44 (4).

further similar provision is that an accessory before the fact to any felony may be indicted, tried, convicted, and punished as if he were a principal felon.[1]

Moreover, in all these three groups of substitutions, a prisoner, on being arraigned, may now plead guilty to the substitutable offence, instead of to the one charged in the indictment (4 and 5 Geo. 5, c. 58, s. 39 (1)).

It has been said that "the fundamental and outstanding procedural difference between the administration of criminal justice in England and the United States lies in the management of prosecutions".[2] In the United States, though the original complaint is, of course, more often than not made by a private person, the "prosecuting attorney" supersedes the private complainant immediately a formal information has been laid.[3] In Scotland prosecutions are conducted by procurators-fiscal working under the supervision of the Lord Advocate. In England in theory the institution of the bulk of criminal proceedings is left to private individuals, who are not compelled to prosecute and are only repaid their costs on a most inadequate scale.[4] Such may be the theory, but the great majority of prosecutions in England are instituted and carried on by the police and are referred to as "police" as opposed to "private" prosecutions. Private individuals may and in the case of *e.g.* commercial frauds do institute and carry through prosecutions employing their own solicitors and counsel, but in the ordinary run of criminal cases it is the police who institute proceedings in the public interest, and, even where a prosecution is started on the initiative of a private person, *e.g.* for theft or burglary, it is normally carried on by the police. In courts of summary

[1] 24 and 25 Vict. c. 94, s. 1. *Ante*, p. 102.

[2] *Criminal Justice in England*, by Pendleton Howard (New York, Macmillan Co.), an invaluable and exhaustive account of the management of prosecutions in England.

[3] Howard, *op. cit.* p. 3.

[4] See p. 583 *post.*

jurisdiction a police officer will frequently himself conduct the case and examine witnesses.[1] If the case is sent to Quarter Sessions or Assizes, a solicitor will be instructed by the police to brief counsel and prepare for trial, or the Clerk to the committing magistrates, or in the case of some counties the Clerk to the Peace, will take over the case.[2] Only barristers have a right of audience at Assizes and at most Quarter Sessions, and they must be instructed by a solicitor. At Assizes and Quarter Sessions only those barristers may appear who are members of the particular Circuit or Sessions unless a special fee is paid them. This rule of the Bar, while restricting freedom of choice, ensures the attendance of a reasonably strong Bar.

Cases of exceptional gravity and importance are conducted by the Director of Public Prosecutions, who will instruct counsel where necessary.[3] This office was created by the Prosecution of Offences Act, 1879.[4] In 1884 the office was merged with that of the Treasury Solicitor, but in 1908 the two offices were separated by the Prosecution of Offences Act, 1908.[5] The Director of Public Prosecutions is appointed by the Home Secretary, but acts under the supervision of the Attorney-General. It is his duty to prosecute in all cases where the offence is punishable with death, in the case of offences such as coinage offences where the prosecutions were formerly undertaken by the Treasury

[1] The practice of police advocacy is confined in the main to country districts and has been strongly condemned (see Howard, *op. cit.* p. 183). Large cities usually employ an official prosecuting solicitor, while in some counties or districts the police in cases of difficulty instruct local solicitors to prosecute.

[2] The procedure varies from county to county and borough to borough. Where there is an official solicitor, he will prepare the case and instruct counsel. Where there is no official solicitor, there is an infinite variety in the procedure adopted (Howard, *op. cit.* chap. v).

[3] Where a particular government department is concerned, *e.g.* the Post Office, the solicitor to that department will conduct the prosecution and instruct counsel where necessary.

[4] 42 and 43 Vict. c. 22. Bentham had urged the appointment of a public prosecutor as early as 1802.

[5] 8 Edw. 7, c. 3.

Solicitor, and in all cases where it appears that the public interest requires prosecution and where there are special difficulties in the way of securing due prosecution. In cases of incest only the Director can prosecute unless the Attorney-General gives his consent. The Director may take over any prosecution at any stage of the proceedings.[1] The consent of the Director is necessary for the insertion in an indictment of a charge of being a habitual criminal.[2] The Director has a special duty to prosecute offences against Election laws. Further the Director is responsible for the defence of criminal appeals. The power to intervene at any stage of a prosecution prevents the wrongful abandonment of a prosecution by a private person.

5. *Arraignment*

An *indicted* defendant (contrast p. 512, n. 6) must personally appear[3] at the bar of the court in order to be "arraigned", *i.e.* called to a reckoning (*ad rationem*), by hearing the indictment read; and to plead to it. (The only exception is that, if the trial be in the King's Bench Division and be merely for misdemeanor, the defendant may, by leave of the court, appear by attorney.) If he do not appear, the court will issue a bench-warrant for his arrest and "estreat" (p. 541) his recognizances; and will "enlarge" *sine die* the recognizances of the prosecutor and the witnesses. As a general rule, too, the defendant must remain in court during all the proceedings[4] including the passing of sentence.[5] But in cases of mere misdemeanors the Court may give him leave of absence so soon as

[1] *Ibid.* s. 2 (3). [2] See p. 597 *post.*

[3] Hence corporations, since they were incapable of appearing in person, were originally outside the criminal law (*ante*, p. 75).

[4] Cf. 17 Cr. App. R. 193. And he must be capable of understanding the proceedings. Hence the trial of a deaf person or a foreigner may have to be delayed until a competent interpreter is found. For a negro prisoner who spoke Fanti alone, only two competent interpreters could be found in all England (*The Times*, Dec. 9, 1908).

[5] *Lawrence* v. *The King*, [1933] A. C. 699.

he has pleaded.[1] A corporation may by its representative enter in writing a plea of guilty or not guilty. If no appearance is made by a representative, or there is a failure to enter a plea, the court will order a plea of not guilty to be entered.[2]

6. *Plea and issue*

When the indictment has been read[3] to him he has several courses open. He may either (1) confess; or (2) stand mute; or (3) take some legal objection to the indictment; or (4) plead to it.

(1) If he confesses, *i.e.* "pleads guilty",[4] he may be at once sentenced. But in serious cases, lest he should be confessing under some misapprehension as to the law or even as to the facts of his case, the court often advises him to withdraw his plea of guilty, and so let the matter be fully investigated.[5]

(2) If he "stands mute", *i.e.* says nothing at all, a jury must be impanelled to try whether he is thus mute "of malice", or "by the visitation of God". In the latter

[1] Thus the Tichborne claimant was absent on a few of the 188 days of his trial for perjury.

[2] Criminal Justice Act, 1925, s. 33.

[3] Under the Indictments Act, 1915, it is the duty of the clerk of the court, "after a true bill has been found on any indictment, to supply to the accused person, on request, a copy of the indictment free of charge". Formerly a felon could not even *buy* one; for fear of his basing on it an action for malicious prosecution.

[4] Nearly half of the prisoners indicted at Assizes or Quarter Sessions plead guilty. They may plead guilty to some only of the counts; or even to only a part of a count, *e.g.* "I admit the jewels but not the money"; or to a substitutable offence, not mentioned in the indictment (see p. 554 *ante*). The prosecution will frequently abandon a major charge if the accused offers to plead guilty to a minor charge, *e.g.* to common assault instead of to unlawful wounding.

[5] In the remarkable case, however, of Constance Kent who, to clear her father's memory, pleaded guilty in 1865 to the Road murder of 1860, Willes, J., at once pronounced sentence of death (*The Times*, July 22, 1865). For procedure when a plea of guilty was made on a charge of murder, see also *Rex* v. *Vent* (1935), 25 Cr. App. R. 55.

case, the question will arise whether or not he can be made to understand by signs. But if he is mute merely from malice, a plea of not guilty will at once be entered.[1] In treason and misdemeanor, standing mute used at common law to amount, on the other hand, to a confession of guilt. But in felony the matter was less simple. It was preferred to try him; yet he could not be tried by jury (instead of by ordeal) without his own consent. To extort that consent he was (until 12 Geo. 3, c. 20) subjected to the *peine forte et dure*, by being laid under a heavy mass of iron, and deprived almost entirely of food. Many prisoners deliberately preferred to die under this torture rather than be tried; because, by dying unconvicted, they saved their families from that forfeiture of property which a conviction would have brought about.

(3) He may shew that the indictment is, on the face of it, open to some legal objection; *e.g.* that a count is too general in its language, or that the court has no jurisdiction to try the offence. Legal objections may be raised by a demurrer;[2] or (which for technical reasons is the far more common course) by a motion to quash the indictment, *e.g.* if the offence alleged is not an indictable one (1 C. and K. 112). Such a motion may be made at any time before the verdict.

(4) He may put in a "plea" to the indictment. The most important pleas are:

i. A plea to the Jurisdiction. This plea is rarely made. For an objection to the jurisdiction of the particular court (as when a man is indicted at the Quarter Sessions for perjury), being a legal objection, may also be raised in the manner just now explained. And if the offence is one over which no English court at all has jurisdiction (*e.g.* an offence committed on board a foreign ship on the

[1] 7 and 8 Geo. 4, c. 28, s. 2. For a modern instance of a verdict of mute of malice, see C. C. C. Sess. Pap. CLVIII, 46; Nov. 1912.

[2] The crown may demur to a prisoner's "plea".

high seas), this defence can clearly be raised not only as a legal objection but even under "Not guilty".[1]

ii. A plea in Abatement; *i.e.* an objection alleging some fact which shews that there is in the indictment some error of form, as when a peer is arraigned before Assizes or Quarter Sessions.[2] Such pleas, however, have been rendered obsolete by the powers given to amend indictments.[3]

iii. A general plea in Bar. A plea in bar means a substantial defence. A *general* plea in bar raises the "general issue", and traverses (*i.e.* denies) the whole indictment by alleging that the defendant is "Not guilty".

iv. A special plea in Bar.[4] These are extremely rare, as almost any matter of defence can be raised under "Not Guilty". The only ones which require any notice are:

(α) That of Justification, in cases of libel; where the defendant pleads, under Lord Campbell's Act,[5] that the matter charged as libellous is true, and that it was for the public benefit that it should be published. But on this plea costs may be given against the defendant if he fails to establish it. Along with this defence he may (contrary to the general rule, p. 563) plead at the same time "Not guilty".

[1] *Rex* v. *Johnson* (1805), 6 East 583. Cf. *Reg.* v. *Jameson*, [1896] 2 Q. B. 425.

[2] In *Rex* v. *Bray* (Old Bailey Sess. Pap. for 1819, p. 460) a thief had to be acquitted because the indictment styled the prosecutor as Augustus Stanley, whereas his name was Augustine.

[3] 5 and 6 Geo. 5, c. 90, s. 5. See p. 553 *ante*.

[4] To any special plea the Crown may put in either a "demurrer" on grounds of law, or a "special replication" on grounds of fact. *E.g.* to a plea of "autrefois acquit" the Crown may reply "not acquit of arson but only of murder by arson" (*Reg.* v. *Serné*, *ante*, p. 156, *post*, p. 562).

[5] 6 and 7 Vict. c. 96; *ante*, p. 371. Such a plea may shew vividly how peculiar to prisoners is the privilege of tendering evidence of good character (*ante*, p. 464). If *A*, being indicted for libellously accusing *B* of theft, should plead the truth of the accusation, *B* (being not a prisoner but a prosecutor) cannot call evidence of his own good character to disprove its truth; though he could do so, if he were *indicted* for the theft.

(β) A Pardon from the Crown.

(γ) Autrefois acquit; and (δ) Autrefois convict. The general principle of common law is *Nemo debet bis vexari*—a man must not be put twice in peril for the same offence. Hence, if he be indicted again, he can plead as a complete defence his former acquittal or conviction.[1] Even though it were in a foreign country that the acquittal or conviction took place, it will none the less constitute a defence in our courts.[2] To determine in any particular case whether such a plea is available, it is necessary to ask: (1) Was the prisoner "in jeopardy" on the first indictment? (2) Was there a final verdict? (3) Was the previous charge substantially the same as the present one?

(1) A prisoner cannot have been in jeopardy if the indictment was legally invalid; for no conviction upon it would have been effectual. If therefore he defeats it by some plea to the jurisdiction (*e.g.* where he has been indicted in the wrong county), or by getting it quashed,[3] he will still remain liable to be again indicted on the same charge.

(2) It is necessary that a final verdict should actually have been given. If the petty jury were discharged without a verdict (*e.g.* on their being unable to agree), this will no more prevent a second trial than would formerly the fact of a former bill having been ignored by a grand jury.[4]

(3) To determine whether the two charges are "substantially" identical is often a subtle problem. The test is not whether the facts relied upon are the same in the two two trials, but whether there has been an acquittal of an offence which is the same, or practically the same, as that

[1] And a similar plea is allowed by statute (42 and 43 Vict. c. 49, s. 27) in cases where an indictable offence has been dealt with summarily (the ordinary forms of plea being confined to acquittal or conviction by a jury). As to assaults, see also 24 and 25 Vict. c. 100, s. 44.

[2] *Rex* v. *Roche* (1775), 1 Leach 134 (acquittal by Dutch court). Contrast the law of Italy, see *J. C. L. and I. L.* xv, 87.

[3] But a conviction quashed *on appeal* becomes an acquittal.

[4] See p. 545 *ante*.

charged in the subsequent indictment, *Rex* v. *Kendrick and Smith* (1931).[1] The two indictments must refer to the same transaction[2]. Yet the intent or the circumstances alleged in the one may be more aggravated than those alleged in the other. Thus an acquittal (or similarly a conviction) for a common assault bars a subsequent indictment for an unlawful wounding;[3] and an acquittal for manslaughter bars a subsequent indictment for murder,[4] and *vice versâ*. But acquittal for wounding with intent to murder does not bar a subsequent indictment for murder;[5] and an acquittal on an indictment for murdering *A* by burning a house in which he was asleep, does not bar a subsequent indictment for the arson of the house.[6] For in each of these two pairs of charges, members of the pair are so dissimilar that proof of the allegations made in the second indictment would not necessarily call for some conviction under the first one.[7]

[1] 23 Cr. App. R. 1; 144 L. T. 748.

[2] They may do this even though they have stated some of the immaterial circumstances in contradictory ways. Thus if *A* has been indicted for murdering *B* on Monday in one parish, and has been acquitted, he can plead *autrefois acquit* if he be subsequently indicted for murdering him on Tuesday in the adjoining parish, provided he can shew by evidence that, though the averments thus differ, the two charges relate to the same transaction.

[3] In *Reg.* v. *Grimwood* (1896), 60 J. P. 809, a man was indicted on four counts; the first three charging the infliction of grievous bodily harm etc., but the fourth merely a common assault. On the first three counts the jury disagreed, but they convicted him of the common assault. He was sent to the Assizes, to be again tried on the first three counts. At the Assizes, however, he pleaded *autrefois convict* (by the verdict as to the common assault); and was accordingly discharged.

[4] 2 Hale P. C. 246. Similarly an acquittal for any crime bars a second indictment for an attempt to commit that crime, now that (by 14 and 15 Vict. c. 100, s. 9) a jury, on an indictment for any completed offence, can convict of a mere attempt. And, since by 6 and 7 Geo. 5, c. 50, s. 44 (2) a jury may convict of embezzlement upon an indictment for larceny—or *vice versâ*—an acquittal for either of these felonies bars a subsequent indictment for the other on the same facts.

[5] *Reg.* v. *De Salvi* (1857), C. C. C. Sess. Pap. XLVI, 884. For there may be Murder without either a "wounding" or an "intent to murder".

[6] *Reg.* v. *Serné* (1887), C. C. C. Sess. Pap. CVII, 418.

[7] Similarly an acquittal for burglary with intent to commit larceny will

In misdemeanors, by a harsh rule, judgment on a plea of *autrefois acquit* or *convict* is final: so that if the accused be defeated on it, he cannot proceed to establish his innocence, but must be sentenced. Yet in felony or treason he is allowed to "plead over", *i.e.* to put in a further plea of Not guilty.

7. *Trial and Verdict.*

"Justice", says Lord Bacon, "is sweetest when it is freshest." Hence, in grave cases, the Habeas Corpus Act makes definite provision to secure this freshness; by providing that if any man, who has been committed on a charge of either treason or felony, be not indicted at the next Assizes after his commitment, he must be released on bail;[1] and if at the next subsequent Assizes he be not both indicted and tried, he must be discharged altogether. The Assizes Relief Act, 1889, ensures the speedy trial of all persons committed to Quarter Sessions, whether charged with felony or misdemeanor, but there appears to be no statutory provision ensuring the speedy trial of misdemeanants committed to Assizes.[2]

When a person indicted pleads *Not guilty* to the accusation he thereby "joins issue" with the Crown. This issue must be decided by a Trial.[3] If the accused be a peer, and

not bar a subsequent indictment for the larceny; though, if the first indictment had charged burglary with an actual larceny, it would be otherwise.

[1] Unless the witnesses for the Crown cannot appear.

[2] See Wade and Phillips, *Constitutional Law*, 2nd ed., pp. 364–5.

[3] Modern practice concedes to every accused person the right to know, before his trial, what evidence will be given against him. Hence if any one who was not produced before the committing justice is to be called as a witness, full information should be furnished to the accused, both as to his name and as to the evidence he will give. If this has not been done, his evidence should not be pressed at the trial if the accused objects (per Hawkins, J., in *Reg.* v. *Harris* (1882), C. C. C. Sess. Pap. xcv, 525). The same principle applies to letters or other documents. And every witness whose depositions have been taken before examining justices must be made to attend at the trial, in order that if the Crown do not call him, the prisoner may be able to do so. For the prosecuting counsel is not bound to call all his witnesses (2 C. and K. 520); though it is the usual practice to

the accusation be either of treason or of felony, the trial will, as we have seen (*ante*, p. 493), take place before the peers. But in all other cases his indictment will be tried *per patriam*—by a petty jury composed of twelve representatives of his countrymen.[1] The history of such trials is noteworthy. Originally, accusations made by the grand jury were tried by ordeal. After the abolition of ordeals in 1215, every accusation had to be referred back to the grand jury, sometimes with the addition of some further colleagues.[2] In the course of a century, it came to be the practice for these new jurors alone to undertake this duty of revision, without the presence of the original accusers; and at last the latter were definitely excluded by a statute of 1352. This produced the system of two juries. But both juries proceeded upon common repute, or upon their personal knowledge; men who knew the circumstances of the crime being often put on as additional or "afforcing"

call any witnesses whom the prisoner desires called, so that the defence may cross-examine them. But should the prisoner elect to call a Crown witness who has been thus passed over, he thereby makes him his own witness; and the Crown can accordingly cross-examine the witness, and can reply on his evidence (*Reg.* v. *Cassidy* (1858), 1 F. and F. 79).

[1] See Pollock and Maitland, I, 138, II, 617; Holdsworth, I, 312–350; Stubbs' *Const. Hist.* I, s. 164; Stephen's *History of Criminal Law*, I, 254. "It is the most transcendent privilege which any subject can enjoy or wish for, that he cannot be affected either in his property, his liberty or his person but by the unanimous consent of twelve of his neighbours and equals." (3 Bl. Comm. 379.) It is true that, as an instrument of accurate inquiry, the value of the jury may sometimes be small. In matters of complicated mercantile accounts, or in scientific disputes about a prisoner's insanity or the results of a poison, or in any very protracted investigation, trial by a common jury—"that bizarre creation" as Garofalo calls it—would have little superiority over trial by Ordeal or by Compurgation, were it not for the guidance afforded in the judge's summing up. Hence ever since the Rules of 1883 (Order XXXVI), trial by a judge, with no jury, has been recognised as the normal *civil* method. But in criminal cases it is not so important that the verdict should be accurate as that it should be humane, and moreover be supported by public sentiment; to let some guilty men escape is a less evil than to punish any innocent man. Consequently, in all criminal accusations that are of any gravity, the protection afforded by trial by jury is a privilege worthy of the eulogium pronounced on it by Blackstone. See also p. 519 *ante*.

[2] Pollock and Maitland, II, 628, 647; Holdsworth, I, 323, 334.

jurors. About 1500, however, such persons ceased to be added to the jury itself, and instead were sent to give evidence before it. This differentiation of the functions of the witness from those of the juror was intensified, two centuries later, by allowing witnesses to be called expressly on behalf of the prisoner. Documentary evidence became common before that of witnesses; and it seems probable that even the evidence of witnesses was at first usually received in a written form. At any rate the practice of producing the witnesses themselves at the trial, to give their evidence orally in open court—though well-established in non-political cases at least as early as Elizabeth's reign[1]—did not become usual in trials for treason until the Commonwealth.[2] Under James I and Charles I the evidence produced to the jury in political trials usually consisted only of "examinations", *i.e.* reports of what had been said by witnesses when interrogated by royal commissioners, in the absence of the prisoner and in private—perhaps in prison or even on the rack. Often the accused himself was thus interrogated; as when Peacham, in 1615, was examined "before torture, in torture, between torture, and after torture".[3] But from the time of the Commonwealth onwards the modern course of trial has prevailed, in political as well as in non-political cases.[4]

[1] Sir T. Smith's *Commonwealth of England.*

[2] The provision made (*ante*, p. 317) by 1 Edw. 6, c. 12 to secure the production of at least two witnesses in open court in all cases of treason was regarded as having been impliedly repealed by 1 and 2 Ph. and Mary, c. 10.

[3] *Ante*, p. 309; 2 St. Tr. at p. 871. On the trial of Lord Essex in 1600 (1 St. Tr. 1333), in which many of these "examinations" were used, Coke, then Attorney-General, blamed the "overmuch clemency" of Elizabeth in having had no witness racked or tortured whilst being examined.

[4] A recent inroad upon the dignity of trials is checked by the Criminal Justice Act, 1925, which makes it an offence, punishable by a fine of £50, to sketch for publication, or to photograph, in any court whether criminal or civil, any of the persons concerned in a judicial proceeding: s. 41).

To serve as a petty juror in criminal cases (or as a common juror in civil ones) a person[1] must (1) be over twenty-one years of age;[2] and (2) be the owner, in fee or for life, of lands or tenements worth £10 a year or of long leaseholds worth £20 a year, or else be the occupier of a house rated at £20 a year, or if in Middlesex at £30.[3] In each county the sheriff returns a "panel",[4] or list, at every assize, of persons thus qualified whom he has summoned. There is no fixed number; but forty-eight is a frequent number at Assizes, and thirty-six at Sessions. From this panel[5] the clerk calls twelve names, and the prisoner then has the opportunity of challenging any of these jurors. Jury service can be a real burden. In 1933 the trial of ten men for conspiracy and arson lasted for six weeks and the judge (Humphreys, J.) said that he considered that the limit of human endurance had almost been reached. It was no light thing to ask of twelve citizens that without

[1] Of either sex. For the Sex Disqualification (Removal) Act, 1919, 9 and 10 Geo. 5, c. 71, provides that "A person shall not be disqualified by sex or marriage from the exercise of any public function, or from... holding any civil or judicial office;...and a person shall not be exempted by sex or marriage from the liability to serve as a juror". But the judge who tries a case, criminal or civil, may—on application of either side or at his own instance—make an order "that the jury shall be composed of men only or of women only". It has since been provided, by Rules, that every jury panel shall include women in the same proportion as they hold in the local list of persons qualified to be jurors; and, if possible, not fewer than fourteen women. But husband and wife are not to be on the same panel.

[2] If over sixty he may claim exemption.

[3] In boroughs that have a court of Quarter Sessions the persons whose names are included in so much of the county jurors' book for the area comprising the borough are the jurors qualified and liable to serve.

[4] *I.e.* a strip (Latin, *pannus*); hence names written on a strip of parchment. In Scottish law, however, the person or persons accused is, or collectively are, called "the panel", *i.e.* the *list* named in the indictment.

[5] At the Assizes there is also a further panel of "special" jurors, of greater wealth, *i.e.* householders rated at not less than £100 a year (33 and 34 Vict. c. 77); but for criminal cases a jury is never taken from this list, except in the rare cases where the indictment has been found in, or removed into, the King's Bench Division; see p. 498 *ante*.

reward, without even being paid their out of pocket expenses, they should be detached from their ordinary vocations for a period of six weeks. It was too much to expect the jury to remember the demeanor of a witness who gave evidence at the beginning of the trial. He suggested that in cases where a large number of separate persons were affected it might be possible to try the defendants in groups.

Challenges are now rare in England,[1] though less rare in Ireland.[2] They may be either to the "array" (*i.e.* the whole panel), where the sheriff has composed it in an unfair manner, *e.g.* by choosing men on the ground of their religion; or to the polls (*i.e.* to individual jurors). Felons jointly indicted sometimes challenge *different* groups of jurors, so as to secure being tried separately; *e.g.* when one prisoner has made admissions, or been found in possession of papers, that would not be legal evidence against the other man. An individual may be thus challenged either for cause shewn, or even "peremptorily" (*i.e.* without shewing cause). A challenge for cause may be made *propter respectum*, *e.g.* to a peer; *propter affectum*, *e.g.* for being near of kin to the defendant; *propter defectum*, *e.g.* for infancy or alienage; *propter delictum*, *i.e.* on the ground of the juror's having been convicted of some infamous offence, *e.g.* perjury. These objections may be raised either by the Crown or by the accused. But a "peremptory" challenge can be made only by the

[1] This rarity makes it easy to arraign together before one jury prisoners concerned in different indictments; thus saving time.

[2] In the United States, from the diversities of race and language, they are employed freely, sometimes occupying two or more days of a trial. Hence, "experience in the selection of a jury is one of the fine arts of an [American] advocate". A like cause may lead to a like result in East London. In one case, there, eight of the twelve jurors were Polish Jews who could not write. Maître Lachaud, that most successful defender of prisoners in France, made it his rule, "I challenge every man who looks intelligent". In Ireland a kindred rule was at one time current; "Challenge every juror who wears a neck-tie".

accused; and by him only in cases of treason or felony.[1] Thus a misdemeanant cannot exclude his bitterest enemy without legal proof of the hostility.[2] In treason the prisoner has thirty-five peremptory challenges, and in treason-felony and felony twenty.

The jury are then sworn.[3] If the case be one of felony or treason, the indictment is read over to the jury; which is called "charging"[4] them with the inquiry concerning the prisoner. It is not so read in cases of misdemeanor, because there the defendant was always entitled to a copy. The indictment is then "opened"; that is to say, the counsel for the prosecution[5] addresses the jury; in order to direct their minds to the main questions in dispute, to tell them what evidence he proposes to adduce, and to explain its bearings upon the case.[6] A prosecuting counsel stands

[1] Hence in treason and felony the jurors have always been sworn separately—to give the prisoner a full opportunity of challenging each—while in misdemeanor they are usually sworn in groups of four.

[2] But in misdemeanors the defendant is generally allowed to exercise the privilege (which the Crown possesses in all criminal trials) of requiring any jurors to "stand by", *i.e.* not to serve unless a full jury cannot be made up without them (*Reg.* v. *Blakeman* (1850), 3 C. and K. 97).

[3] See the Oaths Act 1909 (9 Ed. 7, c. 39). The Criminal Justice Act, 1925, s. 15, provides against death or illness of a juror, or of *two*, during a trial; allowing the remainder to act, if prosecutor and accused consent in writing.

[4] Until they had performed this charge, by completing the inquiry, the common law did not permit them, in cases of treason or felony, to depart from the custody of the court, however protracted the trial might be. In 1873, in *Reg.* v. *Moore*, an Irish trial for murder (114 witnesses), the jury were thus secluded for more than six weeks (*The Times*, Sept. 11, 1873, p. 4).

In misdemeanors, however, the common law did not impose any such necessity. And now by the Juries Detention Act, 1897 (60 and 61 Vict. c. 18), upon the trial of any person for a felony (other than treason or murder or treason-felony) the court may, if it see fit, permit the jury to separate, at any time *before* they consider their verdict, in the same way as if the trial were for a misdemeanor.

[5] A prosecutor who employs no counsel is not allowed (as he is in summary proceedings) to make any such opening speech or to examine the witnesses.

[6] In Scotland there is no such speech; its absence makes the work of the jury harder.

in a position quite different from that of an advocate who represents the person accused or represents a plaintiff or defendant in a civil litigation. For this latter advocate has a private duty—that of doing everything that he honourably can to protect the interests of his client. He is entitled to "fight for a verdict". But the crown counsel is a representative of the State, "a minister of justice";[1] his function is to assist the jury in arriving at the truth. He must not urge any argument that does not carry weight in his own mind, or try to shut out any legal evidence that would be important to the interests of the person accused.[2] "It is not his duty to obtain a conviction by all means; but simply to lay before the jury the whole of the facts which compose his case, and to make these perfectly intelligible, and to see that the jury are instructed with regard to the law and are able to apply the law to the facts."[3] "It cannot be too often made plain that the business of counsel for the Crown is fairly and impartially to exhibit all the facts to the jury. The Crown has no interest in procuring a conviction. Its only interest is that the right person should be convicted, that the truth should be known, and that justice should be done."[4]

On concluding his address, the prosecuting counsel calls his witnesses, one after another; and each is examined in chief, cross-examined, and re-examined, successively.[5] Then, the Crown evidence being thus completed, the prisoner's counsel sometimes submits that it is not such as could reasonably satisfy any jury that the accusation

[1] 4 F. and F. 499. Cf. [1916] 2 K. B. at p. 623.

[2] *E.g.* if the prisoner has written one letter confessing the crime, and another retracting this confession, the Crown must not put the former in evidence without producing the latter also. Similarly, if the victim of an alleged assault has been examined by the police-surgeon, this surgeon should be called by the Crown, even if he negative the assault.

[3] Sir J. Holker, Att.-Gen. (*The Times*, Feb. 25, 1880).

[4] Lord Hewart, C.J., 25 Cr. App. R. at p. 115.

[5] *Ante*, p. 412. And the prisoner's statement to the committing justice is usually read now; cf. p. 533 *ante*.

is established; and he therefore asks the judge to withdraw the case from the jury. If the request be refused or not made, then comes the defence of the person accused.[1] Where the judge refuses to withdraw a case from the jury, evidence for the defence may supplement the evidence of the prosecution.[2]

(1) If the accused has no witnesses to call (except witnesses merely to character), he may nevertheless himself give evidence on oath (should he desire to do so) and be cross-examined upon it.[3] After doing this (or declining to do it), and calling any witnesses to *Character*; then

(*a*) if he have no counsel, he may address the jury in his own defence;

(*b*) if he have counsel, the prosecuting counsel may, should there actually be adequate cause,[4] make a second speech, summing up the Crown evidence and commenting on the prisoner's own evidence[5] (if any). Then the counsel for the accused addresses the jury.[6]

(2) But if the accused has witnesses to Facts then, so soon as the Crown witnesses have finished, his counsel[7] (or

[1] The old "inquisitorial" character of our criminal trials survives in the rule that in criminal trials a judge can call a witness (62 J. P. 232, 149 C. C. C. Sess. Pap. CLXVII, 175); but in civil trials he cannot do so except by consent of the litigants ([1910] 1 K. B. 337). The judge should only exercise this right when the defence has set up a case *ex improviso*, *Rex* v. *Harris*, [1927] 2 K. B. 587.

[2] *Rex* v. *Power*, [1919] 1 K. B. 572. [3] See p. 474 *ante*.

[4] *E.g.* if the evidence has proved to be other than was indicated in his opening speech; *Reg.* v. *Holchester* (1866), 10 Cox 226.

[5] *Reg.* v. *Gardner*, [1899] 1 Q. B. 150.

[6] By a somewhat harsh privilege, the Attorney-General or Solicitor-General, *if present in person*, may—in both (*a*) and (*b*)— make a final speech in reply. Otherwise a prisoner, by calling no witnesses, secures the right to the last word. The Law Officers in 1930 announced that they would not exercise the right of reply.

[7] Where several prisoners, who are being tried together, take the same course as to calling (or not calling) witnesses, their respective counsel usually make their speeches (not in order of professional seniority but) in the order in which their several clients' names occur in the indictment (*Reg.* v. *Barber* (1844), 1 C. and K. 434). Where, again, some prisoners call witnesses but others do not, the counsel for the latter will have the right to the last word; and so will not speak until after the Crown counsel

he[1]) "opens" his case. Then his witnesses (including himself, if he desire to give evidence on oath) are examined, cross-examined, and re-examined.[2] His counsel (or he) makes a second speech, summing up the defence. Finally the prosecuting counsel makes a speech in reply.

When both cases have thus been fully stated it becomes the duty of the judge to sum up the case to the jury; a security for justice unknown to the tribunals of classical antiquity.[3] He not only directs them as to any points of law that are involved in the case, but also advises[4] them, though not imperatively, as to the bearing and value of the evidence. There was no enforceable standard for summings up until the creation of the Court of Criminal Appeal. But now it requires every summing up to be not only accurate but also adequate. The judge may ask the jury to answer definite questions of fact; but they are entitled to refuse to do so, if they prefer to give a general verdict.

The jury then have to consider their verdict,[5] and may,

has replied upon the evidence tendered by the other prisoners (*Reg.* v. *Burns* (1887), 16 Cox 195; cf. C. C. C. Sess. Pap. XCVIII, 363, CVII, 147, CXL, 602, CXIX, 22).

[1] To statements of Fact in his address "the jury may, as regards *himself*, pay any degree of credence that they may think fit" though they are not uttered upon oath (Channell, J.).

[2] In the rare cases where the witnesses for the defence introduce new matter of importance which the prosecution could not have foreseen (*e.g.* an alibi, or insanity), rebutting evidence, to contradict them, may be called even at this late stage, *Reg.* v. *Frost* (1839), 4 St. Tr. (N. S.) 384; *Reg.* v. *Stimpson* (1863), 2 C. and P. 415.

[3] Yet in England it is found as early as 1348; Holdsworth, III, 614. But in France the judges were deprived in 1881 of the power of summing up, as they were thought to exercise it too exclusively in the interests of the prosecution. American lawyers complain of the restrictions whereby some of their States limit or abolish the judges' power to express an opinion on questions of fact, and to control trials "and hold the jury to its province" (see Prof. Roscoe Pound's *Spirit of the Common Law*, p. 123). They attribute to this lack of guidance many undeserved acquittals.

[4] Cf. 18 Cr. App. R. 132; and [1906] A. C. 130.

[5] A verdict must be the utterance of twelve jurors; so that in the petty jury, as there are but twelve, unanimity is essential. But in any larger

if necessary, retire for that purpose.[1] The jury may, at their discretion, return either a "special" verdict, *i.e.* one on the facts alone,[2] or a "general" verdict, pronouncing on both the facts and the law;[3] *i.e.* "Guilty", or "Not[4] guilty". The verdict may dispose of the whole indictment in the same way, or may pronounce the prisoner guilty on some counts but not on others, or even on one part of a divisible count but not on the residue. We have already seen (p. 554) that, in a few exceptional cases, juries are empowered by modern statutes to convict of an offence other than that which the evidence has established. The first delivery of the verdict is not final; for the court may direct the jury to reconsider it. If they find it hopeless to agree, the judge may discharge them. Cases have been tried even four times, owing to successive disagreements; *e.g.* Tease, at Belfast, in 1909.

We have said that of all the persons who are indicted

jury, such as a jury on an inquisition of lunacy—and similarly with the Peers (*ante*, p. 493)—a mere majority suffices, if it consist of twelve. In Scotland (the jury there consisting of as many as fifteen) the verdict of a majority suffices. In India, a High Court jury is of nine, and the verdict of six suffices if approved by the judge, whilst in the Sessions courts the verdict of a simple majority suffices if approved by the judge. In France, a simple majority suffices. As to illness, see p. 568, n. 3.

[1] They are no longer debarred from "food, drink, and fire" after retiring; the Juries Act, 1870, permits them to have, at their own expense, "reasonable refreshment".

[2] These are rare; but a modern instance occurs in *Reg.* v. *Dudley* (1884), 14 Q. B. D. 273 (K. S. C. 62); *ante*, p. 87.

[3] It has sometimes been suggested that the jury are thus "made judges of the law as well as of the facts". But this is not so; for it is their duty to adopt the law as laid down to them by the judge. (See 21 St. Tr. 1039; and, in U. S. A., 2 Sumner 243, 15 Sup. Ct. 273). True there is *now* (contrast Noy 48, Yelv. 24, 6 St. Tr. 967) no legal redress if they violate this duty; *e.g.* if they declare a homicide to have been a murder although by law it was justifiable. But this legal impunity only shews that their duty of making their verdict accord with the law, is—like their duty of making it accord with the evidence—not a jural but an ethical obligation.

[4] Meaning that there is not full legal proof of guilt; but not necessarily that they think him *innocent*. Scotland, by a third alternative verdict ("Not proven", like Rome's "Non liquet"), avoids this ambiguity; and so renders "Not guilty" a clearly definite exculpation.

nearly three-sixths plead guilty. We may add that about two-sixths are tried and found guilty, and rather more than a sixth are tried and acquitted.

On being convicted of felony or treason, the prisoner is asked if he has anything to say why the court should not give judgment against him. The inquiry contemplates only objections *of law*; *i.e.* grounds for a motion in arrest of judgment (now practically unknown). The question might well be abandoned, as not only useless but also apt to elicit irrelevant and mendacious protestations of innocence.[1]

After conviction, but before judgment, was the usual time to pray Benefit of Clergy.[2] This privilege was so remarkable that it deserves the student's attention. After William the Conqueror separated the ecclesiastical from the secular courts, the clergy began to put forward a claim that all persons in holy orders should be exempt from secular jurisdiction in all litigation, civil and criminal. Any clerk accused of crime was accordingly sent to the bishop's court. He was tried there before a jury of clerks, by the oaths of twelve compurgators; a mode of trial which usually insured him an acquittal. But even if he were convicted, the court could not inflict death, but could only degrade him and imprison him. About 1300, however, a change was made, by surrendering no accused clerks to the bishop until after they had undergone conviction in the secular court, and had thereby forfeited their chattels. And it was also settled that the clergy had no such "benefit" in civil cases, or in misdemeanors, or

[1] A salient instance of the untrustworthiness of such protestations is that of Alvin, sentenced to death at York for murder in 1712. During the "condemned sermon" he made a loud protest of his innocence; which so startled the preacher, the Rev. Mr Mace, that he fell dead in the pulpit. Alvin claimed this as a Divine vindication of himself. Yet, at his execution, he confessed his guilt. (Poulson's *History of Holderness*, II, 407.)

[2] See Pollock and Maitland, I, 441; Holdsworth, III, 293.

(soon afterwards) in treason. But, on the other hand, the benefit was extended to all persons eligible for ordination, although not actually ordained; *i.e.* to all males who could read; which soon came to mean, who could learn a few words by heart. But in 1487 it was enacted that these mere laymen should have the benefit only once, and should be branded on the thumb to shew that they had had it.[1] Under Henry VIII benefit of clergy was removed from "wilful murder of malice aforethought" (*ante*, p. 152). Under Elizabeth all surrenders to the bishop, and all distinctions between ordained clerks and laymen, were abolished; and henceforth every person who obtained the benefit became liable to be kept in gaol for a year. Under William III the benefit was extended to women, and independently of their being able to read; and under Anne reading was made unnecessary for men also. On the other hand, successive statutes took away the benefit from the more heinous crimes; until in Blackstone's time there were one hundred and sixty felonies in which it could not be claimed, *i.e.* which were really capital. Finally, in 1827, benefit of clergy was abolished by 7 and 8 Geo. 4, c. 28. It survived longer in parts of the United States; and was successfully claimed in South Carolina at least so recently as 1855 (*The State* v. *Bosse*, 42 S. C. 276; cf. 35, 372).

8. *Judgment.*

Sentence is sometimes postponed, in order to give the prisoner an opportunity of mitigating it by making restitution or giving information; or in order to inflict on him *some* punishment without any obvious disgrace, when it is intended merely to discharge him on recognizances.

A criminal decision, whether of conviction or of

[1] A book of 1633 (*Whimsies*, p. 69) says, "If a prisoner, by help of a compassionate prompter, hack out his Neck-verse (Psalm li. 1) and be admitted to his clergy, the jailors have a cold iron in store if his purse be hot; but, if not, a hot iron, that his fist may cry *Fiz*".

acquittal, constitutes a conclusive estoppel as between the crown and the prisoner. But in any subsequent civil proceedings between either of them and a third party, that decision is no estoppel. It is, however, admissible evidence to rebut a claim to property made by or through the convict, *Re Crippen*, [1911] P. 108.

Already, in our successive accounts of the various kinds of criminal offences, we have mentioned, in connection with each one, the character of the punishments which the law prescribes for it. All that now remains, therefore, is to state some provisions which affect punishment in general. Thus the Bill of Rights provides that "excessive fines ought not to be imposed, or cruel and unusual punishments inflicted". Hence judges cannot create new punishments.[1]

The forms of punishment now permitted by law are death, penal servitude, imprisonment (with or without hard labour), whipping, fine; and, chiefly in the case of juvenile offenders, detention (in approved schools, etc.[2]).

The penalty of Death[3] is now practically restricted to

[1] Thus where a defendant was sentenced to be imprisoned, and also to ask the prosecutor's pardon and advertise the fact in certain newspapers, this was held bad, except as to the imprisonment (1 Wilson 332).

[2] See p. 579 *post*.

[3] The hanging does not operate now through suffocation, but—by a "long drop" invented by Prof. Haughton of Dublin—dislocates the vertebrae and so produces an instantaneous and painless death. Persons under eighteen cannot now be sentenced to death, but are "detained" during the King's pleasure; 23 Geo. 5, c. 12, s. 53. Bishop, aged eighteen, was executed in 1925. Women are rarely executed; but in 1923 one was, and another in 1926. Where a woman convicted of an offence punishable with death is found by the trial jury to be pregnant, she is sentenced to penal servitude for life instead of to death, Sentence of Death (Expectant Mothers) Act, 1931 (21 and 22 Geo. 5, c. 24). Until the passing of this Act pregnancy did not affect the sentence, but resulted in a stay of execution. The issue of pregnancy or not was decided by a jury of twelve matrons.

Sir Harry Poland says (*Seventy-two years at the Bar*, p. 321): "I have found that the fear of penal servitude is nothing like such a deterrent as the fear of being hanged." Mr Justice McCardie pronounces the latter fear "the most powerful deterrent that has been, or can be, known". But for the penalty of Death the burglar would find it worth while to kill his

cases of murder.[1] The average annual number of capital sentences is about thirty, and only about half of these are actually carried out.[2]

Penal servitude was established in 1853[3] to take the place of transportation.[4] It is never imposed for less than three years;[5] whilst, on the other hand, the usual maximum for which a person can be sentenced to imprisonment with hard labour—or to any form of imprisonment for a statutory[6] offence—is only two years. The number of sentences of penal servitude passed in 1931 was 542; or about one in every thirteen convictions upon indictment. An offender who, after having once been convicted of any felony, is again convicted of some felony, may, as a rule, be sentenced to penal servitude for life.[7] But a

victim to prevent his appearance as a witness; and a prisoner already in penal servitude for life would have nothing to fear if he killed his warder. On Dec. 1, 1925, under a like immunity, a prisoner in a Burmese gaol raised a mutiny in which seven were killed. "That bit of rope", said a convict once, in England, "is a great check on a man's temper."

[1] There are, however, three other capital offences: viz. treason and certain forms of piracy and arson (*ante*, pp. 319, 377, 188). But although since 1820 nineteen persons had been convicted of treason, the death sentence was commuted in each case until Casement's in 1916.

[2] Executions are usually deferred until after the third Sunday after the passing of the sentence; and take place at eight in the morning and not on a Sunday or a Monday.

[3] 16 and 17 Vict. c. 99. No one under seventeen can be sentenced to it. See p. 57 *ante*.

[4] Transportation had been originally established by the device, which in 1665 Kelyng (fo. 45) treats as still novel, of giving pardons conditional on the convict's remaining in a colony for seven years, and passing five of them in service. At the end of that service he received a grant of land.

[5] 54 and 55 Vict. c. 69. Until this statute the minimum was five years.

[6] Where it is by the common law that a punishment is prescribed, there is no maximum limit to imprisonment. Hard labour—now always permissible, but nominal (see p. 578, n. 1)—is the creation of statute-law.

[7] But if this second felony be simple larceny, only to *ten* years' penal servitude. All "life" sentences are reconsidered after twenty years. As to "Preventive Detention" after penal servitude, see p. 597 *post*. By the Penal Servitude Act, 1926 (16 and 17 Geo. 5, c. 58), when a person is convicted of two or more indictable offences which are not punishable by penal servitude and for which the *aggregate* sentences might amount to three or more years' imprisonment, the court which convicts him may, instead of inflicting imprisonment, sentence him to penal servitude for a

misdemeanant's legal maximum of punishment is not thus affected (except under special statutes) by his former offence. At present there are only two differences between a sentence of penal servitude and a sentence of imprisonment: (1) length, (2) the remission earned by good conduct, up to a sixth of the sentence in the case of imprisonment, and up to a quarter (women—one-third) in the case of penal servitude, which is in the case of imprisonment absolute, but in the case of penal servitude conditional on good behaviour for the remainder of the term. Originally there was a considerable difference between the treatment of convicts sent to penal servitude and confined in state prisons and those sentenced to imprisonment in local gaols. In 1877 the state took over the local prisons and all prisons are now under the Prison Commissioners, who are responsible to the Home Secretary. A Departmental Committee on Persistent Offenders set up in 1932 recommended the abolition of the distinction between penal servitude and imprisonment (1932, Cmd. 4090, see also p. 599 *post*). They also recommended the abolition of the practice of release on licence. They doubted whether the liability to serve the remainder of a sentence (the *remanet*) exercised any restraint upon ex-convicts, nor in these days of easy communication did they attach value to the requirement that those released on licence should report to the police. They attached far more value to the imposition in addition to a sentence of a further period of police supervision (see p. 582 *post*). They recommended that prisoners should be able to earn a remission of one-sixth and one-fourth of short and long sentences respectively. A further advantage of the abolition of the distinction between penal servitude and imprisonment would be

term not exceeding seven years, and not exceeding the term of the aggregate possible sentences. But—see *Rex* v. *Ascoli* (1927), 20 Cr. App. R. 156—only if it considers that even the maximum sentences applicable under the ordinary law would be inadequate for this multiplicity of offences.

that judges could impose sentences of between two and three years.

Imprisonment involved, at common law, simply the deprivation of liberty; but now it may take several forms. (α) A nominal[1] obligation to perform (not only work but) hard labour may be added to it. Such imprisonment was first authorised in 1776. (β) Ordinary punishment, without this hard labour, is now known technically as that imposed upon "offenders of the Third Division". (γ) Below this[2] is that of "offenders of the Second Division"—who enjoy easier discipline, *e.g.* as to prison dress and letters and visits (though not as to food or labour), and are kept apart from the Third Division. Persons imprisoned in default of finding sureties must be placed in this class. (δ) A still lighter form of imprisonment is that of the "offenders of the First Division". These do not wear prison dress, and in fact incur little inconvenience beyond the mere detention. All persons imprisoned for sedition,[3] for criminal contempt of court,[4] or for offences against[5] the Vaccination Acts, must be placed in this division. These are the only forms of criminal imprisonment. If no division is specified by the judge, a prisoner is put into the third.[6] There exists also an even more lenient form of incarceration which is used in cases of *civil* debt.

It will be remembered (p. 110 *ante*) that a sentence for *felony* involves forfeiture of any pension unless the sen-

[1] For the labour is not really "hard", now. So the Criminal Justice Administration Act, 1914, s. 16 (1), now allows it for all offences, even common-law ones; though forbidding it for mere non-payment of fines. Hard labour for men involves 14 days without a mattress.

[2] In order to keep those prisoners that are not of criminal habits out of all contact with the hardened offenders. It is useful in cases like default of fine, or drunkenness, or petty assaults.

[3] 40 and 41 Vict. c. 21, s. 40. See p. 324 *ante*.

[4] 61 and 62 Vict. c. 49, s. 5. [5] *Ibid.* s. 41.

[6] Sentences at Quarter Sessions *now* date from pronouncement. But those at an Assize date from, and include, its Commission Day. Hence an Assize sentence of "three days' imprisonment" *may* only mean instant discharge.

tence be only one of imprisonment for not more than twelve months and without hard labour. And an Old Age Pension[1] is forfeited by any sentence of imprisonment during two years after release if the imprisonment do not exceed six weeks, or during ten years if it do.

The probation system inaugurated by the Probation of Offenders Act, 1907 (see p. 602 *post*), furnished the Courts with a ready method of providing supervision in the open for offenders, whether adults or young persons or children, who can with advantage be dealt with in this manner. It is more and more realised[2] that the individual and his circumstances must be studied with a view to preventing him from following the path of anti-social conduct. It is further realised that bad surroundings lead to delinquency and that those who suffer from neglect need to be looked after as much as those found committing crimes. Offenders between the age of sixteen and twenty-one may be in certain circumstances detained under penal discipline in a Borstal Institution (see p. 600 *post*). Offenders under seventeen may be sent to an Approved School (Home Office School) or to custody in a Remand Home for a month or less.[3] A child may be sent to a Home Office School for three years or until he attains the age of fifteen; a young person for three years or, if over sixteen, until he attains the age of nineteen. No responsibility lies on the Court for fixing the period of detention. The order merely authorises detention for the period. It is for the managers of the schools, under Home Office guidance, to watch the progress of the boys and girls and place them out in life when they are ready. A child under ten may not be sent to a Home Office School unless he cannot be dealt with otherwise. The training in Home Office Schools has proved successful with ninety per cent. of their pupils.[4] A fine

[1] 8 Edw. 7, c. 40. [2] Home Office Circular, 665, 560–2, Aug. 9, 1933.
[3] 23 Geo. 5, c. 12, ss. 54, 57 and 71.
[4] Report of Departmental Committee on Persistent Offenders, 1932. Cmd. 4090, p. 6.

or damages or costs may be exacted from the parent or guardian of an offender who is under seventeen unless the Court is satisfied that his neglect did not conduce to the offence.[1] The Children and Young Persons Act, 1933, provides that every court in dealing with a child or young person brought before it, either as being in need of care or protection or as an offender or otherwise, shall have regard to the welfare of the child or young person and shall in a proper case take steps to remove him from undesirable surroundings and for securing that proper provision is made for his education or training.[2] Juvenile Courts are urged to co-operate with education authorities, police authorities, probation officers and other social workers. A child or young person may be committed to the care of any fit person. It is the duty of local authorities to bring before a Juvenile Court any child or young person needing care or protection, and the police or any authorised person[3] may take the same course.[4] A local authority may itself act as a fit person and may arrange for the boarding out of children committed to its care.

Whipping (now possible only under statutes) is authorised[5] for male offenders, even adults, in a very few gross cases, such as robberies with violence, and also in the case of incorrigible rogues.[6] Boys who are under the age of sixteen may be sentenced to a whipping in a very much wider range of cases including various offences against the Larceny Act, 1916, the Offences against the Person Act, 1861, the Malicious Damage Act, 1861; and boys under fourteen,[7] when convicted summarily of *any* indictable offence, may be ordered to be whipped, with or without

[1] 23 Geo. 5, c. 12, s. 55; see p. 48 *ante*.
[2] *Ibid.* s. 44.
[3] The N.S.P.C.C. has been so authorised.
[4] 23 Geo. 5, c. 12, s. 62.
[5] See for character of whipping 26 and 27 Vict. c. 44, s. 1.
[6] *Ante*, p. 383. And of Procurers; 2 and 3 Geo. 5, c. 20, ss. 3, 7 (5).
[7] 23 Geo. 5, c. 12, Sched. III.

other punishment. Boys of fifteen or less are sometimes released on their fathers promising to chastise them.

Fining[1] is a punishment rarely resorted to in the higher criminal courts. It is employed in less than one per cent. of the convictions upon indictment, and this only in cases where the offence involves little or no moral guilt. But it is inflicted by courts of summary jurisdiction in about ninety per cent. of their convictions for petty offences.

By the modern repeal of all the statutes which for certain offences prescribed minimum punishments, English criminal courts have obtained, at the present day, a complete power of remitting punishment—a discretion very rarely intrusted to judges under the continental codes.[2]

It has become common for judges, when determining the sentence on a prisoner, to be asked to "take into account" other charges of the same *kind* of offence, on which warrants have been issued against him, and which he now (1) admits to be true,[3] and (2) desires to be now dealt with. Cases so dealt with should then be endorsed on the indictment. The total punishment does not usually exceed what would be the maximum for *one* offence of

[1] A fine must be distinguished from the (now vanished) amercement. An amercement was a pecuniary penalty fixed by the jurors; but a fine is fixed by the court. The earliest fines were compositions agreed upon between the judge and the prisoner, to avoid imprisonment, at a time when the King's judges had no power to impose pecuniary punishments (Pollock and Maitland, II, 515).

Care should be taken, when inflicting a fine, to ascertain the resources of the person fined, and to proportion it to them. The Portuguese Code consequently measures every fine by multiples of the offender's actual daily income. Yet even this does not meet the fact that the loss of a day's small earnings is felt more keenly than the loss of a day's large earnings.

[2] The evil effect of minimum punishments in creating in the minds of juries an exaggerated reluctance to convict is vividly illustrated by the fact that on the final abolition of the minimum limit of punishment (ten years' penal servitude) for unnatural offences, the percentage of trials for such crimes which ended in convictions rose at once from the remarkably low rate of 35 to 47. *Criminal Judicial Statistics*, issue of 1896, p. 26.

[3] See 25 Cr. App. R. 66.

that class. In one case in 1925, fifty-two such other charges were thus taken into account. It is a wise practice; for the offender thus secures a free start on coming out of prison, instead of being rearrested.[1] But charges of offences of a different kind (*e.g.* false pretences as against burglary) are less readily taken into account.

Besides these punitive measures, a court may also make orders whose effect is of a purely preventive character. Thus, as has been seen, with the object of removing the young from criminal surroundings, a Juvenile Court may order children needing care or protection to be sent to an approved school or to be committed to the care of a fit person.[2] Another preventive measure is that of Supervision of an adult by the police for a fixed period after his punishment; for whenever a prisoner is convicted of felony, or of one of certain grave misdemeanors, after having been previously convicted of a crime of equal degree,[3] the judge may direct that, after completing his sentence, he shall be subject to supervision for a specified period; up to seven years. (As to the Preventive Detention of habitual criminals, see p. 597 *post.*) At the other extreme, even a person who has not committed actually any offence at all may be required to find sureties[4] for good behaviour or to keep the peace, if there be reasonable grounds to fear that he may commit some offence, or may incite others to do so, or may act in some manner which would naturally

[1] There is however a danger that this practice will be traded upon, and that there may grow up a class of serial offenders. In 1929 one John Donnelly, sentenced at Chester County Sessions, admitted no less than 315 offences in addition to those charged in the indictment, *Criminal Statistics of* 1928, Cmd. 3581.

[2] Children and Young Persons Act, 1933 (23 Geo. 5, c. 12, s. 57). See p. 579 *ante.*

[3] Prevention of Crimes Act, 1871 (34 and 35 Vict. c. 112), s. 8. And at the opposite extreme, an offender who deserves *no* actual punishment may be supervised; but by a "Probation Officer": see *post*, p. 602.

[4] It is not certain whether this power is derived from common law or from statute, 34 Edw. 3, c. 1. See Wade and Phillips, *Constitutional Law*, 2nd ed., p. 380.

tend to induce other people (even against his desire) to commit one.[1]

After the judgment itself has been given there are further Orders which the judge may have cause to make.

(*a*) Of one such we have already spoken[2]—the order which, after any trial for theft, the court may make for Restitution, to the true owner, of stolen property which has been identified at the trial.

(*b*) Another, of much more frequent application, may be made in respect of Costs. In criminal law costs do not "follow the event". The common law knew nothing of costs. And the statutes which introduced them did not mention the Crown—an omission which Blackstone elevates into rules that it is the prerogative of the Crown not to pay costs, and that it would be beneath its dignity to receive them.[3] Hence, as criminal proceedings are technically at the suit of the Crown, no judgment for costs could be given in them. Even if the prosecution were in fact brought by a private individual, the law in no way reimbursed him for the outlay he had incurred in discharging this public duty. But criminal courts are now empowered—the latest and most comprehensive statute being the Costs in Criminal Cases Act, 1908[4]—to order the reasonable costs of the prosecution and of the witnesses for the defence, or of either of them, to be repaid out of public funds, in the case of any *indictable* offence.

[1] *Lansbury* v. *Riley*, [1914] 3 K. B. 229; *Rex* v. *Sandbach* (1935), 153 L. T. 63. See p. 330 *ante*.

[2] *Ante*, p. 259.

[3] III, 400; cf. *Rex* v. *Canterbury, Abp. of* [1902] 2 K. B. 503. By the Administration of Justice (Miscellaneous Provisions) Act, 1933 (23 and 24 Geo. 5, c. 36), s. 7, costs may be awarded to and against the Crown in civil proceedings.

[4] 8 Edw. 7, c. 15, s. 1. The scale of costs allowed to witnesses is fixed by the Home Secretary. See Statutory Rules and Orders of 1920, no. 354. The money is paid *locally*, out of the rates of the county or county-borough where the offence was committed; see Criminal Justice Act, 1925, ss. 11 (2) and 14 (4).

(The merely quasi-criminal offence of obstructing a road or river is excepted.) The power is given, not only to Assizes and Quarter Sessions, but also to justices of the peace when dealing summarily (*ante*, p. 515) with an indictable offence, or when holding (*ante*, p. 532) a preliminary examination about one. Neither side, usually, will receive an allowance for witnesses who speak only to character. The costs allowed to a prosecutor are said to have averaged about £10. Even now the costs awarded do not adequately recompense a private prosecutor or an innocent defendant.[1]

Besides these orders upon public funds, orders for costs may now also be made upon individuals concerned in the criminal proceedings. For (s. 6) any court that convicts[2] a person of an indictable offence may now order him[3] to pay the taxed costs of the prosecution.[4] A similar power has long existed in case of non-indictable offences (*ante*, p. 510). And, on the other hand, there are a few exceptional cases in which a private prosecutor, if the trial has ended in an acquittal, may be ordered to pay the taxed costs of the defence. The principal instances of this are where the prosecution is for a defamatory libel[5] or where examining justices have not only refused to commit for trial, but

[1] See 98 J. P. Jo. 472 and 664.

[2] Even though it inflict no punishment beyond binding over; C. C. C. Sess. Pap. CLVII, 453. The prosecution must convince the court that the defendant has adequate means to pay the costs.

[3] For *felonies* this had been permitted by the Act of 1870 (*ante*, p. 108), before which a conviction for treason or felony caused a forfeiture of the prisoner's goods. And a sentence of death for treason or felony involved, as a necessary consequence, an "attainder" (4 Bl. Comm. 374). A person attainted (*attinctus*, "blackened") became dead to civil rights; his lands were forfeited, and his blood was "corrupted", so that descent could not be traced through him. These consequences were abolished by the Forfeiture Act. But an attainder may still be produced by a judgment of outlawry; though such judgments are, in practice, obsolete. The last was in 1859.

[4] The court will probably fix a maximum to the amount to be thus paid by the person convicted, *e.g.* £1000 in *Rex* v. *Morriss* (1926), 19 Cr. App. R. 75 in Dec. 1925.

[5] 6 and 7 Vict. c. 96, s. 8.

have pronounced an accusation not to have been made in good faith.[1]

(*c*) The common law knew nothing of orders for Damages in criminal proceedings; as they are instituted for punitive and not compensatory purposes. But a great economy of time and money is effected whenever a single judicial investigation into any wrongful transaction can be made to cover all its consequences, reparative as well as penal. Hence the French code freely permits the addition, at criminal trials, of a civil action to claim damages against the prisoner.[2] An experimental, and therefore very limited, step in this direction was taken by the Forfeiture Act, 1870:[3] which in cases of felony empowers the court to order a convicted prisoner to pay a sum not exceeding one hundred pounds, by way of compensation for any loss of property suffered by any person through the felony. Thus a prisoner convicted of forging a bill of exchange may be made to repay to the prosecutor money which he has lost by discounting it. But the clause, being limited to losses of property, does not extend to injuries to the person.[4]

9. *Reversal of Judgment.*

Along with the steps which may be taken at this stage to secure a revision of any supposed error in the judgment, it may be convenient to recall those other modes and occasions of appealing to higher tribunals which we have already noticed at earlier stages of the ordinary criminal procedure; as the student will thus obtain a general view of the subject. The following are the prisoner's opportuni-

[1] 8 Edw. 7, c. 15, s. 6 (3); see p. 535 *ante*.

[2] "L'action civile peut être poursuivie en même temps et devant les mêmes juges que l'action publique" (*Code d'Instruction criminelle*, art. 3).

[3] 33 and 34 Vict. c. 23, s. 4.

[4] For the power to award compensation (*a*) when dismissing trifling charges—if in summary proceedings, up to £25 only—see p. 514 *ante*; (*b*) on convicting for malicious injuries to property, see p. 192 *ante*.

ties, at the various successive stages, of defending himself against errors of law.

I. Before trial.

(*a*) A motion to quash the indictment; for insufficiency apparent on the face of it. As the court has a discretion to refuse to quash an indictment, even for a valid objection, there is no appeal from the refusal; and the prisoner, if he wishes to press his objection, must do it by demurrer, or else wait till after trial.

(*b*) A Demurrer;[1] alleging, similarly, that the indictment is on the face of it insufficient. The court has no discretionary power of refusing to hear objections raised thus; but demurrers involve such disadvantage that they are unfamiliar now.

II. After trial.

(*a*) A motion in arrest of judgment; for any objection in *law* that appears on the face of the record (unless it be merely formal). A felon as we have seen (*ante*, p. 573) is *asked* if he raises such objection.

(*b*) An application to the Court of Criminal Appeal.

The creation of a general Court of Criminal Appeal,[2] by the Criminal Appeal Act of 1907,[3] constituted a revolution in the administration of our penal justice. Previously (except[4] for cases tried in courts of a merely summary jurisdiction) the general principle had been that in criminal cases—unlike civil ones—no appeal was allowed to either party upon any question of Fact. And even on questions of Law the Crown had little opportunity of appeal and the prisoner not[2] an unlimited one. If a jury wrongfully acquitted a man, the Crown had, as it still has, no redress. If it wrongfully convicted him, his only resource was to apply to the Home Secretary for a pardon—a derogatory form of redress for an innocent man. The

[1] *Ante*, p. 559.
[2] *Ante*, p. 496.
[3] 7 Edw. 7, c. 23.
[4] *Ante*, p. 519.

Act of 1907 does not enlarge the Crown's opportunities of appeal; but it greatly extends those of every prisoner convicted[1] upon a trial by jury. (To convictions at Petty Sessions,[2] or on trials by the Lords, it does not apply.)

(A) In the rare cases where his offence is the merely quasi-criminal one of obstructing a highway or bridge or navigable river, he has the full right of appeal as in a civil action; s. 20 (3). (See note 3, p. 497 *ante*.)

(B) And even when the offence charged is a truly criminal one—as in almost all cases it will be—he nevertheless has (s. 3)

(1) an *absolute* right to appeal on any question of pure law;[3]

(2) a right, *in case of* his obtaining leave either from the judge who tried him or from the Court of Criminal Appeal itself or from one of its judges,[4] to appeal on any question of fact, or of mixed fact and law;

(3) a right, *in case of* his obtaining leave from the Court of Criminal Appeal or from one of its judges, to appeal against the sentence passed on him (unless, as in murder, the sentence is one fixed definitely by the law).[5]

A prisoner who desires to appeal should—s. 7 (1)—give notice of his desire within ten days after his conviction; but the Court may[6] grant him an enlarged time. Accordingly—s. 7 (2)—any sentence of death, or even of corporal punishment, is not to be carried out until the ten days, or the enlarged time, be over; nor until the appeal, if then instituted, be disposed of. If the prisoner be poor, the

[1] Or pleading guilty. But *not* if found "Guilty but insane"; *Felstead* v. *R.*, [1914] A. C. 534.

[2] Except as to the *sentences* on "Incorrigible Rogues" (*ante*, p. 383), or on "juvenile adults" (p. 600 n.), sent from Petty to Quarter Sessions.

[3] But the Registrar of the Court—s. 15 (2)—may bring before it promptly any appeal on a purely legal point that seems to him untenable; and the Court may deal with it at once, without hearing arguments.

[4] From his refusal an appeal lies to the full Court.

[5] No leave is needed as to *sentence* of "Preventive Detention"; p. 597 *post*.

[6] Except in the case of an offence punishable with death.

Court may assign him, at the public expense, a solicitor and a counsel. Applications for leave to appeal are usually made in writing; the appellant has no right to be present. He has, however, a right to be present at the hearing of the actual appeal, unless it be on a matter of pure law. At actual appeals the Director of Public Prosecutions must—s. 12—see that the prosecutor is duly represented.

On every appeal, or application for leave to appeal, the judge who tried the appellant must furnish to the Court his notes of the trial and a report giving his opinion upon any points arising in the case (s. 8). (Or, if the appeal involves only a question of pure law, the Court may require the judge to "state a case" as in the old practice of the Court for Crown Cases Reserved; s. 20.) And in view of the possibility of an appeal, shorthand notes are to be taken, at the public expense, of every criminal trial before a jury[1] (s. 16); thus rendering universal a practice which, by the sedulous caution of the City of London, had been in force at the Old Bailey for nearly two centuries. Moreover the Court, when dealing with the appeal, are empowered (s. 9) to order the production of documentary or "real" evidence, and to receive evidence from witnesses, whether they were called at the trial or not, either in open court or by depositions for the purpose.[2] (But new evidence, not given at the original trial, is never to be made a ground for *increasing* the sentence.) They may also, if necessary, appoint some expert, *e.g.* a chemist or a specialist in lunacy, to act with them as an assessor; or appoint a special commissioner to report to them on any question which involves such a scientific or local investigation, or

[1] These do not include the speeches of counsel (unless the judge order it, so as to make clear what issues are actually raised). Yet they are costly. Mr Ashton, K.C., says, "I have known a hopeless appeal cost the country a three-figure bill for transcripts" of the shorthand notes.

[2] In *Rex* v. *Robinson*, [1917] 2 K. B. 108, it was held that on an appeal the prosecution might give in evidence a letter written by the prisoner from prison.

such a prolonged examination of documents or accounts (*e.g.* in cases of embezzlement), as cannot conveniently be conducted before themselves. Provision is made (ss. 12, 13) out of public funds for all the expenses connected with an appeal, including even those of the appellant's own attendance. It thus costs him no money to appeal.

Groundless appeals, such as impede so greatly the administration of justice in the United States, are discouraged by various provisions.[1] There is, for instance, the necessity of obtaining leave to appeal, whenever the point is not one of mere law. There is also a provision, s. 4 (1), that, even where the appellant is technically in the right, his appeal may be dismissed if "no substantial miscarriage of justice has actually occurred", and the jury not only might, but *must*, have convicted even if the law had been duly followed. A fact, for instance, has been elicited by an improper leading question; but the fact was of no moment. The existence of this provision makes for no little uncertainty in the result of appeals.[2] There is, further, in the case of appeals against a sentence, a power—s. 4 (3)—for the Court to alter that sentence by increasing instead of diminishing it. Moreover although, between the institution of an appeal and the decision of it, the appellant escapes the treatment of an ordinary prisoner[3] (being merely detained in a very lenient custody or in rare cases admitted to bail), yet this period will not count (except by special order of

[1] Nevertheless, in 1924, Avory, J., declared the Court to be habitually "burdened with frivolous appeals". In a case "frivolous to a marked degree" the Court had (April 16, 1923) to peruse six hundred pages of transcripts. "Ninety per cent. of the applications are frivolous." And many of the successful appeals release, on a mere technicality, men who are guilty.

[2] Especially in sexual cases where the point at issue is absence of corroboration. Contrast *Rex* v. *Murray* (1913), 9 Cr. App. R. 248, *Rex* v. *Southern* (1930), 22 Cr. App. R. 6; 142 L. T. 383, *Rex* v. *Coulthread* (1933), 148 L. T. 480; 24 Cr. App. R. 44 and *Rex* v. *Bramhill* (1933), 24 Cr. App. R. 79.

[3] If he be under two concurrent convictions and appeal against only one of them, yet both sentences are thus suspended.

the[1] Court) as any part of the punishment. So any man who appeals on untenable grounds postpones thereby the time of his final return to liberty.

But if—s. 4—a substantial miscarriage of justice has occurred, (whether from the judge's wrong decision of a question of law, or from the jury's having returned a verdict incapable of being supported when regard is had to the evidence[2] or from any other cause), then the appeal will be allowed, the conviction quashed, and a judgment of acquittal entered. If the conviction were for theft, the Court can review not only the conviction but also—s. 6 (2)—any order that may have been made for the restitution of the property alleged to have been stolen.

A new trial cannot be ordered (except after a merely abortive one) even though the prisoner be clearly guilty. In *Rex* v. *Hancock* (1931),[3] the prisoner during the course of the trial confessed his guilt and was sentenced without the verdict of the jury being taken. The Court of Criminal Appeal ordered a new trial on the ground that the trial had been a nullity. Avory, J., stated: "Once a prisoner is in charge of the jury his statement that he is guilty is merely evidence on which the jury may act." Similarly a new trial was ordered where two prisoners separately indicted were tried together.[4] A similar order was made where an unqualified juryman sat on the jury,[5] and would be made should a juryman after the trial be found not to have understood English.[6] Though evidence may not be given on appeal by a juror as to discussions in the jury room, evidence may be given as to the competence of a juror.[7]

[1] Which is never made in any case where the grounds of appeal are so slight that leave to appeal was originally refused; 16 Cr. App. R. at p. 90.

[2] If the verdict be *unreasonable*; cases merely weak are not retried.

[3] 23 Cr. App. R. 16.

[4] *Crane* v. *D.P.P.*, [1921] 2 A. C. 299. See also *Rex* v. *Gee*, [1936] 2 All E. R. 89 (depositions improperly taken).

[5] *Rex* v. *Wakefield*, [1918] 1 K. B. 216.

[6] *Ras Bahari Lal* v. *King Emperor* (1933), 50 T. L. R. 1.

[7] *Ras Bahari Lal* v. *King Emperor* (*supra*) disapproving *Rex* v. *Thomas*, [1933] 2 K. B. 489.

If the appellant appeals against his sentence, the Court may quash that sentence, and pass instead "such other sentence (whether *more* or less severe) as they think ought to have been passed"; s. 4 (3). It will not quash a sentence unless it be so excessive as to shew an error of Principle. If, on *any* appeal, the Court finds that, though the appellant did commit the crime, he did so in a condition of irresponsible insanity, they may quash the conviction, and commit him to custody as a criminal lunatic.

The decision pronounced by the Court will usually be final.[1] But in those rare cases, where a point of law is raised which is of such exceptional *public* importance that the Attorney-General certifies that it is desirable to have the highest decision on it, that certificate will enable either party to take the case from this Court directly to the House of Lords; s. 1 (6).

The Act leaves untouched the Crown's prerogative of mercy; and the Home Secretary will thus still be able to institute inquiries of his own, in which he will be free from the technical rules of evidence, and also will be able to consider pleas for mercy based upon grounds which a court of law cannot accept. Or he may instead (s. 19) refer to the Court of Criminal Appeal either the whole case, or any special point in it.

The Act has conferred great benefits, by remedying miscarriages of justice[2] and (still more) by removing the former public anxiety as to the possibility of such mis-

[1] But its decisions (like those of the Judicial Committee and unlike those of the House of Lords) are *not* absolutely binding on itself; cf. the effect of Cr. App. R. 2, 62 on 2, 51; and of 12, 81 on 12, 44; and of 14, 17 on 4, 64; and of 18, 81 on 14, 141. Indeed of all the forms of English judiciary law, whilst real property law is the most stable, criminal law is the least so. "Criminal law", says Sir Harry Poland, "is an essentially fluctuating thing...since our judges rightly interpret it in accordance with the spirit of the age". For "the static mind of the lawyer", as Sir Clifford Allbutt puts it, "must perforce come to terms with the dynamics of the biologist"; or, we may add, of the sociologist.

[2] At present, about six per cent. of the persons convicted on indictment try to avail themselves of the Act. But scarcely one-eighth of these finish with *any* degree of success. For successful appeals against convictions

carriages. It has also raised the level of summings-up, and has done something towards standardising sentences. And it does not seem to have weakened that sense of responsibility in the minds of jurymen which is the great safeguard of accused persons. Countless are the acquittals that have been secured by the influence of those impressive words—still used, though now unjustifiable—"Remember that your verdict is final".

10. *Reprieve, and Pardon.*

The execution of the sentence may be postponed by a Respite of it, *i.e.* a Reprieve of the offender; or be altogether remitted by a Pardon.

Postponements may be granted not only by the Crown but even by the judge. For except in cases of murder, a judge of assize may not only delay[1] the delivery of his judgment, but may even, after delivering it, delay its execution. And, in the case of capital sentences, it is his imperative duty thus to respite it if the prisoner be proved to be insane. But a Pardon lies beyond all judicial discretion, and can be granted by no authority below that of the Crown itself.[2] It may be absolute, or be subject to some condition,[3] or only "remit" a portion of the punishment, or "commute" it to a milder form. Pardons may be granted by the King for all crimes, except two. For (*a*) under the Habeas Corpus Act the King cannot pardon

for murder, see *Rex* v. *Wallace* (1931), 23 Cr. App. R. 32; *Rex* v. *Martin, Ansell and Ross* (1934), 24 Cr. App. R. 177; *Woolmington* v. *D.P.P.* (1935), 25 Cr. App. R. 72; *Rex* v. *Mills* (1936), 25 Cr. App. R. 138.

[1] See p. 574 *ante*.

[2] Wade and Phillips, *Constitutional Law*, 2nd ed., p. 201. The Crown can review the whole history and condition of the offender; and even take into account popular emotion, as when in Lee's case, at Exeter, the damp gallows had thrice failed to act.

[3] *E.g.* the pardons which introduced transportation. Or the pardon granted, about 1730, to a condemned criminal on condition that he would allow the great surgeon Cheselden to perforate the drum of his ear, that the consequent effect upon hearing might be ascertained.

the offence of sending a prisoner out of England to evade the protection of the writ of habeas corpus;[1] and (*b*) even at common law, he cannot pardon a person convicted of a common nuisance until after the nuisance has been abated,[2] for such a pardon might prejudice the rights of the private persons injured by the nuisance.[3] Moreover[4] upon an impeachment by the House of Commons, a pardon by the Crown cannot be pleaded as a defence so as to prevent the trial; though it does save from punishment. A breach of the statutes of a corporation (*e.g.* a University or a college) is not a "crime"; and so is not within the Crown's power of pardon (2 Str. 912; *Dr Bentley's Case* (1731)).

It has often been maintained that a perfect code would remove all necessity for a power of pardon. "Happy that nation", says Beccaria, "in which clemency shall come to be considered dangerous." But long experience has shewn that human foresight is incompetent to frame, and human language to express, a faultless scheme of legislation. The power of pardon therefore is one which is indispensable to the wise administration of penal justice.[5] Yet it is a power which, if exerted to the full, would suffice to overthrow the whole fabric of the criminal law; for mercy to the Few may be cruelty to the Many. President Taft found that this power "must be wielded skilfully, lest it destroy the prestige and supremacy of Law. Sometimes the President is deceived in his exercise of it. I was". (*Ethics in Service*, p. 60.)

[1] 31 Car. 2, c. 2, s. 11. [2] *Ante*, p. 16.

[3] Contrast the converse rule that it is only *before* any informer has commenced an action that the Crown can grant a pardon in the case of conduct forbidden under some penalty recoverable in a civil action by a common informer; *ante*, p. 17.

[4] By the Act of Settlement (12 and 13 Will. 3, c. 2).

[5] The power has, on an average, been exercised in about three hundred cases a year; but only four per cent., or less, of these are *complete* pardons. In 1923 only in 188 cases; and *no* complete pardon. Very rarely is the remission due to any doubt as to the justice of the conviction.

The Accusatorial System

The accusatorial system of English criminal procedure is in strong contrast with the inquisitorial system of continental Europe.[1] In France a searching preliminary enquiry is made by a *juge d'instruction* who investigates the circumstances of the crime and rigorously examines the accused in private.[2] If the accused is sent to trial he is again examined by the presiding judge, although there is a *procureur-général* to conduct the prosecution. There is no cross-examination as in England but questions may be put through the presiding judge. There is a presumption of guilt rather than a presumption of innocence.

English criminal procedure is based upon the presumption of innocence. The judge is dispassionate and tends to assist the accused rather than the prosecution. Prosecuting counsel are restrained by strict convention from acting oppressively or unfairly.[3] From the beginning criminal proceedings take place in public and may be fully reported. A prisoner is rarely refused free legal aid,[4] and always has the right to a dock defence.[5] The rules of evidence are stringent against the prosecution, but are frequently relaxed in favour of the accused.[6] The verdict of a jury must be unanimous. Undoubtedly there is more risk in England of the acquittal of a guilty man than the conviction of an innocent man.[7] It must, however, be

[1] *Criminal Justice in England*, by Pendleton Howard, p. 384.

[2] The accused may be represented by counsel.

[3] See p. 569 *ante*.

[4] See p. 542 *ante*.

[5] The right to call upon any counsel present in court to conduct the defence for the fee of £1. 3*s*. 6*d*.

[6] "If a point of evidence is a near thing, I never decide it against the prisoner"; Lord Darling. Cf. 9 Cr. App. R. 244.

[7] Whether this is advantageous probably varies with variations in social security. J. D. Lewis (*Causes Célèbres de l'Angleterre*) states that, after a wide study of English criminal trials from the time of James II, he found only three cases in which any person had been actually executed who had afterwards been proved quite innocent: viz. the clear cases of Shaw (executed at Edinburgh for the supposed murder of a daughter who had committed suicide), of Jennings (executed at Hull in 1762 for

remembered that, though there is a presumption of innocence upon which the rules of evidence are based, yet there is in fact, and juries know it, a presumption in common sense that an accused person committed for trial after an examination before a magistrate is probably guilty.[1] One distinguished French writer considers that in some points the French system is more favourable to the accused than the English.[2] An innocent man will gain advantage from the thorough preliminary sifting of evidence. An accused who defends himself is in England perplexed by the necessity of distinguishing, when cross-examining witnesses, between statements and questions. Moreover the strict exclusion of hearsay frequently excludes truth.[3]

theft by a mistake of identity), and the much more doubtful case of Eliza Fenning (executed in London in 1815 for an alleged attempt at poisoning). That of the inn-keeper, Jonathan Bradford (executed in 1736 for the murder of a traveller), though a case of innocence, was one of moral guilt, as he had entered the traveller's room to kill him but found him already slain by his own valet.

[1] Study "The Presumption of Innocence" in C. K. Allen, *Legal Duties*.

[2] *Les Principes Directeurs de la Procédure Criminelle de l'Angleterre*, by Emile Seitz.

[3] See p. 435 *ante*.

CHAPTER XXXII

ORDINARY PROCEDURE

III. Detention and Probation

Our review of the long-accustomed forms of Punishment, all of them instituted mainly for Deterrence, must be supplemented by consideration of three methods of dealing with convicted offenders, which aim instead at Seclusion or at Reformation. They are intended, not for the average criminal, but for those who are either worse or better—less capable or more capable of reclamation—than he.

In the reaction of the nineteenth century against penal severities, a theory arose that punishments should be solely directed to the Reformation of the offender. But protracted experience has shewn that noble aim to be far more difficult of achievement than this theory presupposed. The great number of "Recidivists", a number now increasing in almost every country, sufficiently attests this. Thus in England, in 1930, out of 39,000 sentences of imprisonment, 28,000 were imposed on persons who had previously been found guilty of offences. In 20,834 cases the offenders had been previously imprisoned. Of these 3382 had served from six to ten previous sentences, 2622 had served eleven to twenty previous sentences, and 2125 had served over twenty previous sentences. Now the great object of criminal law is to prevent crime. Hence, if any particular offender has been convicted so frequently as to make it clear that he cannot be kept from crime through the medium of either reformation or deterrence, it remains only to effect that prevention in a direct way, by placing him in a seclusion where it will be im-

possible for him to repeat his offences. Unless so secluded, he will not only continue his offences, but will also train others to offend, and will moreover transmit his aptitudes to a tainted posterity. "The interests of justice are sacred; the interests of the offender are doubly sacred; but the interests of society are thrice sacred" (Anatole France). For social safety, an attempt was made, by the Inebriates Act, 1898 (61 and 62 Vict. c. 60), to provide State reformatories for the seclusion for three years of those offenders whose cravings for alcohol have proved to be incorrigible, but the experiment was a failure and the reformatories are now closed.[1] A similar seclusion is still more necessary in the case of similarly incorrigible cravings for crime. If we cannot deter from it, we must debar from it. Hence in France, a criminal whose record shews him to be thus hopeless, must be placed in perpetual *relégation*, in a penal colony. Accordingly the Prevention of Crime Act, 1908 (8 Edw. 7, c. 59) enabled the court which sentences to penal servitude a person whom a jury has convicted of felony,[2] and has also pronounced to be an "habitual criminal",[3] with at least three previous serious convictions since the age of sixteen, to add a further[4] sentence of merely "Preventive Detention" after the end of the penal servitude. This detention may be for any period between five years and ten (but not, as the Bill at first proposed, for life). It goes on under treatment less rigorous than in

[1] Against the once notorious Jane Cakebread, who died in 1898, 281 convictions for drunkenness stood recorded; Eleanor Larkin underwent her 228th in 1920. Lord Herschell mentions a woman who underwent 404 imprisonments for drunkenness.

[2] Or of coining, false pretences, conspiracy to defraud, or being found by night about to commit burglary.

[3] If the indictment has charged him with this "habitualism"; which it can only do by consent of the Director of Public Prosecutions. Consent is not given unless the man has already undergone penal servitude once; and is over thirty; and the present offence is grave. A previous finding that a man is an habitual criminal does not mean that he will always be an habitual criminal, *Rex* v. *Norman*, [1924] 2. K. B. 315.

[4] The offender can (*ante*, p. 587 n.), without leave, appeal against this.

prisons; *e.g.* as to hours, food, visits, recreation, and earnings.[1] The life is practically that of a Farm Colony. The cases are periodically considered with a view to discharge on licence; but of the men released the proportion that have done well is "very small" (Troup's *Home Office*, p. 123).

As can be seen from the statistics of 1930 (p. 596 *ante*) the present methods "not only fail to check the criminal propensities of many persons, but may actually cause progressive deterioration by habituating the offenders to prison conditions, which weaken rather than strengthen their characters". "A substantial part of the prison population consists of a stage army of individuals who pass through the prisons again and again."[2] Normally a court sends an offender to prison for a period proportionate to the gravity of the particular offence for which he stands convicted, and society is temporarily protected from injury from him, but nearly 80 per cent. of imprisonments are for not more than three months, and in the case of persistent offenders the amount of trouble and money expended is out of all proportion to the result achieved. The Court of Criminal Appeal has[3] frequently insisted that the length of a sentence must be primarily determined by the intrinsic gravity of the crime committed. The maximum sentence must be reserved for especially heinous cases, and though the Court must have regard to age, health, previous convictions, etc.[3] it must also be remembered that if a man with a bad record were liable to receive the same sentence whether convicted of a minor larceny or of robbery with violence, there would be danger of his preferring to be hanged for a sheep rather than a lamb.

Faced by this problem a recent Committee on Persistent

[1] The average number of persons serving this sentence is 128.

[2] Report of Departmental Committee on Persistent Offenders, 1932, Cmd. 4090.

[3] See p. 607 *post*.

Offenders[1] has recommended considerable changes in the treatment of persistent offenders. At present a sentence of preventive detention can only be imposed (*a*) in addition to sentence of penal servitude; (*b*) where the accused is convicted of an offence of sufficient gravity in itself to warrant a sentence of penal servitude, and (*c*) for not less than five years. The Home Office have recommended that this procedure under the Act of 1908 should not be adopted unless the accused is over thirty and has already served at least one sentence of penal servitude. The Committee formed the view that for offenders between the ages of twenty-one and thirty in the initial stages of a criminal career a shorter period of detention than five years would often be effective. They recommended that the Borstal principle should be extended to adult offenders, *i.e.* that it should be possible to regard the character of the offender as much as the nature of the offence, that sentences of detention should be served under conditions designed to fit the offender for life on release, and that there should be a prospect of release on licence. They stressed the importance of providing for persistent offenders between the ages of twenty-one and thirty. In 1930 25 per cent. of the indictable crimes committed were committed by persons between those ages. They recommended that a new form of sentence should be introduced and that it should be possible for Courts of Assizes or Quarter Sessions in suitable cases to pass a sentence of detention for not less than two nor more than four years. Such power should only be applicable where the offence committed is punishable on indictment w th two years' imprisonment. The object of detention would be remedial and custodial rather than penal. For hardened professional criminals the Committee recommended that it should be possible to impose *in lieu* of imprisonment or

[1] Report of Departmental Committee on Persistent Offenders, 1932, Cmd. 4090.

penal servitude a sentence of detention for not less than five nor more than ten years, in cases where detention is expedient for the protection of the public. This power would only be exercised when the offender is convicted of a serious crime and has had three previous convictions. The Committee recommended that the conditions in Detention Establishments should be less repressive than in prisons. It would appear difficult to distinguish between cases suitable for detention and cases suitable for imprisonment, and perhaps the objects of the Committee could be sufficiently attained by a relaxation by the Court of Criminal Appeal of the rule that the gravity of the crime must be the primary factor in determining the length of the sentence. That imprisonment should as far as possible be reformative as well as deterrent and should be directed to fitting the prisoner for life outside would seem to be a principle as applicable to ordinary prisons as to Detention Establishments. Indeed this principle is already practised. Special prisons are set aside for special classes of prisoners. An educational adviser is attached to each prison. Effort is made to provide training.

Old offenders are frequently beyond reclamation, but young ones are exceptionally capable of it. Thus good results have long been obtained by sending boy-criminals to Reformatory Schools instead of to prisons. The experiment of a similar treatment of older lads was tried in 1902 at Borstal Prison, near Rochester. Its success led to the passing of s. 1 of the Prevention of Crime Act, 1908 (8 Edw. 7, c. 59); under which an offender who has attained sixteen but is not yet twenty-one—a "Juvenile Adult"—when convicted on indictment of a crime punishable by imprisonment, may be sent for not more than three years, or [now] less than two, to "detention" as an "inmate" of a "Borstal Institution", instead of to prison. In 1925 the judges declared three years to be the desirable minimum. Even a court of summary jurisdiction may send a *reconvicted* juvenile adult, whose new offence is one punish-

able with at least a month of prison, to assizes or sessions, which can decide for or against Borstal treatment for him.[1] There are now several Borstal Institutions; and during 1931 there were sent to them 600 young persons. These institutions are classified and before being sent to one boys are sent to a boys' prison at Wormwood Scrubbs for classification. The young offenders receive physical, industrial, and moral training.[2] Good behaviour is rewarded by enjoyment of a Summer Camp.[3] Release on licence is possible after six months at the discretion of a visiting committee, and after two years lads are usually released on licence and pass the next two years under the supervision of an admirable Society—the "Borstal Association". Its more than a thousand Associates (many of them unpaid) afford to these licencees the assistance and advice that ex-prisoners receive from the excellent Discharged Prisoners' Aid Societies. And about three-fourths of the Borstalians pass through these two years of freedom without committing any offence against the law; and even of those who have been at liberty for eleven years a majority have proved equally law-abiding. Of those who have now undergone Borstal treatment, only about 35 per cent. have again been convicted. As many of them are mentally or corporeally defective, these results surpass expectation.

Borstal treatment is not for those physically weak; nor for first offenders or other novices in crime; but for hale lads who have been imprisoned and have obviously taken to a career of lawlessness. Anyone, whether youth or adult, who has committed only a single offence, and that a trivial one, can usually be checked effectually by a simpler method. It has long been a practice of the judges

[1] Criminal Justice Administration Act, 1914, s. 10 and Criminal Justice Act, 1925, s. 46 (1).

[2] In prisons themselves a kindred course is now followed in the "Young Prisoners' classes" (formerly called "Modified Borstal treatment"), for those between nineteen and twenty-one.

[3] In 1928, 495 enjoyed it.

—where a convicted offender's character and surroundings make it desirable—to release him without immediate punishment; but to bind him over to appear for his sentence should his conduct make this necessary, and to be of good behaviour meanwhile. (See 30 St. Tr. 1130 for an instance in 1809.) To commend this practice, and to approve its exercise even in courts of summary jurisdiction, s. 16 of the Summary Jurisdiction Act, 1879, was passed. The matter is now regulated by the Probation of Offenders Act, 1907 (7 Edw. 7, c. 17).[1] Under this statute, any court, whether of summary or of higher jurisdiction, which considers that, though an offence is proved, it is inexpedient[2] to inflict actual punishment, may release the offender on recognizances[3] to be of good behaviour and to appear for judgment, within a time not exceeding three years, *if* called on. A court of summary jurisdiction need not even record a conviction.[4] The Court may also order him to pay damages (not exceeding £25[5] if it be a summary court) and costs. The Court may attach conditions to the recognizance; *e.g.* as to restitution, residence, intoxicating liquor, entering a Farm Colony or a Refuge or an Inebriates' Home, or even quitting Great Britain, but if it is desired that young offenders should be placed in an institution, they should be sent to a Home Office school. It may, in addition, place him under the supervision of a Probation Officer; whose duty will be to visit him periodically, report on his behaviour, and "advise, assist, and befriend him". If he breaks his recognizance, the recognizance may be forfeited and sentence may be imposed for the original offence. The sum adjudged to be paid under the recognizance may be remitted in whole or in part. An alternative punishment is to impose a fine not exceeding £10 without prejudice

[1] As amended by Criminal Justice Act, 1925 and Criminal Justice (Amendment) Act, 1926 (16 and 17 Geo. 5, c. 13).

[2] See p. 514, n. 2. [3] See p. 541 *ante*. [4] See p. 514 *ante*.

[5] Criminal Justice (Amendment) Act, 1926, s. 1.

to the continuance in force of the recognizance.[1] A court of summary jurisdiction may even release him without recognizances. Where any person under a recognizance is brought before a court of summary jurisdiction, he may be remitted to the court which imposed the recognizance.[2] In 1933 the Act was applied to more than half of the persons against whom indictable offences were *summarily* proved; whilst of these half were put under Probation Officers. In all, over 16,000 were so put. Barely five per cent. of the probationers offend again within the same year.[3]

This lenient release is not appropriate where the first offence is one of great gravity,[4] like coining or forgery or doing grievous bodily harm. Its indiscriminate application is apt to produce in the locality an impression that every person may commit *one* crime with impunity. Nor is it appropriate when a person who has already been on probation commits a second offence, even a slight one. In France the application of similar leniency upon a third or even a fourth offence is said to have "volatilisé" the

[1] Probation of Offenders Act, 1907, s. 1; Criminal Justice Act, 1925, s. 7; Criminal Justice (Amendment) Act, 1926, s. 1. Where the charge is one of breach of recognizances there must be an opportunity given to answer the charge, *Rex* v. *Pine* (1933), 24 Cr. App. R. 10. The charge must be proved, but it is a matter for the court and not for the jury.

[2] Probation of Offenders Act, 1907, s. 6; Criminal Justice Act, 1925, s. 7; and Criminal Justice (Amendment) Act, 1926, s. 1.

[3] Mr Wheatley, invaluable in London courts, was during 1908–24 the probation officer to 2629 persons. He stated that "the great majority" of them have done well *permanently*. A probation officer's task is nevertheless a difficult one. A departmental committee in 1922 reported that thorough success in it requires "a keen missionary spirit based on religious convictions"; as with Mr Wheatley. A kindred system of "Liberté surveillée", established in 1912 in France, has worked disappointingly; partly from being applied too indiscriminately, and partly from the lack of supervisors, especially of good ones. At a conference of jurists in 1925 it was stated, without contradiction, that out of the 300 supervisors in Paris only twenty worked efficiently.

[4] On Oct. 26, 1925, the Court of Criminal Appeal in two bad cases of theft by first offenders, confirmed sentences of nine months and of twelve months; and one of three years' penal servitude on a second conviction.

criminal law in some districts. Obviously this light treatment must have some tendency to encourage crime; both by the offender's prospect of comparative immunity and also by the victim's reluctance to undertake the trouble of prosecuting for a result so slight.

But for a first offender, whose offence is not a heinous one, it is desirable to avoid imprisonment.[1] Prisons are a great deterrent to those who have never been in them; but often have little terror for those who have had actual experience of their comforts.[2] And their effect on the young is apt to be[3] degrading. Too often have juvenile offenders "entered gaol as Imps, but come out of gaol as Devils". Hence when his case cannot be met by a fine, a first offender is often sufficiently punished by the disgrace of the public exposure to make it well to dispense with any graver immediate punishment. A stigma has accrued and has to be lived down.[4]

The success of Probation is now so clear that the Criminal Justice Act, 1925, ss. 1 (1) and 2 (1, 2), requires every Petty-Sessional Division to have (1) at least one probation officer, and also (2) a Probation Committee[5] to supervise him and remunerate him. The Social Services Committee (1936) recommended the appointment of whole-time salaried Probation Officers.

[1] But it must be remembered that a first prosecution does not necessarily mean a first offence. In 1925, in a case of first conviction, fifty-one previous offences were admitted and "taken into account".

[2] Warmth, clothing, regular meals, medical aid, and a clean separate room, are potent attractions to English idlers; as a prison's coolness in summer is to Neapolitan ones.

[3] Short sentences often are long enough to degrade but too short to reclaim.

[4] On the other hand the prospect of public notoriety does actually attract some vain persons to crime; especially to grave crimes, like attacks on Royalties. Hence Czecho-Slovakia has forbidden publication of the portraits of criminals who attempt to kill any high public official.

[5] Except in London; where the Home Secretary will act as one.

CHAPTER XXXIII

THE PROBLEMS OF PUNISHMENT

Our consideration of the various modes of punishment now recognised in English criminal law may recall the remark (*ante*, p. 39), that neither they, nor the abstract doctrines of Punishment which have given rise to them, can be regarded as having attained a final—or even a temporarily stable—form. Nor can our doctrines as to punishment, and our present modes of inflicting it, be said even to be in logical accord with each other. "All theories on the subject of Punishment", said Sir Henry Maine in 1864 (*Speeches*, p. 123), "have more or less broken down; and we are at sea as to first principles". Citing these words in 1924, Mr Justice McCardie added "Again and again I have heard men of juristic distinction express the same opinion." And in 1925 Lord Oxford, also citing them, added "Nothing has since been said or written that has brought us any nearer to those principles." Continental jurists express an at least equal distrust as to the systems pursued in their countries. But to Englishmen the importance of arriving at definite principles on this subject is peculiarly great; for our abolition of minimum punishments has given our judges a range of discretion, and therefore of responsibility, not usually entrusted to continental tribunals.[1]

One important rule has been laid down by John Stuart Mill;[2] viz. that, as the Deterrent power of any punishment depends more on what it seems to inflict than on what it actually does inflict, it is well to select penalties that seem

[1] Cf. Franqueville, II, 706. Sir Raymond West has described an instance in which, under the rigid minima of the French Code, it had been necessary in Egypt to sentence a boy who had stolen a turnip to three years' imprisonment.

[2] *Hansard*, April 21, 1868.

more rigorous than they really are. Thus, he adds, Death-penalties in fact are less cruel than any penalties which modern legislatures would be likely to substitute for them. Less cruel, we may add, for instance, than the "living tomb" of perpetual subterranean isolation to which the Swiss law consigned the assassin of the Empress of Austria.

Yet, though Penology is still an incomplete science, it is an ancient one. The experience of centuries rendered familiar, long ago, various leading considerations which habitually affect the minds of legislators in determining the maximum penalty for any given class of offences, and the minds of judges in determining the particular penalty to be inflicted in any given instance. Thus the ancient Roman lawyers enumerated[1] seven points to be taken account of: 1. *Causa, e.g.* wanton aggression, or parental chastisement; 2. *Persona* (both of offender and of victim); 3. *Locus, e.g.* sacrilege or not; 4. *Tempus*,[2] *e.g.* night or day; 5. *Qualitas, e.g.* open theft or secret; 6. *Quantitas, e.g.* theft of one sow or of a whole herd; 7. *Eventus*,[3] *e.g.* mere attempt or consummated crime. Practically speaking, the Offence itself, and the Offender.

I. As regards the Offence, account must be taken: (1) of the greatness or smallness of the evil likely to result from acts of its class;[4] (2) of the facility or difficulty with which it can be committed[5] or, again, with which it can be detected; (3) of the frequency or rarity with which, at the particular time concerned, acts of this class are being

[1] *Dig.* 48, 19, 16. The passage, which is a striking one, is the only extant fragment of Claudius Saturninus, an Antoninian magistrate. Cf. an admirable corresponding enumeration of topics made by Blackstone (4 Comm. 13).

[2] The Code made in 1892 for Samoa provides (chap. ϕ), that "If any one breaks a law on a *Sunday*, this aggravates the act."

[3] At Lagos men, convicted of murder, urged "But we did not *eat* her."

[4] Hence the severity with which treason is punished, or a sentry's sleeping on duty; even when the ethical guilt is small.

[5] Hence the severity with which servants are punished for thefts of their employers' property; and the leniency usually shewn to the rank and file after the suppression of a great rebellion.

committed;[1] (4) of the aggravating or extenuating circumstances which accompanied this particular act—for instance, (α) the victim, as where a woman or a child is assaulted, (β) the place,[2] (γ) the time,[3] (δ) the company, a crime being more dangerous if committed by a group of men than if by one alone.

II. As regards the Offender himself, account must be taken: (1) of his age, health and sex;[4] (2) of his rank,[5] education,[6] career, and disposition[7] (previous offences of the same kind count more in raising sentence than do those of a different kind); (3) of his motive; (4) of any temptation,[8] or intoxication (*ante*, p. 69), under the influence whereof he acted; (5) of his susceptibility[9] to punishment, *e.g.* an imprisonment meaning much more, but a fine meaning much less, to a nobleman than to a

[1] Frequency mitigates the wickedness, but increases the need for deterrence. Conversely, the fact that felonies against property have (in proportion to population) fallen to less than half of what they were a generation ago, has made possible the lighter sentences which are now inflicted for them. The prevalence of a particular crime in a particular locality is a proper consideration to be taken into account in determining a sentence, but it must not result in a convicted man being made the scapegoat of other people who have committed similar crimes, but have not been caught and convicted, see *Rex* v. *Withers* (1935), 25 Cr. App. R. 53.

[2] Cf. p. 196 *ante*.

[3] Cf. p. 201 *ante*.

[4] Of our grave offenders, women form only one-tenth.

[5] See 16 Cr. App. R. at p. 194. Privilege augments Responsibility.

[6] To have had a good education and done well at College is often urged in mitigation. Yet it may aggravate guilt; "*he* ought to know better".

[7] The practice of diminishing a sentence because the accused has pleaded guilty or has made restitution or has disclosed the whereabouts of the stolen property (cf. 15 Cr. App. R. 81, 85, 95) may be justified, even in theory, by regarding this attitude of his as proof of a penitent disposition; and so (as Lord Bacon says) "a footstool for mercy". He deserves credit for making a clean breast of it; or, again, for not having gone into the witness-box to perjure himself, but the fact that the Judge believes that the prisoner has committed perjury in defending himself is not a ground for increasing sentence.

[8] Cf. p. 37 *ante*.

[9] In 1896 the author heard a prisoner urge, in mitigation of sentence, "Whenever I've been sent to prison before now, it has always been for such a very long time."

ploughman; (6) of the evil which the judicial proceedings have inflicted on him already, *e.g.* his imprisonment whilst awaiting trial.[1] The Court of Criminal Appeal has frequently laid it down[2] that if a man is convicted for a minor offence, it is not right that he should receive a severe sentence merely because he has been previously guilty of serious offences, especially where a considerable interval has separated the more serious offences from the minor offence. The sentence passed ought to bear some relation to the intrinsic gravity of the crime.[3] It has been suggested[4] that the present practice of the Court of Criminal Appeal does not pay enough regard to the security of the community.

Numerous as are these determining circumstances, a complexity is introduced by the fact that the same circumstance does not always operate in the same way. We have already (p. 37) noticed this in the conspicuous instance of Temptation, which sometimes extenuates the punishment, and sometimes aggravates it. For, since the aims for which punishment may be inflicted are numerous—deterrent, preventive, reformative, retributive, reparative (*ante*, pp. 33–36)—the effect of a circumstance may vary according to the particular aim which is predominant in the mind of the particular legislator or judge. For example, that the person murdered was the husband or wife of the murderer, is usually regarded as enhancing the wickedness of the crime; yet there are some modern codes which treat it as an extenuation. Indeed, as Sir Samuel Romilly observed, "Often the very

[1] But the habitual practice of taking any such preliminary detention into account, in sentencing a convicted prisoner (the whole period being now usually deducted from a sentence of imprisonment, see 2 Cr. App. R. 149), requires, as its logical consequence, legislative provision for affording to acquitted prisoners (if clearly innocent) a pecuniary compensation for similar detention.

[2] 19 Cr. App. R. 35, 75.

[3] 22 Cr. App. R. 78; but see pp. 598 *et seq.*, *ante*.

[4] *Journal of Comparative Legislation and International Law*, xv, 241.

same circumstance is considered by one judge as matter of extenuation, but by another as a high aggravation of the crime." He gave, as illustrations, the facility of the offence, the frequency of it, the fact of the offender's being a foreigner, or of his being young (which can be treated as a proof either that he is not yet hardened or that he is precociously wicked).[1]

Since Romilly's time, the difficulties surrounding this subject have grown greater instead of less. For the development of a science of Criminology[2] has disclosed to us the unexpected complexity of the problems of crime. The jurists of the eighteenth century—Romilly himself, for instance, and his masters Beccaria and Bentham—have earned a just fame through their successful efforts to purge mediæval criminal law of its aimless severities, by abolishing mutilations, minimising the number of capital punishments, and reforming the prisons. But experience has shewn that they exaggerated the simplicity of the problem they were dealing with. They treated the human race as if all its members were possessed of equal moral responsibility, except a few abnormal individuals, all of whom were equal in their abnormality. And they supposed that, if punishment were but aptly selected, the threat of it would effectually restrain all ordinary human beings from crime.[3] But, since their time, the experience of three generations has tested their doctrines. The numerousness, in every country, of "Recidivists", who return time after time to gaol, has shewn how exaggerated

[1] Political motive, similarly, whilst often thought to extenuate, may well sometimes aggravate. A bank-cashier, who had defrauded his bank, urged in 1909 that "I don't look upon it as a crime; for capitalists are the ruin of this country."

[2] The student may refer to Prof. A. Prins' admirable treatise, *La Science pénale*, and to Tarde's *La Philosophie pénale*.

[3] Even so experienced a lawyer as Romilly could say (in the speech of Feb. 9, 1810, already cited) "If punishment could be made an absolute certainty, a very slight penalty would suffice to prevent almost any species of crime, except crimes arising from sudden passion."

were the hopes once entertained as to the reformative effects of well-directed imprisonment. For soul, as for body, surgery is found far less effective than sanitation. The cure of criminal habits is difficult. But the prevention of them is more easy. Nothing, it has been said, more signally marked the reign of Queen Victoria than the diminution of crime.[1] Yet even this prevention was effected less by any improvements in the criminal law than by improvements in the social surroundings of the people. Crime has diminished; not so much because people were more strongly deterred from it by the terrors of punishment, as because they were raised further above temptation to it, by better education, greater sobriety, healthier dwellings, increased thrift, more systematic provision for the events of sickness, accident, and fitfulness of employment, and readier assistance for orphans and other destitute children. How much more the criminality of a country depends upon its fiscal and administrative[2] laws than upon the laws that directly concern crime, has been growing increasingly clear ever since Quetelet first shewed by arithmetical illustrations that the ratio of convictions to population varies both with physical and with economic changes. Familiar examples of this are the decay of smuggling since the reduction of customs-duties, and of piracy since the development of steam navigation. Others are the increase of violent assaults in periods of high wages (as also, for a different reason, in the months of heat); and the increase of thefts in years of bad trade or in the months of winter. Unquestionably by far the most important means of securing a diminution of crime is a

[1] The statistics of 1911 shewed a nearly continuous decrease of *indictable* crimes since at least 1857 (beyond which date, accurate comparison is not possible). The annual number of persons tried for them was, in the period 1862–66, 2860 per million of population; but by 1920 had fallen to 1612 per million.

[2] Some truth underlies the exaggeration that "One policeman is worth two gaolers; and one street-lamp is worth two policemen."

general improvement in social conditions. The general level of prosperity, comfort and education, the whole standard of civilisation of the nation, is reflected in its criminal statistics.[1] Most crime is merely the symptom of profound social maladjustments and injustices, and can only be cured by removing the fundamental causes in the social structure itself.[2] Insanitary and congested areas are breeding grounds of crime.[2] What Indigence does not do, Instability will. Any sudden economic change, which intensifies poverty abruptly, will produce a temporary increase of theft; though it lessens drunkenness, and consequently crimes of violence. Experience of the influence of external causes has led some observers of prison-life into extreme generalisations; as when Lacassagne says that "A nation has only just so many criminals as she deserves", or Mr J. W. Horsley that "Crime is only condensed alcohol." We may more safely say that the chief causes of crime are poverty, drink (decreasingly now) and betting (increasingly now); or, as Mr Justice McCardie put it, "the elemental passions of avarice, anger, and lust".

The reaction against the views of the eighteenth century has carried a very important group of jurists—the "Italian" or "Positive" school of criminologists—into an opposite extreme. Instead of treating nearly every offender as a responsible being, capable of being deterred from crime by the threat of punishment, these writers, all but discarding any idea of deterrence, treated nearly every grave offender as an irresponsible being, the victim of either his nature or his nurture, either his defective cerebral organisation or his unfavourable social surroundings. This "Scuola Positiva"[3] formulated a five-fold

[1] The Home Secretary, Sir Herbert Samuel, 1932.

[2] Mr C. H. Tuttle, *Reports of American Bar Association*, 59, 1934.

[3] Created by the physician Cesare Lombroso, and the lawyers Garofalo, Ferri, and Colajanni. See *Journal of Soc. of Comparative Legislation*, 1910, pp. 220–228.

classification of criminals, grouped accordingly as their respective crimes spring:

(1) merely from Passion;

(2) from Opportunity (the man offending only when exposed to some active temptation and restrained by no external check);

(3) from acquired Habit (usually the result of social surroundings);

(4) from Insanity (in its vast variety of grades, from neurasthenic absence of self-control to active mania);

(5) from innate Instinct[1] (which these writers regard as usually an atavistic inheritance from some early stage in the development of the human race).

This fifth class, the supposed "born-criminals", intermediate between the madman and the savage, have been subjected to elaborate investigation by these Italian writers; who allege them to be recognisable by pathological signs, visible not only in the skull and skeleton but even in the skin, hair, ears, hands, muscles and eyes. Some Russian psycho-pathologists have carried this so far as to allocate different colours of the eye to different species of crime; finding, for instance, chestnut-brown prevalent in murderers, and slate-colour in robbers.[2]

Of the five groups, the first two are corrigible; but the third (to which most thieves belong) passes easily into incorrigibility, and the fourth and fifth, from the outset, are usually incorrigible.[3] For these last three, therefore, as *déséquilibrés*, the only appropriate treatment is "Segregation" (*i.e.* non-punitive detention in what is rather an asylum than a prison). And this must continue for an

[1] Aristotle's "Brutishness"; Ethics, VII, 5. Like Caliban, "a devil, a born devil, on whose nature Nurture can never stick".

[2] The author heard a prisoner (apparently of Lombrosian views) plead in mitigation of sentence that on one foot he had *six* toes.

[3] Hence the extreme Lombrosians would seclude such men as soon as their pathological signs are recognised, without waiting until they have committed a crime. But the less extreme would merely use those signs to eke out weak evidence on an actual accusation of crime.

indeterminate period;[1] that is to say, permanently, except when the treatment proves so successful as to bring any particular offender to such a condition of mental health as makes it safe to release him. Meanwhile the detention is to have not only a curative, but also a compensative purpose; being so regulated as to try[2] to obtain from the labour of the criminal a sum of money which will make amends to the victim of the crime. In the case of offenders of the first two classes the raising of this compensation-money is, indeed, to be practically the sole object of their detention.

In these Italian theories, it is obvious that criminal law, properly so-called, disappears from view; and is replaced by civil law in some cases, and by the art of medicine in others. The writers of this school have certainly rendered great services by drawing attention to the necessity of distinguishing between different types of criminals.[3] They have thus warned legislators against the old error of trusting uniformly to the deterrent efficacy of punishment; and, still more, have warned judges of the necessity of an "Individualisation of Punishment", based on such an inquiry into the career and characteristics of each offender as will make it possible to adapt his particular penalty to his particular needs.[4] But their influence is now waning. The pathological peculiarities upon which so much stress has been laid by them are now shewn to

[1] Measured, not by the guilt of the Act, but by the obduracy of the Man.

[2] Hopelessly, however; for a prisoner, even when hale enough to be employed (15 per cent. are not), costs more than he earns. His *gross* earnings in 1920–21 were £44. 2*s*. 9*d*. a year; his gross cost for maintenance and supervision £121. 7*s*. 10*d*. Thus in 1923–24 a man's *net* cost in prisons was £84. 10*s*.; in penal servitude, £100. 7*s*.

[3] Van Hamel well says: "Former lawyers had bidden men study Justice; Lombroso bade Justice study men."

[4] The importance of this Individualisation has been recognised ever since Wahlberg published his *Princip der Individualisirung in der Strafrechtspflege* (Vienna, 1869). Hence codes err that fix a minimum to punishments.

occur in many persons who are free from all taint of criminality; and even should they occur in criminals more frequently than in others, this may be a mere result of economic surroundings, for the surroundings of most criminals are those of poverty. Nor is the innate instinct to crime at all so frequent as these writers assume; experience shews that most criminals are much like other men, and that it is only by gradual steps that they have fallen. The fact that most criminals are born of non-criminal parents, considered in view of the success of the training given in institutions like Dr Barnardo's to children of the poorest classes, shews that it is less to Inheritance than to Environment that crime is due. The orderliness of the people of a colony may shew little inherited trace of the convict founders. And the fear of Punishment does go far in restraining ordinary people from crime. The Italian writers are—just as, on the other hand, were the eighteenth-century writers who laid exclusive stress upon Deterrence—too eager to reduce the complex problem of crime to an artificial simplicity.

Lombrosian influence soon waned. The tide was turned against it by two elaborate books—Baer's *Der Verbrecher in anthropologischer Beziehung* and Aschaffenburg's *Das Verbrechen*. The waning has gone on.[1] "There are now very few thorough-going adherents of Lombroso", said Lord Oxford in 1925. Dr Goring, in an invaluable treatise *The English Convict*, tabulated elaborate medical statistics concerning three thousand grave offenders. The results challenge the Italian theories at almost every point; and lead to the inevitable conclusion that "there is no such

[1] Prof. Dwight, the Harvard anatomist, wrote in 1911 that "The rise and fall of Lombroso's school is one of the most curious episodes in the history of science in the nineteenth century." Even in Italy there has been a reaction under the "Humanist" school, led by Lanza, who based penal law upon the human Conscience. Prof. Karl Pearson holds that no one has more gravely "disregarded the laws of scientific procedure" than Lombroso.

thing as an anthropological criminal type" (p. 370). This conclusion is, of course, quite compatible with the familiar fact that the proportion of persons more or less defective, in body or mind, is usually higher amongst prisoners than amongst the general population. That fact is readily intelligible, quite apart from any theory of innate criminal propensities. For every one who has less than the average physical and mental powers for earning an honest living, has more than the average temptation to get his living dishonestly; and is hampered also in any effort to evade the police. Thus the proportion of feeble folk, of one sort or another, will always be higher amongst criminals than amongst ordinary people; and higher amongst criminals arrested and punished than amongst those who succeed in evading detection. The Prison Commissioners, in 1914, endorsed (p. 23) the conclusions of Goring's book; convinced that "there are no physical or mental or moral characteristics *peculiar* to the inmates of our prisons.... The man is not predestined to a criminal career by a tendency which he cannot control".[1]

In the case of offenders whose minds are obviously feeble and who fall into crime from mere weakness of will, a seclusion[2] in farm colonies under philanthropic surveillance might well be substituted for punitive imprisonment. The same feebleness which makes them yield to the first tempter, or to the first impulse, makes them also unable to feel any deterrent force in so apparently remote a prospect as that of legal punishment. Hence it is not by threats of a punitive seclusion, but only by the direct

[1] Mr Clifford Rickards, in 1920, after acquaintance with several thousand convicts in penal servitude, "unhesitatingly confirms" Dr Goring's refutation of Lombroso (*A Prison Chaplain*, p. 66).

[2] As aimed at by the Mental Deficiency Act, 1913. Many degrees of mental disorder or weakness so lessen the power of self-control that the man, with his diminished responsibility, becomes "unfit for ordinary penal treatment, yet not capable of being certified as insane". About one per cent. of our prisoners seem to be thus "sub-normal".

action of a preventive one, that they can be effectually withheld from committing crime.

Nor are these the only considerations which render necessary some extension of the variety of our modes of dealing with convicted offenders. Multifarious as were the forms of punishment practised by our ancestors, the humane abolition of many of them, the virtual restriction of capital punishment to cases of murder, and the reluctance to inflict corporal pain upon adult offenders,[1] have left us with practically no alternatives but those of penal Detention (in its various forms) and of pecuniary Fines. But a fine is not an adequate punishment for any offences that involve serious guilt.[2] Nor, again, is it a punishment always practically available, even in the case of the pettiest offences. For offenders are often penniless; a large portion of the total number of persons fined go to prison for default of payment.[3] Yet, where a fine is an unsuitable or an impossible penalty, it is doubtful whether the only alternative—that of penal Detention—adequately effects the principal aims which the criminal law has in view. Detention may (1) gratify the prosecutor's Resentment, but it does not, as at present organised, afford him (2) any Compensation.[4] It does, for the time being, effect (3) a Prevention of the continuance of the offender's criminal career; but in the case of short sentences (which "enable one criminal to do the work of many"), the suspension is brief, and (4) far too brief to secure his Reformation.[5] And as regards (5) its Deterrent effects,

[1] Mutilation for the mere sake of Punishment survives only in Moslem countries. But, for another aim, a recent Californian statute (No. 224) allows the Court to inflict an emasculative operation on men guilty of sexual wrong to a girl under ten.

[2] And even where a fine would intrinsically be an appropriate punishment, the legal maximum, at present set to it, often renders it inadequate.

[3] Justices should be careful to order them only a Second Division imprisonment (*ante*, p. 578, n. 2).

[4] See *ante*, p. 613 n. 2.

[5] Even a juvenile offender undergoes little amendment in less than three months (*Report of Prison Commissioners for* 1901, pp. 12, 44). But

though both its irksomeness and its degradation are greatly dreaded by those on whom it has never been inflicted, yet so soon as persons have actually undergone imprisonment, the prospect of such incarceration (in spite of its involving the loss of alcohol and tobacco) ceases to have much influence upon their minds.[1] Thus prison-

in longer periods the influence of the chaplain often has effect. Even an agnostic observer like Saleilles says of it, "Each one may think as he prefers about the Truth of religion; but its Reformative value no criminologist can afford to neglect. For no more powerful instrument of Reformation can there be" (*Individualisation*, s. 97). Reformation, however, is less often effected in prison than by the aid now so constantly afforded upon discharge from prison. "You get a helping hand when you leave a prison, but not when you leave a workhouse", said a first offender. The author once saw a young governess tried for attempting abortion. She desired to plead guilty but was dissuaded. Despite her full confession, fully corroborated, a "humane" jury found her not guilty. Never can be forgotten her look of distress as she left the dock acquitted; but friendless, penniless, pregnant, ill. A conviction would have brought her both shelter and medical care in prison, and friendly guidance on her discharge.

[1] "Women often go out of prison, saying they have never been so well or so happy anywhere else"; *Report of Prison Commissioners for* 1901, p. 332. See the same *Report*, pp. 44, 347, 388, 391, 445, as to the contrast between the casual wards of workhouses and the prison, with its better food, warmer rooms, separate room at night, cleaner bedding, gratuity on discharge, and its officers "who speak civil and don't shout at you". "Old offenders often commit crime to get into prison, to recruit their energies for fresh depredations"; Dr John Campbell's *Thirty Years' Prison Experiences*, p. 124. Deterrence thus is weakest where most needed. And the proposals, now current, to "brighten" prison-life by concerts, theatricals, and dances, would render it still less deterrent. When Mme. Sarah Bernhardt and her company visited California in 1913, they were engaged to act in the prison at St Quentin, though their language was French; on the declared ground that "every prisoner ought to be given a chance". Of what?

Even in India the death-rate of prisoners is under two-thirds of that of the general population. And English prisons are ranked as "among the best sanatoria in our island". In Howard's day it was otherwise. English prisons were then nests of typhus ("gaol-fever") by which, as 19 Car. 2, c. 4, s. 2 states, "sometimes the judges, justices, and jurors have been infected; and many of them died thereof". Thus successive "Black Assizes" were fatal even to judges; at Oxford in 1577 to Bell, C.B. (and, it is said, to all the 300 persons in the court); at Exeter in 1586 to Flowerdew, B.; at Taunton in 1730 to Pengelly, L.C.B.; at the Old Bailey in 1750 to Abney, J., Clarke, B., and the Lord Mayor. These last fatalities are still to-day commemorated at the Central Criminal Court by the sweet herbs which, from May until autumn, are scattered as disinfectants upon the several judicial benches.

warders find the old offenders actually easier to manage than the first-convicted ones; for the routine has grown pleasant to them. Hence an experienced official (Major A. Griffiths) has even said that "one-half of the people in our prisons ought never to have been sent there, and the other half ought never to come out". The unfortunate fact that an actual experience of imprisonment does thus reduce its deterrent power over the offender (as well as impair his reputation and his self-respect), has led to a widespread exercise of the modern statutory powers[1] of releasing first offenders without punishment. Hence comes the paradoxical result, that persons, who would have been punished had they committed some unlawful act so petty as to admit of a fine, often enjoy immunity when they commit a graver offence.

Even if we hesitate to say, with Prof. Vinogradoff,[2] that Imprisonment is "the most unsatisfactory" of all modes of punishment, we cannot but recognise the desirability of introducing new modes. Bentham[3] has shewn the efficacy of penalties of mere Ignominy—forfeitures not of liberty or money but of Reputation—which submit the offender to the ridicule or censure of public opinion. His remarks find illustrations in Gierke's interesting historical pamphlet, *Der Humor im deutschen Recht.* The "Drunkard's cloak" of Commonwealth times, and the Stocks (obsolete since about 1870[4] but never abolished) are kindred English instances. In Russia the Soviet Criminal Code has a punishment of Public Censure; *i.e.* the publishing of the conviction and advertising of it at the offender's cost in newspapers. It permits also a condemnation to Compulsory Labour for prolonged hours, but at the offender's own home without any loss of liberty.

[1] *Ante*, p. 602. Cf. a study by Dr Kaarlo Ignatius, in *Zeitschrift für die gesamte Strafrechtswissenschaft* for 1901.

[2] *Historical Jurisprudence*, p. 57.

[3] *Penal Law*, II, ch. XV.

[4] The author saw a man in them at Halifax about 1854.

In France a desire is already apparent for a wider extension of corporal punishment. In England that close reasoner, Mr W. S. Lilly (*Idola Fori*, p. 241), has expressed a similar view. And in his *Studies by the Way* (p. 59) the late Lord Justice Fry, from long experience as a county magistrate, wrote that "For the purpose [even] of Reformation, short and intense punishments are often better than long punishments—a sharp flogging than a long confinement. I often wish that the criminal law of this country gave more power of inflicting punishments of this description." The Court of Criminal Appeal said (April 15, 1919), "There can be no doubt that with certain types of people there can be no such deterrent as that of flogging."

In India, in 1862, flogging ceased to be inflicted; but the results led to its early revival at the unanimous demand of the local Governments. Sir Henry Maine, in introducing the Bill, pronounced flogging (*Speeches*, p. 122), "though it should be sparingly employed and carefully guarded", to be "the most strongly deterrent of known punishments". Cf. Judge Rentoul's *Stray Thoughts*, p. 182; Mercier's *Crime and Criminals*, p. 282; Rickards' *Prison Chaplain*, p. 202; Lombroso's *Crime*, § 212. The power (p. 515 *ante*) of petty sessions to whip boys summarily convicted of *indictable* offences might profitably be extended to malicious non-indictable ones. Fines punish the parents; not the boy.

CONCLUSION

THE student's task in mastering the principles of English criminal law and procedure will be rendered far more easy should those principles ever be reduced by the legislature to an authoritative form. A distinguished French writer described English criminal law as "un corps de doctrine sans cohésion".[1] But the codification of criminal law—though successfully accomplished in all the leading continental countries, in India, and in several of the principal British colonies—seems in England to be more remote than some fifty years ago, when it formed in successive sessions a prominent feature in the programme of Lord Beaconsfield's cabinet. They, in 1878, introduced a Criminal Code Bill, which had been drafted by Sir James Fitzjames Stephen, and reintroduced it in 1879, after it had been recast by a committee of judges, and again in 1886, with some few further alterations. Had the Bill passed, it would not only have reduced the present law to a briefer and more precise shape, but would also have introduced some important reforms. For it would have (1) recast the present distinctions between felonies and misdemeanors, (2) removed from the law of murder all cases of merely constructive malice, and (3) simplified the multiform law as to thefts and frauds.[2]

Meanwhile particular reforms have been effected piecemeal. Thus the Act of 1907 created a General Court of Criminal Appeal. In 1911 the Perjury Act, in 1913 the Forgery Act, and in 1916 the Larceny Act,[2] gave instalments of codification.

[1] Seitz, *Les Principes Directeurs de la Procédure Criminelle de l'Angleterre.*

[2] "The Act of 1916 may be, comparatively speaking, simple; but the Act of 1861 is chiefly a rubbish heap of laws that a very small measure of amendment would render unnecessary." Preface to Stephen, *Digest of Criminal Law*, 7th ed.

Writing in 1935 and surveying the past fifty years a learned writer considers[1] that codification has practically ceased to be a live issue, though in 1885 it would have been a reasonable prophecy that the criminal law would soon be embodied in a Code and thereafter receive, if at all, mere incidental amendments. "Substantially the system rests in 1935 on the same principles as in 1885."[1] In the words of another experienced lawyer criminal law has attained a greater degree of certainty than any other branch of law, and few points of real law now fall to be decided.[2]

The most striking change affecting criminal procedure is the abolition of the Grand Jury.[3] Much too has been done to secure for an accused person an expeditious trial. "Indeed the time-honoured gibe regarding the law's delay seems now to have little sting as far as criminal trials are concerned."[2] The changes adopted in order to expedite trials have reduced to a shadow of its former importance the old common-law principle of local venue for crime.[4] The Court of Criminal Appeal has done something to standardise sentences and lay down principles of punishment, but the facts of individual cases still leave room for infinite variety.

After the War of 1914–18 there was a definite increase in crime.[5] Crimes of personal violence have decreased, but there has been a serious rise in the number of breakings in and kindred offences. It is among the younger generation that there has been the chief increase in crimes of lawlessness and violence. It is therefore of especial importance to concentrate upon improving the methods of dealing with youthful offenders.

[1] Roland Burrows, K.C., LL.D., *Criminal Law and Procedure*, 51 L. Q. R. 36.

[2] T. R. Fitzwalter Butler, *Developments in Criminal Law*, 1910–1935, 179 L. T. Jo. 325.

[3] p. 545 *ante*.

[4] p. 535 *ante*.

[5] See Home Office Criminal Statistics.

It may fairly be claimed that our criminal courts strive to do justice and that the main structure of our criminal law is accepted as sound.[1]

[1] Other proposals for change that may be summarised are (1) enlargement of summary jurisdiction—for arguments for and against see p. 518 *ante*, (2) enlargement of jurisdiction of Quarter Sessions, see p. 535 *ante*, (3) appointment of legal chairmen at all Quarter Sessions, see p. 503 *ante*, (4) alteration of the procedure for preliminary examination, see p. 540 *ante*, (5) transfer of assizes to large towns, see p. 501 *ante*, (6) greater facilities for committal from one district to another, see p. 536 *ante*, (7) abolition of Crown Office informations, see p. 544 *ante*, (8) the enlargement of public provision for prosecutions or more liberal provision for the cost of private prosecutions, see p. 584 *ante*, but it must not be forgotten that the Superintendent of Police in every petty-sessional division is practically an active local public prosecutor, see p. 555 *ante*, (9) a more systematic allowance of compensation from public funds for convicted prisoners who establish their innocence. In 1905 the Treasury paid £5000 to Mr Adolf Beck, after conviction, on demonstration that fifteen witnesses had been mistaken in identifying him. In 1928 Mr Oscar Slater received £6000 when his conviction was quashed for an error in law.

APPENDIX

FORMS OF INDICTMENTS

After mastering the rules for the drafting of an indictment, the student may impress them on his memory by the following illustrations, taken from the Indictment Rules 1915–16. For a full form of indictment for Treason, see 12 Cr. App. R. 99.

(I) COMMENCEMENT.

The King *v.* A.B.

Durham County Assizes held at Durham

A.B. is charged with the following offence [*or*, offences]

(II) COUNTS. The Commencement will be followed by one or more Counts;[1] as in the following various examples.

A

STATEMENT OF OFFENCE.

Murder.

PARTICULARS OF OFFENCE.

A.B., on the day of in the county of , murdered J.S.

B

STATEMENT OF OFFENCE

Manslaughter.

PARTICULARS OF OFFENCE.

A.B., on the day of in the county of , unlawfully killed J.S.

[1] All the counts ought to be tried together; 13 Cr. App. R. 173.

C

STATEMENT OF OFFENCE.

Accessory after the Fact to Murder.

PARTICULARS OF OFFENCE.

A.B., well knowing that H.C. had murdered C.C., did on the day of and on other days thereafter, in the county of , receive, comfort, harbour, assist and maintain the said H.C.

D

First Count.

STATEMENT OF OFFENCE.

Arson contrary to section 2 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A.B., on the day of , in the county of , maliciously set fire to a dwelling-house, one F.G. being therein.

Second Count.

STATEMENT OF OFFENCE.

Arson contrary to section 3 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A.B., on the day of , in the county of , maliciously set fire to a house with intent to injure or defraud.

E

First Count.

STATEMENT OF OFFENCE.

Larceny.

PARTICULARS OF OFFENCE.

A.B., on the day of , in the county of , stole a bag, the property of C.D.

Second Count.

STATEMENT OF OFFENCE.

Receiving stolen goods contrary to section 33, sub-section 1 of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A.B., on the day of , in the county of , did receive a bag, the property of C.D., knowing the same to have been stolen.

A.B. has been previously convicted of felony, to wit, burglary, on the day of at the Assizes held at Reading.

Contrast a form in use before the Act of 1915, for Larceny and Receiving:

Cambridgeshire, to wit.

The jurors for our Lord the King upon their oath present that John Doe, on the 1st day of January in the year of our Lord 1903, an umbrella and a gun, of the goods and chattels of Richard Doe, feloniously did steal take and carry away; against the peace of our Lord the King, his crown and dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said John Doe afterwards, to wit, on the day and year aforesaid, the goods and chattels aforesaid, before then feloniously stolen taken and carried away, feloniously did receive and have, he the said John Doe (at the time when he so received the said goods and chattels as aforesaid) then well knowing the same to have been feloniously stolen taken and carried away; against the form of the statute in such case made and provided, and against the peace of our said Lord the King, his crown and dignity.

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