

**CRIMINAL CODE (INDICTABLE OFFENCES) BILL.**

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RETURN to an Order of the Honourable The House of Commons,  
dated 16 June 1879;—for,

COPY “of LETTER from the LORD CHIEF JUSTICE of ENGLAND, dated the  
12th day of June 1879, containing Comments and Suggestions in relation  
to the CRIMINAL CODE (INDICTABLE OFFENCES) BILL.”

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Dear Mr. Attorney General,

12 June 1879.

HAVING carefully considered the Bill now before Parliament for “establishing a code of indictable offences, and the procedure relating thereto,” a measure in which I cannot but take a lively interest, and having arrived at the conviction that the Bill ought not to pass without very many corrections and amendments, I am induced to trouble you—the conduct of the Bill having been most properly committed to your charge—with such observations as occur to me upon it.

Let me assure you that I approach the subject in no hostile spirit, either from disbelief in the results of codification, or from any want of appreciation of the merits of the work embodied in the present measure.

I have long been, for reasons on which it is unnecessary here to dwell, a firm believer in, not only the expediency and possibility, but also in the coming necessity, of codification; and I have rejoiced, therefore, at the favourable reception which the proposal to codify our criminal law has received from the Press as of good omen. But it would, I think, be much to be deplored if the eager desire to see the law codified—entertained by the public, of whom few have perhaps taken the trouble to study the details of the measure, and still fewer are in a position to appreciate the legal difficulties which present themselves—should lead to the adoption of a statement of the law still imperfect and incomplete. For, not only would this be a misfortune as regards the work itself, and the administration of justice under it, but any failure in this, our first attempt at what can properly be termed a code, would engender a distrust of this method of dealing with the law, which would retard all further attempts at codification for an indefinite period.

Let me next say that I see in the present Bill every encouragement to persevere in the attempt to codify the criminal law.

It is impossible not to appreciate the vast amount of labour which has been bestowed on the work by the Commissioners, or the great learning and research displayed in it. I am indeed astonished that they should have done so much in so short a time. It was impossible they should do more. And a serious mistake was, I cannot but think, made in supposing that so great and difficult a work as that of stating the criminal law in all its voluminous details, with a due regard to arrangement and classification, in language carefully selected, avoiding on the one hand the cumbrous, prolix, inartificial, and bewildering phraseology of our statutes; and, on the other hand, taking care that the terms used shall be sufficiently comprehensive to embrace every case which is intended to come within it—could possibly be effected in the comparatively short time for which, consistently with a due regard to their judicial duties, two members at least of the Commission could devote themselves to the work. I am not, therefore, surprised at the signs of haste which are apparent in many parts of the Bill, and more particularly the latter part of it, relating to procedure.

We have to thank the Commissioners for having collected abundant materials for a complete and perfect code. But I cannot concur in thinking that they have as yet presented us with such a code; and I am bound to say that in my opinion a great deal remains to be done to make the present code a complete

and perfect exposition, or a definitive settlement of the criminal law. Not only is there much room for improvement as regards arrangement and classification, but the language used is not always perspicuous, or happily chosen, while the use of provisoes, an objectionable mode of legislation, is carried to an unusual excess, nor is the intention always clear; and, what is still more important, the law is, in many instances, left in doubt, and I am bound to say, in my opinion, not always correctly stated. As to this, however, I ought to add that I am often left in doubt whether particular passages are intended to be a statement of the existing law or a proposed alteration of it. With regard to the avowed alterations of the law, some of which are of a somewhat radical and daring character, I will say no more for the present than, while change may be desirable, in some instances the change proposed—I refer particularly to the admissibility of an accused person as a witness—would be, as I shall be prepared to show by-and-bye, a grievous mistake.

Being thus of opinion that, while the work of codification thus begun should be carried out, the passing of the Bill in its present condition would really be a misfortune, compared to which delay would be of little importance; for, after all, the administration of the criminal law, when once the facts of a case are ascertained, seldom presents much difficulty; but on the other hand, seeing that Parliament is not likely, and, indeed, can scarcely be expected to go into the details of such a measure, unless indeed a select committee were appointed for the purpose. I am led to invite you to go through the Bill with me, and to consider how far my suggestions may tend to the improvement and perfecting of this important measure.

The Bill, I think, may properly be divided into three main parts: the first containing general provisions as to jurisdiction and other preliminary matters, which form, as it were, the foundation of the code; the second, the substantive law; the third, the law relating to procedure. On each of these three main branches I propose to trouble you with a letter. That of to-day will be directed exclusively to the first.

I need scarcely add that I value your time too much to wish to engage you in a correspondence on the subject of the Bill. All I can with any propriety ask, is that you will give to my suggestions such attention as they may appear to you to deserve.

The Bill begins by stating in the 3rd and 4th clauses the persons to whom, and the area over which, its enactments shall extend, and the places at which offences shall be triable; which, however, I am bound to say, it does in a somewhat confused manner. The Act is to be applicable to piracy by the law of nations, wheresoever committed; and to offences committed in England or Ireland, or on such part of the sea adjacent to any part of Her Majesty's dominions "as is deemed by international law to be within the territorial sovereignty of Her Majesty"—a somewhat vague and uncertain definition;—or is "within a marine league of low water-mark of the coast of any part of Her Majesty's dominions; or committed on board of any British ship, vessel, or boat, which is in any place where the Admiralty of England or Ireland has jurisdiction." But the Act is not, "except where expressly provided, to apply to offences committed elsewhere," which I should have supposed would have followed by implication without express mention, with a further proviso that the Act shall apply to offences committed elsewhere than in England or Ireland only when they are tried in England or Ireland.

The first observation to be made on this section is, that the Act is made to apply to offences committed on the seas adjacent to, or within a marine league of, "any part of Her Majesty's dominions," which, of course, must be taken to comprehend Her Majesty's dominions in all parts of the world. But the law as to offences and their punishment is by no means the same in all parts of Her Majesty's dominions. Is it intended that a man shall be liable to the law of the Colonial dominion, or to that of this country, according as he may be brought to trial in the one country or the other, and that, as he is tried in the one or the other, he may undergo a heavier or a lighter sentence? Is it intended that he may be withdrawn from the jurisdiction of the country in which (the adjacent sea being considered as part of it) the offence has been committed, and be tried in this? It would seem to be so, as the proviso to which I have called attention excludes the operation of the Act, and leaves the offence to be dealt with by the local law when the offender is brought to trial where the offence

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was committed. Is it intended that a foreigner committing what would be an offence under this Act, but which is not so by the local law of the particular dominion, shall be liable to be tried and punished under our law if brought to trial here? If so, this should be placed beyond doubt.

Other objections appear to me to arise on this section. In the first place, there is a total omission of all mention of offences committed on board of British ships *on the high seas*, an omission at which I am not a little surprised, and which I think must have arisen from inadvertence. Of course it cannot have been intended to except offences committed on British vessels on the high seas, and it may have been thought that the case is provided for by the mention of British ships "in any place where the Admiralty has jurisdiction." But the high sea cannot with any propriety be called "*a place*," more especially as there are "places" to which, as contradistinguished from the high sea, the jurisdiction of the Admiralty extends; for which reason in all the statutes relating to the jurisdiction of the admiral, the term high, or open, sea has always been made to precede the mention of "place to which the jurisdiction of the Admiralty extends." In the Bill of last year these words were introduced, and I cannot help thinking that, to prevent any question being raised on their omission, made plausible by their presence in former statutes, the words should certainly be restored.

In the second place, as the term "any place in which the Admiralty has jurisdiction" may be read as used in contradistinction to the open sea, by restricting offences committed in any such place to those committed on board British ships, offences committed in places to which the jurisdiction of the Admiralty, taken in its narrower, and, as it seems to me, proper sense, extends, on board foreign ships would not be amenable to our law. For by the law, as settled since the time of Richard II., the admiral has had jurisdiction in respect of murder and mayhem committed, not only on the main sea and coast of the sea out of any county, but in ships in the main stream below the points of rivers; and also in arms of the sea, *inter fauces terræ*, sufficiently wide to prevent what is done on one side from being seen on the other. It is not, I presume, intended to exclude the operation of the Act in respect of foreign ships in such places when it is intended to extend it to such ships as far as a league from the coast. Yet such will be, or, at all events, may be held to be, the effect of the proposed enactment as it stands. I am at a loss, therefore, to see any ground for the difference proposed to be made between offences committed in ships on the sea adjacent to the coast, and those committed in places where the Admiralty has jurisdiction, by confining the enactment to offences committed in British ships.

We have, in the second part of the section, an enactment as to where offences shall be tried, which is evidently out of place, and belongs to the next section, or, perhaps, more properly to the head of procedure. Placed where it is, it interferes with what really does belong to the section, as introducing an important limitation on the earlier part of it, namely, a provision that no proceeding shall be instituted for the trial or punishment of a foreigner committing an offence on the sea adjacent to the coast, except with consent of a Secretary of State; and on his certificate that the institution of such proceeding is in his opinion expedient. At what stage the consent of the Secretary of State is to be obtained, or when the certificate is to be produced; whether these preliminaries are necessary to warrant the arrest of the offender, or his committal on the charge, or are only necessary to authorise his trial and punishment, the Bill omits to provide; yet surely this ought not to be left in doubt. Moreover, the power thus vested in the Secretary of State, in other words in the Government, is, I feel bound to observe, a power unknown to the law, and the conferring of which deserves the most serious consideration. A subject who has suffered injury at the hands of a foreigner may thus be deprived of the redress which the law should afford him in the punishment of the offender, because the Government may think the prosecution of the offender impolitic. I cannot help thinking that this provision, if retained at all, should at all events be considerably modified, and that, instead of the consent of the Secretary of State being a condition precedent to the institution of proceedings, if this is what is intended, the power, if given at all, should be confined to that of intervening to arrest the proceedings when begun. Publicity would then have been given to

the charge ; and the power would be exercised under a more pressing sense of responsibility, and with greater circumspection.

The power to prevent a prosecution exists, no doubt, at present, in the *nolle prosequi* of the Attorney General, who, it has been held, may issue it *ex mero motu*, without affording the prosecution the opportunity of being heard against it. But this power now exists only after an indictment has been found, and so publicity has been given to the case. Moreover, the proper officer to determine whether a prosecution shall proceed, is the Attorney General, as representing the Crown in all prosecutions, and who, as a lawyer, which a Secretary of State need not be, is best qualified to judge whether a prosecution, should take place.

To this part of the subject belongs also the important question, which though, in a certain sense, it may be said to belong to the domain of international law, yet belongs also to the local law, and should not be omitted from it, namely, whether an offence committed by a foreign subject, on board a foreign ship of war, lying in British waters, is cognisable by the criminal law of this country. In other words, is a foreign ship of war, under such circumstances, to be treated as extra-territorial? Is a crime committed by a foreigner on board such a ship cognisable by our tribunals? If the foreigner, having committed an offence on board such a ship, escapes from it to the shore, is he to be given up without proceedings under the Extradition Act? If seized and taken back to the ship, will he be entitled to a habeas corpus? If a British subject, having committed a crime, should escape and get on board such a ship, and a warrant should be issued for his apprehension, could the warrant be executed on board the ship, as of right? These questions are discussed, and the difficulties arising upon them pointed out in papers written by Sir Fitzjames Stephen and myself, when serving on the Fugitive Slave Commission, and are there shown to be such as might give rise to serious complications. It is true the subject belongs to the domain of international law, but it ought none the less to form part of the local law, it being the province of those who have to administer the criminal law to administer the latter, not the former, leaving to the legislator so to adapt the local law to the international, as that the one shall not conflict with the other. A code must surely be imperfect, which, when dealing with the subject of jurisdiction in territorial waters, is silent on a matter of this importance.

There remains that part of the section to which I have already referred, as being out of place, because it relates, not to the area of jurisdiction, but to the place of trial, and therefore belongs entirely to the subject of procedure, which forms a separate branch of the code. It enacts that "all offences may be tried in England or Ireland." I know not what this means. Is it that an offence committed in the one country may be tried in the other? that a man charged with having committed an offence in the one country can be withdrawn from a jury of his own countrymen and transferred to the other? I presume not; as when we come to the part which relates to procedure, we shall find a provision materially qualifying what is said in the present section; namely, one which precludes a court in the one country from trying an offence committed entirely in the other. The offence must, at all events, have been partially committed in the country where the trial is had. The passage in Section 3 is not only out of place, but useless, and should be struck out.

I pass on to Section 4, headed "The place of commission of offences." From its heading this section might be expected to treat of the place where offences may be committed; but, in fact, it relates only to offences which have to pass through more than one stage in order to their completion. Every such offence is to "be deemed to be committed at every place where any act is done, or omitted, the doing or omission of which forms a part of the offence; or, where any event happens necessary to the completion of the offence, whether the person accused was or was not at such place at the time of such act, omission, or event." The first part of the enactment, as intended, is proper, as representing the law that where an offence is made up of a succession of acts or omissions, it shall be deemed to have been committed at any place at which any act or omission which forms part of the offence has taken place, or where any event necessary to the completion of the offence happens, whether the accused was present at such place at the time of such act, omission, or event,

event, or not. Thus, if A. employs B. at one place, to induce C. at another, to lay poison for D. at a third, and D. takes the poison and dies, A. might be tried as accessory to the murder at either of these places. Here, however, unfortunately, for *any* place has been substituted "every" place, so that, as the Bill stands, A., under these circumstances, would commit three offences instead of one, which certainly cannot have been intended.

Passing this by as requiring merely verbal alteration, we find annexed to this enactment, as it were by way of rider, a proviso relating to the liability of foreigners under it. No person not being a subject of Her Majesty, is to be liable to be tried for any offence, except for piracy, by the law of nations, unless, when he became a party to the offence, he was in some part of Her Majesty's dominions, or in some British ship, or ship in British waters; or unless, after becoming a party to the offence, and before or at the time of its completion, he came for any purpose whatever into some part of Her Majesty's dominions, or on board some British ship in any place where the Admiralty of England or Ireland has jurisdiction. Now the liability of persons not being British subjects to the law of England, in respect of offences committed out of the dominions of the Crown, is one of grave importance, and, I cannot help thinking, should have been dealt with by way of substantive enactment, instead of being thus incidentally introduced for the sole purpose of excluding foreigners from the operation of the rule just laid down, except when taking part in some stage of the offence committed within the realm. Taking the provision as it stands, however, it being undoubted law that a person not being a British subject cannot be held to be amenable to the criminal law of this country for an offence committed out of the Queen's dominions, while it is equally certain that for offences committed on British territory, or within British waters, or on a British ship on the high sea, he is so amenable, no exception can be taken to the first branch of the proviso, but the second may give rise to a very serious question. Suppose that a wound is inflicted by a foreigner out of the Queen's dominions on a British or other subject, with intent to murder, or that poison is administered for that purpose, but that the death does not ensue till the party injured has come to this country. The offence of murder being compounded of the cause of death, and the death as its effect, and the offence being therefore incomplete till death has taken place, a foreigner so inflicting a wound, or administering poison, would not, as the law now stands, be amenable to English law, though the death took place here. But, since the offence is not completed till the death takes place; in other words, as the death is "an event necessary to the completion of the offence," the foreigner, if he came into any part of Her Majesty's dominions, or on board a British ship, before the death ensued, as this would happen "after his becoming a party to the offence, and before or at the time of its completion," would, as the proviso is framed, be liable to be tried and executed for the murder. I am not aware whether this is intended to be a representation of the law as now existing, or as an alteration of it. If the former, I must except to it as erroneous, the case of *Reg. v. Lewis* (1 Dearsley & Bell, p. 7) being a direct authority to the contrary; if the latter, I think it may be very questionable how far it is consistent with international law, and the matter ought not to be left in doubt.

Again, suppose a foreigner, not being in this country, were to employ a person to commit a murder here, and a mortal stroke having been given, the foreigner were to arrive in this country, or be found within the jurisdiction, before the death took place, he would be liable, under this section, to be tried for the murder. Is this intended? If so, the law should be so expressed as to exclude all doubt, which, at present, it certainly is not.

Again, suppose a crime to be committed in this country by a foreigner residing abroad, through an innocent agent, and that the foreigner, after the crime was completed here, were to come to this country, he would not be within the terms of the proviso. Is it intended to protect him? Such a case occurred in the United States (*see* Story's "Conflict of Laws," s. 625) in a case of fraud, set on foot in the state of Ohio by a citizen of that state, but effected through an innocent agent in the state of New York. The originator of the fraud, having been afterwards found in the latter state, was held to be indictable there. Is it intended to give immunity to a foreigner under such circumstances? It may, perhaps, be said that as an offence effected through an innocent agent, is, in law, held to be that of the party employing him, the

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foreigner, in the case supposed, would not be entitled to the benefit of the proviso. But, here again, no doubt should be allowed to be left on such a point. I cannot but think that the subject of the amenability of foreigners to our criminal law, a subject, I need not say, of considerable importance, requires more careful and elaborate treatment than it has received in the proposed code.

We have next a section (S. 5) which I cannot contemplate without much regret, as it proceeds upon a principle which I cannot help thinking fatal to the completeness of the code, and seriously detrimental to its utility. While the Act abrogates the whole of the common law with reference to offences being proceeded against under it, which was of course necessary, it keeps alive statutes, or parts of statutes, relating to the Criminal Law; the whole of which in the present code should cease to have a separate existence, and so far as it is desirable to keep these enactments alive, should be embodied in it. It is of the very essence of a perfect code that it shall contain and provide for whatever it is intended shall be the law at the date of its formation; so that both those who have to administer the law, whether in its preliminary or after stages, and those who have to obey it, should have it before them as a whole, without having to search for it in Acts of Parliament scattered over the Statute Book, and which most persons, at least so far as the laity are concerned, are ignorant of, and know not where to find. The main purpose of a codification of the law is utterly defeated by leaving the code to be supplemented by reference to statutes, and, what is still worse, to parts of statutes, which are still to remain in force, but are not embodied in it. On turning to the second Schedule of the Bill, which deals with the repeal of existing statutes, I find that, out of 83 Acts of Parliament therein dealt with, no less than 39, some of them very important ones, are thus partially repealed and partially left standing. Nor, in dealing with the latter class, is any system adopted. Sometimes a whole Act is repealed with the exception of a section; sometimes a single section, or one or two sections of a voluminous Act are abolished. I have no hesitation in saying that the course thus pursued is radically wrong, and can only lead to embarrassment and confusion. Whatever is intended to form part of our penal law, whether derived from the common law or statute law, should be embodied in, and form part of, the intended code, not by reference to Acts of Parliament to be found in the statutes at large, but by its actual presence in the code. After a careful study of the law, as exhibited in the proposed code, a person would still remain ignorant of many important parts of it contained in the portions of the statute law thus remaining unrepealed and omitted from the code. Is this the fitting result of codification? I cannot think so; and would earnestly recommend that the statutes thus partially repealed should be entirely got rid of, and that the parts retained, so far as they relate to the offences dealt with by the code, should be introduced into the present statute, and form part of the code, a matter easy of accomplishment at the expense of a very little time and trouble.

This will be a convenient place to offer a few observations on some of the statutes thus dealt with. The first of these statutes is that of the 5 Eliz. c. 9, an "Act for the punishment of such as procure or commit wilful perjury." For some reason which I am unable to comprehend, while that part of the Act which relates to the procurement of perjury is repealed, that part of it (Section 6) which relates to the committing of perjury is retained. Surely, whatever relates to perjury and its punishment should form part of the code, and not be left to depend on this this old and obsolete statute. And there is the more reason for getting rid of the section in question, that it is objectionable, as rendering the offender permanently incapable of being a witness in any court of record, the effect of which may be to deprive some innocent party of his testimony, in a matter as to which he may have no interest in speaking falsely, and his evidence might safely be trusted. Moreover, the section is so ill drawn that it has been found next to impossible to obtain a conviction under it, for which reason it has seldom been resorted to in modern times. Indeed, it has been held not to apply to perjury on the trial of an indictment or information see Deacon's Criminal Law, Title Perjury, sect. 5, and seq.; and 1 Hawkins, c. 69, ss. 17 & 18.

The Act of the 7 & 8 Will. 3, c. 3, for regulating trials for treason, so far as repealed, is very properly repealed. But Sections 10 and 11 are preserved,  
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and properly so, if, as is said at the end of Clause 5 of the Bill, "nothing contained in the Act is to extend (not only to any Parliamentary impeachment, or the Court of the Queen in Parliament, or the Court of the Lord High Steward, but also) to the right of any person entitled to the privilege of peerage to be tried therein." But ought this part of our procedure to be thus excluded from the code? Peers are as much amenable to the criminal law as the meanest of Her Majesty's subjects, and the trial of a peer for an offence recognised by it should not be excluded from the operation of a code containing the criminal law. The procedure applicable to peers, as distinguished from commoners, on an indictment being found, should therefore properly be stated when the different modes of trial are dealt with. It forms as much part of our penal procedure as the mode of trial in the case of a commoner. But be this as it may, the matter cannot be left as is proposed. The privilege of a peer to be tried by his peers is limited, as is well known, to cases of treason and felony; it does not extend to misdemeanour. But the distinction between felony and misdemeanour is henceforward, if the present Bill passes, to be done away with. A peer committing an offence, heretofore a felony, will no longer be indicted for felony. Will the present privilege be gone when the former felony is no longer dealt with as such? Or, as misdemeanour is now placed on the same footing as felony, will the privilege extend to offences which were heretofore misdemeanours? Surely a matter like this should not be left to the possible chances of future decision. There is nothing in the section which abolishes the distinction between felony and misdemeanour, as we shall see when we come to it further on, which meets the difficulty.

Of the transportation Act, 5 Geo. 4, c. 82, sect. 22, is alone repealed. Why this particular section has been thus selected for repeal I know not. Transportation having been wholly discontinued, and penal servitude substituted for it, the whole Act has become a dead letter, Section 22 included. This section has reference to the offence of returning from transportation, or from banishment, either under sentence or where a party has agreed to transport or banish himself, before the expiration of the term. As regards transportation by sentence, the section in question might have been suffered to sleep with the rest of the Act. But if banishment, as the condition of pardon, or commutation of punishment, should ever occur in future, the repeal of this section might be attended with inconvenient consequences. How could the convict be dealt with under such circumstances?

I pass on to the 7 Geo. 4, c. 64, "An Act for improving the Administration of Criminal Justice," in which we have a striking instance of partial repeal. The three first sections relating to preliminary proceedings before justices are repealed. So, also, Section 5, which relates to coroners and justices neglecting the duties imposed on them by the Act, is repealed, so far as justices are concerned; as are Sections 12 to 21, by which difficulties as to venue, and the laying of property in indictments, and certain matters of form, had been got rid of; and, as these matters are dealt with in the code, the repeal is right. But the important provisions of the Act relating to the trial of accessories, as also as to the cost of prosecutions for felony and misdemeanour, instead of being transferred, once and for all, to the code, are left to be sought for in the part of the Act thus remaining unrepealed.

In like manner in the Act of the 7 & 8 Geo. 4, c. 28, "An Act for further improving the Administration of Justice in Criminal Cases," Sections 9 to 12 inclusive, sections relating to punishment, are very properly repealed as they are transferred to the code. But other parts of the Act, such as the enactments as to pleading or refusing to plead, the effect of pardon by the Crown, and, above all, the rule in Section 14, the rule for the interpretation of criminal statutes, which is not unlikely to be needed in interpreting the present one, are left to be found in the former Act, instead of being, as they should be, removed from the Statute Book to the code.

Of the 9 Geo. 4, c. 54, an Act "for improving the Administration of Justice in Ireland," out of 35 sections nearly half are repealed, while the rest are left standing, some of them being such as should form part of the code. Thus the sections relating to the trial of accessories, to the cure of formal defects by verdict, and the effect of a pardon by the Crown, are material parts of our procedure, and should find their place in the code.

The manner in which the next Act, that of the 9 Geo. 4, c. 69, the Act for



the prevention of night poaching, is dealt with is remarkable only in this, that the Act being repealed so far as the offence is, after two former convictions, made punishable by indictment, while, so far as it makes the offence punishable on summary proceeding, it is preserved, we have here the first indication of the intention of the framers of the new code to exclude from it all offences (though otherwise within it), so far as they are capable of being dealt with by summary proceeding, a rule, as it seems to me, fatal to the completeness of the intended code.

But, as I shall have an opportunity of explaining my views on this subject further on with reference to a more important statute, I abstain from further observation on this head for the present.

The Bill next deals with the Act of the 1 & 2 Will. 4, c. 44, which relates to persons compelling others by force or menaces to leave their farms, houses, or employments; to sending threatening notices, letters, or messages, exciting to riot or unlawful assemblies, or demanding money or arms, &c.; to breaking open gaols to escape therefrom, or rescue others (Section 4), and rescuing persons committed for treason or felony (Section 5). These two last sections are repealed, and properly so, as they are included in the code. Why the others should not go with them, as they are made indictable offences by the Bill, I am at a loss to tell.

The next Act which is dealt with after this fashion affords a striking instance of the inconvenience of this method of legislation. I refer to the 7 Will. 4 & 1 Vict. c. 36, an Act "for consolidating the law as to offences against the Post Office." Of this Act, Section 26 is repealed, "except so much as relates to destroying a post letter;" Section 28, "except so much as relates to stopping a mail with intent to rob or search the same;" Section 29, "except so much as relates to taking away a post letter bag, or taking a letter out of it."

Each of these offences had in the section in which it is referred to been combined with the offence of larceny, as to which latter offence, this being incorporated into the present Bill, the section is very properly repealed. But the act of destroying a post-office letter, of stopping the mail with intent to rob it, or the taking away a post-office bag, are none the less offences; nor is it intended by the framers of the code to treat them otherwise than as offences; and they have consequently been excepted from the repeal of the sections to which they respectively belong. Surely, offences of so grave a character, involving the punishment of transportation for life, ought to find a place in a criminal code, nor be left to be hunted up in an Act of which most persons have never heard. Moreover, these offences are by the Act referred to made felony, and under it must have been treated as such. By the present Bill the distinction between felony and misdemeanour is abolished, consequently no offence can now be prosecuted as felony. But, as I shall show when I come to the subject of procedure, on the section relating to the abolition of the distinction between these two classes of offences—a section, I must observe in passing, not at all happily drawn, the main enactment being clogged with no less than four provisos—a serious question presents itself, namely, whether the enactment applies to offences other than those which are constituted offences by the Bill itself, or can affect offences created by statutes, or parts of statutes, left unrepealed, and which, not being embodied in the proposed code, continue to have a separate and independent existence.

The next Act is the 5 & 6 Vict. c. 28, an Act to assimilate the law in Ireland as to the punishment of death to the law of England, which Act, with the exception of two sections, 12 and 16, is suffered to remain; for what possible purpose, seeing that all punishments are, or ought to be, settled and regulated by the code, I am at a loss to see. But I am equally unable to understand why, if the Act is to be kept alive at all, the 12th section, which substitutes transportation for life after four years' imprisonment, for the punishment of death, as the penalty for returning from transportation, or the 16th, which substitutes transportation for death as the punishment of piracy, should be singled out for repeal.

I have next to call attention to a very important statute, the 14 & 15 Vict. c. 100, an Act "for further improving the Administration of Criminal Justice;" and with this the Bill before us deals after the following manner: It repeals "all that is unrepealed, except Sections 22, 27, 28, 30, and 32." So that we need not trouble ourselves to hunt through the Statute Book since the passing of the Act in order to see what there remains, as, with the exceptions

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of these sections, the whole Act is repealed. I agree that so far as it thus repealed, the Act is properly repealed, but why Section 27, which relates to the traversing indictments and postponing trials, or 28, which relates to the plea of *autre fois* acquit or *autre fois* convict; or Section 30, which relates to the interpretation of terms, should be retained, instead of being transferred to and embodied in the code, I must leave to be explained.

Then follows the repeal of the Act of 16 & 17 Vict. c. 32: "An Act to make further provision for staying Execution of Judgment for Misdemeanours on giving Bail in Error," with the exception of Section 8. The repeal, so far as it goes, is quite right, as the Writ of Error in such cases is to be abolished; but Section 8, which relates to the estreating of recognizances on indictments or informations filed in the Court of Queen's Bench, should find its place in the code as part of the procedure of the Queen's Bench on indictments or informations prosecuted in that court.

The next statute which calls for observation, as partially repealed, is the Act of the 24 & 25 Vict. c. 96, the Act consolidating the Statute Law of England and Ireland relating to Larceny. Out of 123 clauses, 88 are repealed and 35 retained. It is with reference to those retained that I think it necessary to trouble you. Sections 12, and 14 to 17 inclusive, relate to stealing deer, or hares and rabbits in a warren, in the night-time, which offences are punishable on summary proceeding. Sections 18 and 19, and 21 to 23 inclusive, relate to the larceny of dogs, birds and animals kept in confinement or for domestic purposes, not being the subject of larceny at common law, all which are made punishable on summary proceeding. Sections 24 and 25 relate in like manner to fish; all of which sections are retained. So Section 33, which makes stealing trees and shrubs a misdemeanour, punishable, for a first or second offence, on summary proceeding. Sections 34 and 35, which relate to stealing live or dead fence; Sections 36 and 37, which relate to stealing fruit or vegetables, are in like manner, where they make these offences punishable on summary conviction, retained, as are also Sections 65 and 66, relating to the possession of shipwrecked goods. In like manner Sections 97 and 99, which make the receivers of stolen goods and the abettors of larceny, where the larceny was punishable on summary conviction, liable to be so dealt with, are also retained. So are Sections 105 to 113 inclusive, which relate to proceedings on summary conviction; as also Section 120, which again refers us back to the 11 & 12 Vict. c. 43, and the 14 & 15 Vict. c. 93.

It is obvious that the reason for the retention of these sections is the intended omission from the Code of all offences punishable on summary conviction; and herein, as it seems to me, is to be found a radical defect, which must necessarily mar the completeness of the work, namely, that when dealing with offences, its operation is limited to such offences when the subject of indictment; but surely, whatever constitutes an offence against the penal law should properly find its place in a code which can only be complete if it sets forth that law in its entirety. The offence being established, the mode in which, under different circumstances, the offender may be proceeded against, and the punishment which, according to the degree of guilt, may be awarded, should be set forth. It is all important to those who have to administer the penal law in its subordinate departments, to have the law before them as an entire and unbroken whole. The present code does that for them when, as magistrates, they are called upon to take the information against a party accused; why should it not do so when they are called upon to deal with offences summarily as judges in a judicial capacity. It would, no doubt, be impracticable to enumerate all the instances in which penalties are resorted to for the purpose of enforcing the performance of duties, or the observance of police or sanitary regulations, or the like; but we are here dealing with acts which the proposed law constitutes crimes, and which are so dealt with in the code. It is exclusively to these that my observations apply; it seems in the highest degree illogical to omit all mention of them, and all reference to the procedure applicable to them, when dealt with otherwise than by indictment, simply because the degree of guilt is less, or the circumstances are such that the fuller and more formal methods of proceeding may be dispensed with. The offences being, as they necessarily must be, specified, it would occupy but comparatively little space, and cause little additional trouble, to say under what circumstances such of them as it is intended to make the subject of summary proceeding shall be so

subject, and what, in such case, shall be the method of proceeding, and the measure of punishment. The statement of the law applicable to the offence would then be complete. Why should the code be limited to "Indictable Offences"? What is wanted is a consolidation or code of the law relating to crimes, no matter what may be the method of proceeding applicable to them. Larceny is not the less larceny, assault is not the less assault, malicious injuries to property are not the less malicious injuries; all these offences are none the less within the criminal law, because under one set of circumstances they may be fitly dealt with by one mode of procedure, and under a different set of circumstances by another.

A further observation arises on the retention of Section 85, which in substance provides that no one shall be entitled to refuse to answer any bill in Equity, interrogatory in any civil proceeding, or proceeding in bankruptcy, but exempts a person so answering from being convicted of any of the misdemeanours "mentioned in the ten preceding sections." The "ten preceding sections"—sections relating to frauds committed by bankers, factors, and persons acting under powers of attorney—having been repealed, and in substance transferred to the code, one is at a loss to see why this section might not have been transferred to it along with them; that is to say, in an amended form, for nothing can be more clumsily drawn than the section in question, when read at length. The provision is an important one, as limiting the liability to prosecution in cases in which a disclosure or admission has been obtained from the offender. The substance of it should find a place in a statement of the law intended to be complete.

Similar observations present themselves as to the manner in which the Act of the 24 & 25 Vict. c. 97, the Act "to consolidate and amend the Law relating to Malicious Injuries to Property," is dealt with. While the Act is generally repealed, all the sections relating to injuries to property punishable on summary conviction are retained. They are excluded from the code. They ought to be included in it.

So also, as to Sections 58 and 59, and 77; the first of these, which provides that the punishments and forfeitures imposed by the Act on any person maliciously committing any offence "whether punishable upon indictment, or upon summary conviction," shall equally apply and be enforced, whether the offence has been committed from malice towards the owner of the property or not; the second of which makes the provisions of the Act applicable in cases where the property injured is in the possession of the party doing the injury; and the third of which relates to the costs in indictable misdemeanours; these three sections, as applicable to proceedings on indictment, as well as on summary conviction, at all events as applicable to the former, ought certainly to be transferred to the code.

The same observation applies in respect of the 24 & 25 Vict. c. 100, the Act for consolidating and amending the statute law relating to offences against the person. Ten important sections relating to assaults of a less aggravated character, and which are therefore, under given circumstances, made punishable on summary conviction instead of being transferred to the code, are, with an important section relating to the allowing of costs in prosecutions for misdemeanour, retained, while the rest of the Act is repealed.

Similar observations apply to 31 & 32 Vict. c. 116, an "Act to amend the Law relating to Larceny and Embezzlement," and consisting of two sections. The 1st section, relating to members of co-partnership embezzling property of the co-partnership, is repealed; the second, which extends the provision of the Act we have been last considering, relating to the summary jurisdiction of justices to embezzlement by clerks or servants, is preserved; it ought to find a place in the code.

Next comes an Act, the manner of dealing with which is to me matter of equal surprise and regret. I allude to the Act of the 28 & 29 Vict. c. 118, an "Act for amending the Law of Evidence and Practice on Criminal Trials." No part of that branch of the criminal law which relates to procedure can possibly be more important than that which relates to evidence admissible on the trial of offences. There can be nothing more fit to form an integral portion of a penal code. Great indeed was therefore my surprise to find the very important provisions of the Statute in question omitted from the new law, and left to be found elsewhere. That so serious an omission, if suffered to remain, must

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tend to deprive the code of the character of completeness, I can entertain no doubt.

Next in order comes the 30 & 31 Vict. c. 35, an "Act to Remove Defects in the Administration of the Law;" the repeal of which, so far as its enactments are embodied in the code, is quite right; but an exception is made of the 8th section, which provides that jurors having conscientious objection to be sworn may affirm. This provision should certainly, with the rest of the Act, have been embodied in that part of the code which relates to trial by jury. Had this been done, the anomaly which now presents itself would have been seen and avoided. As the code is framed, in Section 519, the jury who are to try the cause must be "sworn"; there is no provision enabling them to affirm.

The Act of 33 & 34 Vict. c. 23, an "Act relating to the Abolition of Forfeitures for Treason and Felony," should also, in part at least, form a portion of the code. By this Statute, which abolished the old law of corruption of blood, and forfeiture on conviction for treason and felony, a person so convicted is rendered incapable of dealing with his property, and the Crown may appoint an administrator, or justices may appoint an *ad interim* curator, of his estate or effects, with power to such administrator or curator to pay the convict's debts, to make restitution to the persons he has injured or defrauded, and to provide for the maintenance of his family. It is evidently not intended to alter this state of the law, or the Act would not have been kept alive. But the consequences which thus attach to a conviction for crimes of a given order are in effect part of the punishment, and as such should find their place in the codified statement of the penal law.

The 34 & 35 Vict. c. 112, an "Act for the Prevention of Crime," is left standing by the Bill, with the exception of Section 19, which relates to evidence admissible on a charge of receiving stolen property. But there are two sections of the Act which should be embodied in the code; the one is the 18th section, which settles by what evidence a former conviction may be proved, an important enactment. The other is the 7th section, which belongs to the head of punishment, and which provides that, on conviction of a crime after a former conviction, a person so convicted may, at any time within seven years after the expiration of his sentence on the last conviction, be condemned summarily to a year's imprisonment if found under given circumstances. This is a very formidable aggravation of the sentence already undergone, and should find its place in the statement of the law. Why the 8th section, which gives power to the Court to add to the punishment on a second conviction, by subjecting the convict to police supervision after the expiration of his sentence, is preserved, I am at a loss to see, as a similar power is contained in the 16th section of the Bill.

So much for the statutes dealt with by the Bill. But I have not yet quite done with the 5th section. It goes on to provide that when any offender is punishable both under this Act and any other statute, a state of things which, for the reasons I have given, ought no longer to be possible; "he may be tried and punished either under this Act or such other statute." Why this confusion? Either "such other statute" is identical as regards the offence and its punishment, with "this Act," or it is not. If it is, then there is no necessity for keeping it alive; if it is not, then, as there ought not to be conflicting laws with reference to the same offence, there is the more reason for getting rid of it. I cannot see the use or purpose of this proviso, the effect of which, in appearance at least, is to make the Bill inconsistent with itself.

We come next to a section (Section 6), headed "Interpretation of Terms," which appears to me open to remark.

The word "person" in the Act is made to include Her Majesty, which, considering the purpose for which the word is frequently used in connection with offences, appears to me, to say the least of it, strange. In other respects the meaning assigned to the terms "person" and "owner" is useful, as stating what the law should be, even if it is not; and, though very general in its terms, is perhaps as precise as the subject will admit of. But the next enactment, that the word "oath," and "all expressions relating to the taking of oaths, shall include all such affirmations and declarations as may by law be substituted for an oath," is objectionable, as making the word mean something which it not only does not mean, but from which it differs essentially, and in this case is the more objectionable from the fact that so little is gained by it, as the enactment

relating to the occasion on which oaths have to be taken are but few, while all that relates to the taking of evidence is, as we shall see when we come to the subject of procedure, omitted from the code, being left perhaps to be filled up by "rules and regulations," the modern system for supplementing defective legislation.

Next follows a remarkable definition, that of a term which is to be used in the further progress of the Act, the term "Offence involving dishonesty," one hitherto unknown to the law, and which is to mean the offences contained in no less than nine parts of the code, with of course numerous exceptions. But this definition, occurring where it does, is prematurely introduced. The "Offence involving dishonesty," is a creation of the proposed Act, to be substituted for "felony," and it will therefore be time enough to consider it when we have gone through the nine parts of the code referred to, and the numerous offences therein contained, and arrive at the section which abolishes the distinction between felony and misdemeanour, and substitutes this new offence for the former of them, including, however, certain other offences which before were not felony. At the same time I must confess that when I am told that "a conviction for an offence involving dishonesty includes a conviction," not only for any offence as so defined, but also "for any act which would amount to such offence, however the offence may be, or may have been defined, either by common law or by any statute," I am really puzzled to know what is meant. Nor can I well recognize the propriety of declaring that "a conviction for an offence involving dishonesty," shall include "two summary convictions for any offences which would now be offences involving dishonesty."

I pass on to Part II., which deals with the important subject of punishments. In the list of these the punishment of death occupies of course the foremost place. I observe that the word "death" is printed in italics, which I presume implies that the Commissioners desire to submit to the consideration of the Legislature whether the punishment of death should be retained. I cannot however suppose that on a proposal to consolidate the law, Parliament would be prepared to deal with so grave a question as the abolition of capital punishment, and I abstain therefore from any further consideration of the subject.

Next comes imprisonment, two sorts of which only are mentioned; imprisonment with, and imprisonment without, hard labour. The Bill of last year superadded a third, under the name of "Simple Imprisonment," and provided that the last should be inflicted in the manner prescribed for misdemeanants of the first division by the Prison Act of 1865. Are we to gather from the omission of simple imprisonment in the present Bill, that this form of punishment is not to be applied to any of the offences with which the Bill deals?

Next comes corporal punishment, flogging and whipping, of which the framers of the code appear prepared, at all events as regards juvenile offenders, to make a very liberal use, as to which I shall have occasion to offer some observations when we come to its specific application hereafter. The language of the section is certainly capable of improvement. "Flogging," it says, "shall consist of the infliction on a person whose age exceeds 16 years, of a number of strokes not exceeding at any one time 50, with an instrument specified by the Court." "Whipping shall consist of the infliction on a person whose age does not exceed 16 years, of a number of strokes not exceeding at any one time 25 with a birch rod." Now flogging or whipping are equally flogging or whipping, whether the person on whom either of these forms of punishment is inflicted, is over 16 years of age or under it. The language of the section would be simplified and improved if the two forms of punishment having been specified, there followed a provision that flogging should be applied only to persons above the appointed age.

But an objection of a more substantial character presents itself in respect of the punishment of flogging; all that is provided being that the instrument to be used is to be specified by the Court. It is true this is only a re-enactment of the existing law; but it is very desirable that something more definite and uniform should be established on this head. The Court in such cases always specified the cat-o'-nine-tails as the instrument to be used. But it is notorious that there are different forms of the instrument in question, differing widely in the severity of the punishment they are calculated to inflict. The "scutica" did not differ more widely from the "flagellum" than one sort of cat-o'-nine-tails

tails differs from another. At present, whether the heavier or the lighter sort shall be used, is left to the discretion of the gaoler or other prison authorities. This ought not to be. The same description of instrument should be uniformly used. And if as many as 50 strokes may be inflicted at one time, the lighter sort of instrument, that used for breaches of military discipline, should alone be available.

Next comes a provision with regard to the punishment of fining; namely, that in addition to it, the party may be adjudged to be imprisoned till the fine is paid, the maximum of imprisonment being two years, a very proper provision.

But what the species of imprisonment should be is not stated. It ought not to be of such a rigorous character as that which is intended as a punishment. At all events, its character should be determined, and not left to the discretion of the gaoler.

Next (Section 12) comes a provision vesting in the court a discretionary power, in all cases where an offender is liable to be sentenced to penal servitude for life, or for years, to pass a sentence of not less than (as proposed) five years, or, instead of it, of imprisonment of not less than (as proposed) two years, with or without hard labour. In like manner, anyone liable to be sentenced to imprisonment for any term may be sentenced to imprisonment for any shorter term.

This section, which proposes five years as the shortest period of penal servitude to which anyone convicted of a crime may be sentenced, is no doubt in accordance with the existing law; but it is full time that the law should be reconsidered.

I believe there is scarcely a judge who has not regretted his inability to pass sentences of penal servitude of three or four years, or who does not at times, from a conviction that five years is too long a period as a punishment in the particular instance, stop short of penal servitude altogether, where it would, if it could be given for a shorter period, be the appropriate punishment.

The making seven years the minimum after a former conviction, as is done in Section 15, will be likely to be attended with a similar result.

I am half tempted to add a few remarks on the present system of remitting a portion of sentences of penal servitude, which I believe to be a mischievous one, as it tends to diminish the effect of sentences by depriving them of a part of their reality, though it may be one acceptable to prison authorities, as it makes convicts more tractable. But I feel that this is hardly the place for such a discussion. I therefore pass on to Section 13, which is by no means an unimportant section. It provides: "In any case where the court considers that the offence deserves no more than a nominal punishment, the court may in its discretion direct the discharge of the accused person without taking any verdict, and such discharge shall have all the effects of an acquittal."

But this leaves it altogether uncertain at what stage the court may thus interpose. May the judge do this on reading the depositions, before any indictment is found? or, after an indictment has been found, but without hearing the witnesses? or is it to be when the case for the prosecution has been heard, in order to prevent the verdict? In other words is the power thus vested in the judge intended to enable him to prevent the case from being submitted to the jury at all, or to enable him to withdraw it from their decision before they pronounce their verdict. I presume the last, but am by no means sure. The purpose of the enactment may be to save the accused from exposure altogether; or it may be to save him from a verdict of guilty being pronounced. This should not be left in doubt. The uncertainty may prove very embarrassing.

Section 18 keeps alive all Acts relating to the reformatory schools, and the power to send offenders to such schools. But the being sent to such a school, in the case of a juvenile offender, becomes the punishment he has to undergo. And the power to pass this sentence should be given, and the circumstances under which it can be passed should therefore be stated in the Code.

I pass on to Part III., which deals with the matter of "justification and excuse for acts which would be otherwise offences," a most important part of the law. Great, indeed, was my astonishment on reading the first clause (Section 19), which is in these terms:

"All rules and principles of the common law which render any circumstances a justification or excuse for any act or a defence to any charge,

shall remain in force, and be applicable to any defence to a charge under this Act, except in so far as they are thereby altered, or are inconsistent therewith."

Such a provision appears to me altogether inconsistent with every idea of codification of the law. If it is worth while to codify at all, whatever forms a material part of the law should find its place in the Code. The circumstances under which acts, which would otherwise be criminal, will be excused or justified, forms an essential part of the law, whether unwritten or written. If the unwritten law is, as part of the law, to be embodied in a Code, so material a part of it as that with which we are dealing ought certainly to be carried into the Code, and should not be left at large, to be sought for in the unwritten and traditional law, which, the Code once established, it will be worth no one's while to study, and which will speedily become obsolete. We have done with the common law so far as relates to criminal matters. No one is henceforth to be indicted under it. Why then is this particular part of it to be kept alive? Why should not its rules, which it is thus proposed to make applicable to offences under the code, be ascertained, as the enactment in question assumes them to be capable of being, and carried into the Code, and thereby this part of it rendered complete?

Let me next call attention to Section 21, which relates to the capacity of children between 7 and 14 years of age. A child between these ages is not to be convicted unless at the time he committed the offence he had "sufficient intelligence to know the *nature* and *consequences* of his conduct, and to appreciate that it was wrong;" what does this mean? What is here meant by the very uncertain phrase, "*Nature*" of his conduct? Or, by the "*consequences*" of his conduct? Or, by his "*appreciation that it was wrong*?" Does "*consequences*" mean legal consequences? Does "*wrong*" mean merely something which the child knows is so far "*wrong*" that if he is found out he will be whipped or otherwise punished for it? Or does it mean that he knows it to be legally wrong, and as that which is prohibited by the law, and which will, if discovered, entail on him the penalties of the law as the "*consequence of doing wrong*." The true ground on which the legal irresponsibility of children rests, or ought to rest, is that, though they may be capable of knowing the difference between right and wrong in a certain limited sense, they are deemed incapable of knowing the law, or of understanding its sanctions, or of appreciating the consequences which the infraction of it may entail; be this, however, as it may, the meaning of the section should be made clear.

We have next to deal (s. 22) with the important subject of insanity: here the first observation to be made is that imbecility is included under insanity; yet the two things are essentially different, the one being the imperfect condition of mental power from congenital defect, or natural decay; the other the diseased condition of the mind in some or all of its functions. Passing this by, we have here, as it has been often done before, the law stated, in the terms in which it was expounded by the judges in the House of Lords, with reference to the McNaghten case, but without the important addition, namely, that to disentitle a man, though labouring under delusions, to be acquitted on the ground of insanity, his state of mind must have been such that he "*knew that he was acting contrary to law*." It is true that the judges also stated "*that the question to be put to the jury in such cases is, whether the party accused was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, did not know he was doing what was wrong*," being in the latter part the same loose and uncertain language as occurs in the present Bill—language not the less loose and unsatisfactory because used by learned judges, but which, taken with the earlier part of the answer, must, I think, be understood to mean *legally* wrong. But here an important question presents itself, and which is not covered by the statement of the judges. Among the functions of the human mind liable to be perverted by disease, is, as all scientific writers on insanity are agreed, the human will, which sometimes becomes the slave of maniacal impulses which it is unable to resist. Among the different forms of madness by which the will is liable to be thus affected is that which is known by the term of homicidal mania, or, when it impels a person to self-destruction, suicidal mania. That the will is liable to be thus maniacally affected, and so to be swayed by impulses which



it is unable to resist, is a point on which writers on mental pathology are agreed. Instances have been known in which lunatic patients have been periodically thus affected, and conscious of the approach of the maniacal condition, have requested to be placed under restraint. Murders for which no motive could be suggested, sometimes of children by their own mother, self-murder, equally without adequate motive, by men of religious character, can often only be thus accounted for. Ought persons who, thus afflicted, commit crimes, to be punished as though they were of sound mind, and capable of the self-restraint which the sense of moral right and wrong, or the fear of the law, imposes upon others more happily constituted? The point cannot as yet be said to have been authoritatively determined. The language of the judges in the House of Lords has no doubt been repeated as of general application, but erroneously. Their answers had reference to the specific question put to them by the House, language of which was in these terms: "What is the law respecting alleged crimes committed by persons afflicted with insane delusions in respect of one or more particular subjects or persons?" The answer is restricted to the specific question so put. "Assuming," it begins, "that your inquiries are confined to those persons *who labour under such partial delusion only, and are not in other respects insane*, we are of opinion," &c. The answer thus excluding any other form of insanity save that of partial delusion, and consequently not touching the case of mania to which I am at present directing attention. Further questions are put as to the questions to be put to the jury when a person having insane delusions is charged with a crime, and insanity is set up as a defence, and the answers, as before, have reference only to the question put; that is to say, to the effect of insane delusion as a defence.

The point has not come under judicial decision in a case which really raised the question. The nearest approach to it was in the case of *R. v. Burton*, reported in 3 F. and F. 772, where the prisoner, a lad of 18, had murdered a boy, confessing the fact afterwards, and accounting for it by saying "he had made up his mind to murder some one, as he was tired of his life." There was insanity in the boy's family, his mother having been twice confined in a lunatic asylum, but the defence set up being homicidal mania and the want of self-control, there was no evidence of the latter in anything but the fact itself. The summing up of the learned judge, Mr. Justice Wightman, cannot, I think, be considered as satisfactory. While deprecating the doctrine of homicidal mania as a highly dangerous doctrine, he went the length of saying—founding himself on the supposed doctrine of the judges, which he mistook—that to entitle a man to be acquitted on the ground of insanity, there must be "delusion" and "inability to distinguish right from wrong;" whereas the question whether mania accompanied by insane impulse might afford a defence, was not submitted to the judges or involved in their answers.

The question whether, under the influence of mental disease, the human will may become subject to impulses which it is unable to resist, and upon which even the fear of death will not operate as a restraint, is not one for lawyers to dispose of dogmatically, as they too often do, but one which as a question of pathological science it is for men conversant with that science to decide. If the fact is established, as I believe it to be, it is for the enlightened and philosophic lawgiver, in the interest of justice and humanity on the one hand, and of society on the other, to determine whether an act done in such a condition of the mind shall subject a man to punishment.

But let us look at the section from the point of view in which it is framed. The arrangement is certainly not a happy one. For the first sentence begins by telling us, not how a person shall be acquitted on the ground of insanity, but how he shall not. The passage in question should come at the close of, instead of as introductory to the section. Passing this by, we come to the statement of the law as to how far insanity shall constitute a defence. This is stated to be when the accused, at the time he committed the act, was labouring under natural imbecility, or disease of, or affecting the mind, so as to be incapable of "appreciating the *nature* and *quality* of the act, or that the act was wrong." What is meant by the "nature and quality" of the act I really know not. Does it simply mean that the person committing the act knew what he was doing? or that he knew that the act was legally wrong or was morally wrong? What is meant by the alternative "or that the act was wrong"? Is this phrase meant to be synonymous with the "quality" of the



act, as just before mentioned? If not, what is the difference between the two forms of expression?

Thus far the section has been dealing with insanity generally. In the next sentence it proceeds to deal with delusions, in other words with partial insanity, although that term is not used in the section. The section, though it does not distinguish between total and partial insanity, distinguishes between what it calls "specific" and what it calls "partial" delusions, a distinction which I fail to appreciate. "A person labouring under specific delusions, but in other respects sane, shall not be acquitted on the ground of insanity, unless the delusions caused him to believe in the existence of some state of things which, if it existed, would justify or excuse his act." What is here meant by specific delusion I know not. I should have thought that any delusion by which a man is induced to commit an act must be a specific delusion. But there is a more serious objection to the passage. The person thus labouring under delusions is supposed to be "otherwise sane," in other words capable of discerning between right and wrong. The language of the enactment is, it is true, negative, the party shall not be acquitted except under the circumstances stated; but this would seem to involve the converse, affirmatively, and as entitling the offender to be acquitted as insane if the conditions existed. Consequently, the accused being, on the hypothesis, otherwise sane, in other words capable of appreciating the character of the act, he would be entitled to be acquitted notwithstanding, which cannot, I presume, have been intended.

Last comes an important provision, the effect of which, taking it with what has gone before, is, if I understand it rightly, that while insanity shall not afford a defence, except where there is a capacity to distinguish between right and wrong, the existence of insanity or of delusion, "though only partial," the meaning of which term I must again say I fail to appreciate, may nevertheless of itself and without more, afford evidence from which the absence of such capacity may be inferred. With this modification of the existing law, as generally stated, I am very far from quarrelling; but the enactment being in its terms made applicable to insanity or delusions existing "before or after" the act, omitting all reference to insanity or delusion existing at the time it was committed, as I presume it cannot have been intended to exclude the consideration of the state of mind at the time of the offence, I would suggest that these words should be added.

The next important head is that of "Compulsion," dealt with in Section 23. According to Hale and East, compulsion forms no excuse in law for the committing of crime. It is here proposed that "threats of immediate death or grievous bodily harm, from a person actually present, shall be an excuse for any offence other than high treason." Why should we retain the term "high" treason, when petty treason has ceased to exist? Murder, attempts to murder, piracy, assisting in rape, forcible abduction, robbery, causing grievous bodily harm, and arson. Two provisoes are annexed to the main proposition, the substance of which might easily have been embodied in it; first, that the person under compulsion shall believe in the execution of the threat, without which, by the way, there could obviously be no real compulsion; secondly, that "he was not a party to any association or conspiracy which rendered him subject to such compulsion." The protection, so far as it goes, appears to me of a dangerous tendency; nor, if it is to be withheld in the case of the more serious crimes enumerated in the clause, can I see why it should be afforded in offences of a less serious character. The subject is one which requires very serious consideration, and ought by no means to be adopted as a matter of course.

But the section deals further with a species of compulsion which the law has always recognised as affording immunity, namely, the coercion supposed to be exercised by a husband over his wife in respect of offences committed in his company. But here, while no exception in favour of the wife is made in the general enactment of this section, and it may, therefore, be inferred that it is intended to apply to her, all that is provided is that henceforth "no presumption shall be made that a married woman, committing an offence in the presence of her husband, does so under compulsion." But what if there be actual compulsion, either such as the section recognises as an excuse in the case of the offences not excepted from its operation, or such as the law would now recognise as compulsion in the case of a married woman, though falling short of danger to life or limb? The presumption of compulsion in the case of the offences

offences here excepted, as well as of all others to which the presumption extends, made, as the law now stands, in favour of the wife, presupposes and is based upon the principle that actual coercion by the husband would be a valid excuse in law. The proposed enactment which we are considering does away with the presumption, but is silent as to *actual* coercion. Is it intended to do away with the excuse afforded by actual coercion unless it amounts to threat of death or grievous bodily harm, and the offence is one of those not excepted by the enactment? In other words, is it intended to place a married woman, with regard to compulsion by her husband, on the same footing as she would stand upon with reference to compulsion by any one else? Those who disbelieve in the reality of mental coercion, looking upon it as a fiction of the common law, may see no objection to the alteration of the law as thus proposed to be made, if such is intended to be the effect of the language; but ought such a matter to be left in the slightest doubt?

There follows a section, stated no doubt in the accepted form, "The fact that an offender is ignorant of the law is not an excuse for any offence committed by him"; in its terms a fearful proposition, seeing how many offences there are as to which it is impossible that the mass of mankind can in fact know the law, but which it may be necessary to uphold for the protection of society, but which, though, as I must admit, stated in the usual terms, would be improved if stated with the qualification that the ignorance is not the result of defective intelligence, as in this case the proposition is both theoretically and practically untrue.

There next follow a series of enactments touching exemption from the law relating to the protection of personal liberty and safety, such as arrests and imprisonment on process, or execution of sentence; acts done in the suppression of riots; acts done in self-defence, or defence of property, or assertion of right of property; acts done in the exercise of parental or *quasi*-parental authority, extending in the whole to 47 sections. But, in my view, the whole of this part of the Bill is out of place; these provisions being, as I have just said, limitations on the general law relating to assault and false imprisonment, and to be better understood and appreciated when the fundamental principles relating to personal liberty and safety have been laid down. I prefer, therefore, to defer the consideration of these sections till I come to the substantive law relating to these important subjects. But I feel bound here to say I shall have to take exception to the greater number of these sections, either as regards the substantive enactments contained in them, or the language in which they are framed, as uncertain or obscure. There are few of them which, in one or other of these respects, do not, as I shall show hereafter, require to be re-considered, and I venture to think amended.

The last of these sections, however (s. 370), I cannot pass over without observation. "Every one is protected from criminal responsibility for any act done in obedience to the laws for the time being made and enforced by those in possession *de facto* of the sovereign power in and over the place where the act is done."

What does this strange enactment mean? Of course it cannot be proposed in anticipation of any change in the possession of sovereign power in Her Majesty's dominions. I suppose it must be meant to apply to acts done by British subjects in foreign parts, which would be offences by our law. If so, this should be made clear. Moreover, the enactment in that case is out of place, and should have been inserted in the first division of the Bill, when the area of jurisdiction and the persons subject to the intended code were provided for. Placed where it is, one is at a loss to see its bearing, or what is its practical application. Yet it may not be unimportant that this should be rightly understood.

Part IV. contains the law as to "parties to offences." The language of the first section of this division (s. 71) is not happily chosen. "Every one," it is said, "is a party to and guilty of an indictable offence who (a) actually commits the offence, or does, or omits, any act, the doing of which forms part of the offence; or (b) aids and abets any person in the actual commission of the offence; or in any such act or omission as aforesaid; or (c) directly or indirectly counsels or procures any person to commit the offence, or to do or omit any act as aforesaid."

The purpose is here manifestly to get rid of the distinctions hitherto known to the law, of accessories before the fact, and principals in the first and second

degree at the time the offence is committed. All three are here included in the term "party to an offence." Yet these distinctions were not without their use, as serving to denote the different stages or degrees of guilt in an offence committed; and I see no advantage in getting rid of them. Besides this, the term "party to an offence" is inappropriate in its application to a person actually committing an offence, either as regards its legal or its popular use. It is properly applied to one who procures or counsels the committing of an offence, as also to one who aids and abets it; popularly speaking, it may be applied to each of several persons when the offence is jointly committed. No one would apply it to a person himself doing the act which constitutes the offence. I would suggest, therefore, that the language should be altered, and that the section should stand thus, or to this effect: "Every person is guilty of any offence established by this Act, who actually does, or omits the act, the doing or omitting which constitutes the offence; or, who becomes a party to any offence;" if it is thought desirable, with a view to other sections of the Act, that these words should be retained; for my own part I would get rid of them altogether; "by doing or omitting to do any act, the doing or omitting of which forms part of the offence;" to which I would add the words "with the intent that the offence shall be committed;" "or who becomes a party thereto by aiding or abetting, &c.;" or, by counselling or procuring, &c., leaving out the words "directly or indirectly."

The words occur in the last passage of this section in their natural and popular sense, and therefore are not open to objection; but in Section 72 they occur in the sense of and equivalent to the word "commit," and which latter word should be substituted for them.

In the next Section (73) we have a definition of an "accessory after the fact." To make this complete the words "committed, or has been," should be inserted in line 21; and the words "committed, or to have been," in line 22. But independently of its language, the enactment is incomplete, in making the assistance afforded to the guilty person referable only to the purpose of "escape;" it should embrace concealment also.

Lastly, we have in Section 74 a definition of an "attempt to commit an offence;" a very simple matter I should have thought, and which pretty well spoke for itself. If it was necessary to define it, I should have said it was "an act or acts done with the intention of committing the offence, but which failed in effecting the purpose." In the section this is amplified into the following form: "An attempt to commit an offence is an act done or omitted with intent to commit that offence, forming part of a series of acts or omissions which would have constituted the offence if such series of acts or omissions had not been interrupted, either by the voluntary determination of the offender not to complete the offence, or by some other cause." Would not this long definition of an attempt serve rather to embarrass a jury rather than to assist them?

We have in this section a further definition of an attempt: "Every one who, believing that a certain state of facts exists, does or omits an act, the doing or omitting of which would, if that state of facts existed, be an attempt to commit an offence, attempts to commit that offence, although its commission in the manner proposed was by reason of the non-existence of that state of facts at the time of the act or omission impossible." The proposition, it strikes me, is somewhat vague in its terms, and requires to be made somewhat more specific, with a view to its practical application. It cannot be intended as a statement of the existing law, as it would be in direct conflict with the decisions of the judges in *R. v. Scudder* (R. & M. 216), and *R. v. Collins* (L. & C. 474). I do not wish to be understood as quarrelling with the proposed alteration of the law, I only desire to have it stated in a way to prevent future difficulty. Suppose that A., desiring to kill B., were to fire a pistol at a spot where he believed B. to be, but B. was, in fact, not there, is it intended that this should be indictable as an attempt to kill B.? Or, suppose A., desiring to kill B., fires a shot at C., believing him to be B., but misses him, is this to be treated as an attempt to kill B., or an attempt to kill C.? Inasmuch as it is clear law that if C. were killed, the murder would be that of C., it would seem to follow that, as the law now stands, the attempt would be held to be an attempt to kill C. Is it intended that A. shall be guilty of both attempts? I must say I doubt whether the proposed enactment was intended to apply to such a case. It looks more as if intended to apply to such a case as that

of *R. v. Collins*, where a man was acquitted on a charge of attempting to pick a pocket, because though he put his hand into the pocket, it turned out that there was nothing in it. But the case I have put would be within the terms of the proposition.

Lastly, comes the provision that "the question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law." To this I must strenuously object. The question is essentially one of fact, and ought not, because it may be one which it may be better to leave to the judge to decide than to submit it to a jury to be, by a fiction, converted into a question of law. The same thing is done in other instances, and is in all of them open to objection. The right mode of dealing with a question of fact, which it is thought desirable to withdraw from the jury is to say that it shall, though a question of fact, be determined by the judge.

With this I conclude my observations, subject to the reservations as to Sections to on the first main division of the Bill containing the proposed Code. I regret to say that the other two divisions will afford matter for much observation and exception, with which I shall be sorry to trouble you, but which I feel bound to submit to you from a profound conviction that the Bill is as yet far from being in a condition in which it ought to become law.

The Attorney General, q.c., M.P.

I am, &c.  
(signed) *A. E. Cockburn.*

*P.S.*—I have been informed on reliable authority that it has been proposed, from apprehension of want of completeness of the Code as prepared, to supplement probable deficiencies by an enactment that the common law shall be applicable to any offence or case not provided for by the Bill. This would be to make confusion worse confounded, and would deprive the proposed measure of all pretensions to the character of a code. I trust it will not have your support.

*A. E. Cockburn.*

CRIMINAL CODE  
(INDICTABLE OFFENCES) BILL.

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COPY of LETTER from the LORD CHIEF JUSTICE  
OF ENGLAND, dated 12 June 1879, containing  
Comments and Suggestions in relation to the  
CRIMINAL CODE (INDICTABLE OFFENCES) BILL.

(*Mr. Attorney General.*)

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*Ordered, by The House of Commons, to be printed,  
16 June 1879.*

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