CHAPTER XII.

[1] DESCRIPTION OF MODERN CRIMINAL TRIALS.

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I PASS now to the consideration of modern criminal trials, by which expression I understand criminal trials as they now are, and as they have been for the last 120 years; for although some variations in the practice of the courts have taken place during that period, the resemblance between the proceedings of our own time and those of 1760 is so strong, that in reading the reports of the proceedings relating to Wilkes, Lord George Gordon, Tooke, Hardy, or Thelwall, a lawyer feels himself quite as much at home as when he reads the reports of contemporary trials in the newspapers of the day. I propose to give some account of each of the most important of the stages in the criminal trials which take place amongst us from day to day. In doing so I rely mainly upon the acquaintance with them which I have acquired by nearly thirty years' experience as a barrister and as a judge. During these thirty years nearly a quarter of the period which has elapsed since the beginning of George III.'s reign, no change in the procedure important enough to notice has taken place, except the introduction of the second speech of the counsel for the prosecution, which I think of doubtful advantage.

The first step in the trial properly so called is the opening speech of the counsel for the Crown. He is expected to confine himself—except under very special and unusual circumstances—to a quiet account of the different facts to be proved, and of their bearing upon each other, and on the guilt of the prisoner. This statement is often of decisive importance,

[1] See *Dig. Crim. Proc.* arts. 283-300.

for it produces the first impression made upon the minds of the judge and jury, the indictment being a neutral, formal document, wholly unlike a Continental *acte d'accusation*. It is pleasant to be able to say that, as a rule, subject only to rare exceptions, extreme calmness and impartiality in opening criminal cases is characteristic of the English bar. It is very rare to hear arguments pressed against prisoners with any special warmth of feeling or of language: one reason for which no doubt is, that any counsel who did so would probably defeat his own object. Apart, however, from this, it is worthy of observation that eloquence either in prosecuting or defending prisoners is almost unknown and unattempted at the bar. The occasion seldom permits of it, and the whole atmosphere of English courts in these days is unfavourable to anything like an appeal to the feelings—though, of course, in particular cases, topics of prejudice are introduced. This characteristic of English courts has existed for a considerable time. M. Cottu, who was sent by the French Government in 1822 to inquire into the administration of criminal justice in England, and who made an interesting report on the subject, thus describes the opening speeches of counsel:—

"[1] The plaintiff's counsel then lays before the jury a summary "of the case, which is nothing but a more detailed and "circumstantial repetition of the indictment, guarding him-"self, however, from every sort of invective against the "prisoner, and making no reflections on his depravity. "Facts must speak; the counsel is forbidden to excite feel-"ings which must be called forth by them alone." This description is as true now as it was sixty years ago. The opening speech for the prosecution is followed by the examination of the witnesses, who are first examined in chief by the counsel for the Crown, then cross-examined by the counsel for the prisoner if he is defended by counsel, or by the prisoner himself if he is not, and then re-examined by the counsel for the Crown. The judge and the jury can also

[1] *On the Administration of Criminal Justice in England*, by M. Cottu (English translation, 1822). The translation is not a good one. I have not seen the original.

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ask such questions as they may think necessary. The object of examination-in-chief is to make the witness tell what he knows relevant to the isssue in a consecutive manner and without wandering from the point. The object of cross-examination is twofold, namely, to prove any facts favourable to the prisoner which may not have been stated by the witness when examined in chief, and to bring to light any matter calculated to shake the weight of his evidence by damaging his character, or by showing that he has made inconsistent statements on former occasions, or that his opportunities of observation, or his memory as to what passed, were defective. The object of re-examination is to clear up any matter brought out in cross-examination which admits of explanation.

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

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

Their proper application requires experience and skill. It is not easy to question a person in such a way as to draw from him the knowledge which he possesses on a given subject in the form of a continuous statement in the

order of time, the questions being so contrived as to keep alive the attention and memory of the witness without being open to the objection that they suggest the answer which he is to give. The power of doing so can be acquired only by experience joined with quickness of observation and power of sympathy; and it may be compared, not inappropriately, to the management of a horse's bridle. The present method of examining-in-chief must, to judge from the *State Trials*, be at least as old as the beginning of the reign of George III. In earlier times, as I have already observed, the witness was allowed to tell his own story, and I have little doubt that the present practice was introduced in order to keep witnesses to the point, and as a consequence of the recognition of the rule that all evidence must be confined to the issue which, like other rules of evidence, found its way from the civil into the criminal courts I should think early in the eighteenth century.

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

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In discussing the subject of criminal trials and the procedure, as to evidence and otherwise, to be observed upon them, people are usually tempted to forget their real character. Cool, unexcited bystanders, often demand that a criminal trial should be conducted as quietly as a scientific inquiry, and are disgusted if any course is allowed to be taken which compromises the interests or character of third parties, or which leads to any sort of unseemly discussion. The truth is that litigation of all sorts, and especially litigation which assumes the form of a criminal trial, is a substitute for private war, and is, and must be, conducted in a spirit of hostility which is often fervent and even passionate. No man will allow himself to be deprived of character, or liberty, or possibly of life, without offering the most strenuous resistance in his power, or without seeking, in many cases, to retaliate on his opponent and his opponent's supporters. A trial of any importance is always more or less of a battle, and one object of the rules of evidence and procedure is to keep such warfare within reasonable bounds, and to prevent the combatants from inflicting upon each other, and upon third parties, injuries, the inflicting of which is not absolutely essential to the purposes of the combat. Such injuries, however, as are essential to the object in view must be permitted. Within its proper limits the battle must be fought with swords and not with foils. Unless this is clearly understood it is practically impossible to form a sound judgment upon the limits to be imposed upon cross-examination.

These limits can hardly be defined with precision, nor do I think that it would ever be practicable to lay down rules upon the subject, which would not leave much to the discretion of the judge as well as to the honourable feeling of counsel. Some limits, however, may I think be described distinctly enough to answer many practical purposes.

First, the difference between cross-examinations and examinations-in-chief, has reference rather to the question, What facts are relevant? than to the question, What proof must be given of a fact admitted to be relevant? In cross-examination the great object is to test the memory, the power of observation, and the good faith of the witness. Many

matters are relevant to the probability of a witness's observing a fact correctly, and reporting it accurately, which are not relevant to the occurrence of the fact itself. It may thus often be proper to ask a witness under cross-examination whether at a given time he had not heard or done certain things, which might predispose him to take a prejudiced view of circumstances described, but which are quite irrelevant to the main facts to which he deposes.

Suppose, for instance, that a servant is charged with theft, and that a fellow-servant deposes to conduct which is at first sight suspicious, it may be very important to know whether the common master of both had set the one servant to watch the other, and had communicated to the one the suspicions which he entertained against the other. This would not be admissible upon the examination-in-chief, because the master's suspicion is not regarded as relevant to the guilt of the accused servant, but it may well be admitted in cross-examination, because it is relevant to the probable accuracy of the witness's observation.

Assuming, however, that the relevancy of the fact to be proved is not in question, its existence must be proved in precisely the same manner in the case of a cross-examination as in the case of an examination-in-chief. If, for instance, it is necessary to prove the contents of a document, the document itself, or such secondary evidence of it as the nature of the case permits or requires to be given, must be produced, whether it is proved in chief or upon cross-examination.

The most difficult point as to cross-examination is the question how far a witness may be cross-examined to his credit by being asked about transactions irrelevant to the matter at issue, except so far as they tend to show that the witness is not to be believed upon his oath.

No doubt such questions may be oppressive and odious. They may constitute a means of gratifying personal malice of the basest kind, and of deterring witnesses from coming forward to discharge a duty to the public. At the same time it is impossible to devise any rule for restricting the latitude which at present exists upon the subject, without doing cruel injustice. I have frequently

known cases in which evidence of decisive importance was procured by asking people of apparent respectability questions which, when first put, appeared to be offensive and insulting in the highest degree. I remember a case in which a solicitor's clerk was indicted for embezzlement. His defence was that his employer had brought a false charge against him to conceal (I think) forgery committed by himself. The employer seemed so respectable and the prisoner so discreditable that [1] the prisoner's counsel returned his brief rather than ask the questions suggested by his client. The prisoner thereupon asked the questions himself, and in a few minutes satisfied every person in court that what he had suggested was true. I have in the same way heard of a woman, who seemed perfectly respectable, being compelled to admit that she had hidden in her servant's box articles which she charged the servant with stealing, and of a constable who was compelled by the late Serjeant Ludlow to confess that he had hidden forged bank-notes in the pocket of a man tried for being in possession of them. It is also to be remembered that cross-examination to credit may be conducted in very different ways. It is one thing to throw an insulting question coarsely and roughly in the face of a witness. It is quite another thing to follow up a point by questions justified by the circumstances. I remember an occasion when a most modest, respectable-looking woman swore to an alibi on the prisoner's behalf. She was cross-examined (without instructions) as follows:—*Q.*: Are you sure it was the same man? *A.*: Oh, yes. *Q.*: Did you know him before? *A.*: Yes, I knew him before (there was an expression in her eyes as she said this which led her questioner to go further). *Q.*: Did you know him well? *A.*: Yes, well. *Q.*: Very well indeed? *A.*: Yes. *Q.*: Did you live in the same house? *A.*: Yes. *Q.*: Are you his wife? *A.*: No. *Q.*: Do you live with him as his wife? *A.*: Yes.

The most difficult cases of all are those in which the imputation is well founded, but is so slightly connected with the matter in issue that its truth ought not to affect the credibility of the witness in reference to the matter on which he

[1] The late Mr. Adams, afterwards Attorney-General for Hong Kong.

testifies. The fact that a woman had an illegitimate child at eighteen, is hardly a reason for not believing her at forty, when she swears that she locked up her house safely when she went to bed at night, and found the kitchen window broken open and her husband's boots gone when she got up in the morning.

Cases, however, may be imagined in which a real connection may be traced between acts of profligacy and a man's credibility on matters in no apparent way connected with them. Seduction and adultery usually involve as gross a breach of faith as perjury, and if a man claimed credit on any subject of importance, the fact that he had been convicted of perjury would tend to discredit him. No general rule can be laid down in matters of this sort. All that can be said is that whilst the power of cross-examining to a witness's credit is [1] essential to the administration of justice, it is of the highest importance that both judges and counsel should bear in mind the abuse to which it is liable, and should do their best not to ask, or permit to be asked, questions conveying reproaches upon character, except in cases in which there is a reasonable ground to believe that they are necessary.

There is another matter connected with cross-examination in which there is no room for doubt as to the duty of counsel, and as to the duty incumbent upon judges to enforce that duty stringently. The legitimate object of cross-examination is to bring to light relevant matters of fact which would otherwise pass unnoticed. It is not unfrequently converted into an occasion for the display of wit, and for obliquely insulting witnesses. It is not uncommon to put a question in a form which is in itself an insult, or to preface a question or receive an answer with an insulting observation. This naturally provokes retorts, and cross-examination so conducted ceases to fulfil its legitimate purpose, and becomes a trial of wit and presence of mind which may amuse the audience, but is inconsistent with the dignity of a court of justice, and unfavourable to the object of ascertaining the truth. When such a scene

[1] As illustrations of such examinations see the cross-examination of Lutterloh by Dunning in 1781 (21 *St. Tr.* 746—54) and the cross-examination of Castles, the spy, by Sir C. Wetherell in 1817 (32 *St. Tr.* 284).

CH. XII. takes place the judge is the person principally to blame. He has a right on all occasions to exercise the power of reproving observations which are not questions at all, of preventing questions from being put in an improper form, and of stopping examinations which are not necessary for any legitimate purpose.

I have already given the history of cross-examination in general. The history of cross-examination to credit is a separate matter. As I have shown in the chapter on trials the practice of the court in the seventeenth century was to allow great latitude in calling witnesses to discredit witnesses for the Crown by showing almost any sort of disgraceful conduct on their part, but witnesses were not allowed to be discredited by cross-examination. By degrees this practice was reversed and the modern rule substituted for it. The rules upon the subject are stated in my *Digest of the Law of Evidence*, Articles 129—133. The history of these rules is curious. In the seventeenth century, as I have already shown, evidence defaming a witness was permitted, but he was not allowed to be cross-examined as to his character. By degrees cross-examination as to character came into use, but evidence defaming a witness's character was allowed at the same time. The most modern and most remarkable instance of this which I can cite occurred in the trials for the Irish rebellion of 1798. [1] On the trial of the Sheares, Captain Armstrong, the principal witness against them, was accused of disloyalty, of holding atheistical opinions, and of cruelty in the suppression of rebellion, and this having been denied on cross-examination several witnesses were called to prove it. On the [2] trials of Byrne, M'Cann, and Oliver Bond, Reynolds was the principal witness. In cross-examination questions were asked him suggesting that he had poisoned his mother-in-law and committed other gross offences. He denied the imputations made against him, and

[1] 27 *St. Tr.* Cross-examination of Armstrong, 314—319. Evidence in contradiction, 347—358.

[2] *Ib.* See Reynolds's examination and cross-examination in Byrne's case, 469—479; and see the evidence of Eleanor Dwyer, p. 499. Most of the witnesses against Reynolds, however, confined themselves to the general assertion that he was not to be believed on his oath. They gave their reasons on cross-examination. This is the modern practice.

witnesses were called to prove some of them. This is no longer allowed on account of its obvious inconvenience and unfairness. It is inconvenient because a trial so conducted has a tendency to swell to unmanageable dimensions. It is unfair because it puts the witness on his trial for every act of his life without notice. The modern rule accordingly is that when defamatory questions are asked the witness's answer must be taken, though he may be indicted for perjury if he swears falsely. He may, however, be impeached by witnesses who will swear in general terms that he is not worthy of credit on his oath, and if such witnesses are asked why they say so they can answer that they know the imputatation which he denied on oath to be true in fact. Such evidence is now very rarely given. I can remember only one case in which it decided the issue of a trial. That case occurred very lately in a trial before me for rape. The prosecutrix in that case was shown in the manner just described to be a person on whom it was impossible to rely, and the jury stopped the case.

[1] The rules as to the relevancy of facts and as to the proof of relevant facts, are, speaking generally, the same in relation to criminal as in relation to civil proceedings, for the manner in which a fact is to be proved has no necessary connection with the use to which it is to be applied when it has been proved. If it is necessary to show that a man is dead the fact must be proved in the same way, whether it is proved in a criminal trial for murder or on the trial of a civil action for the recovery of an estate. Moreover the principles which determine whether or no a given fact is either in issue or is or is not relevant to the issue, are the same whatever may be the nature of the issue. Some of the more detailed rules of evidence, however, apply exclusively, and others most frequently to criminal cases, and as they give much of its special character to an English criminal trial, I will refer to the most important of them.

In the first place, I may mention the general presumption of innocence which, though by no means confined to the criminal

[1] As to the rules of evidence in general see my *Digest of the Law of Evidence* (4th edition, Macmillan).

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law, pervades the whole of its administration. This rule is thus expressed in my [1] *Digest of the Law of Evidence*, "If the commission of a crime is directly in issue in any proceeding, civil or criminal, it must be proved beyond all reasonable doubt.

"The burden of proving that any person has been guilty of a crime or wrongful act is on the person who asserts it, whether the commission of such act is or is not directly in issue in the action."

This is otherwise stated by saying that the prisoner is entitled to the benefit of every reasonable doubt. The word "reasonable" is indefinite, but a rule is not worthless because it is vague. Its real meaning, and I think its practical operation, is that it is an emphatic caution against haste in coming to a conclusion adverse to a prisoner. It may be stated otherwise, but not, I think, more definitely, by saying that before a man is convicted of a crime every supposition not in itself improbable which is consistent with his innocence ought to be negatived. But I do not know that "improbable" is more precise than "reasonable." It is also closely connected with the saying that it is better that ten guilty men should escape than that one innocent man should suffer—an observation which appears to me to be open to two decisive objections. In the first place, it assumes, in opposition to the fact, that modes of procedure likely to convict the guilty are equally likely to convict the innocent, and it thus resembles a suggestion that soldiers should be armed with bad guns because it is better that they should miss ten enemies than that they should hit one friend. In fact, the rule which acquits a guilty man is likely to convict an innocent one. Just as the gun which misses the object at which it is aimed is likely to hit an object at which it is not aimed. In the second place, it is by no means true that under all circumstances it is better that ten guilty men should escape than that one innocent man should suffer. Everything depends on what the guilty men have been doing, and something depends on the way in which the innocent man came to be suspected. I think it probable that the length to which this sentiment has been carried

[1] Article 94.

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

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

1. The first and by far the most important is the rule that the prisoner and his wife are incompetent witnesses. The history of this rule is as follows:—The husbands or wives of

[1] Cottu's *Report*, p. 91, &c.
[2] This clumsy sentence is obviously the fault of the translator.

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

Soon after the Revolution of 1688, the practice of questioning the prisoner died out, and as the rules of evidence passed from the civil to the criminal courts, the rule that a party was incompetent as a witness, which (subject to evasion by bills of discovery in equity) prevailed in civil cases till [1] 1853, was held to apply to criminal cases. This, however, was subject to two important qualifications. First, the prisoner in cases of felony could not be defended by counsel, and had therefore to speak for himself. He was thus unable to say, as counsel sometimes still says for him, that his mouth was closed. On the contrary his mouth was not only open, but the evidence given against him operated as so much indirect questioning, and if he omitted to answer the questions it suggested he was very likely to be convicted. This was considerably altered by the act which allowed prisoners accused of felony the benefit of counsel. The counsel was always able to say, "My client's mouth is closed. If he "could speak he might say so and so." Within the last few years, however, counsel have been allowed to make any statement they please as from their clients, and in [2] some instances prisoners have been allowed to make such statements themselves, though such a course has been held to give the prosecutor a right to reply. Counsel still often allege by way of grievance that their clients' mouths are closed; but no one who is acquainted with the law can believe

[1] It was repealed by 16 & 17 Vic. c. 83.

[2] Especially by Cave, J., in the winter circuit of 1882. I have done the same.

it, nor ought judges to allow such a statement to pass uncontradicted.

Secondly, the statutes of Philip and Mary already referred to, repealed and re-enacted in 1826 by 7 Geo. 4, c. 64, authorized committing magistrates to "take the examina-" tion" of the person suspected. This examination ([1] unless it was taken upon oath, which was regarded as moral compulsion), might be given in evidence against the prisoner.

This state of the law continued till the year 1848, when by the 11 & 12 Vic. c. 42, the present system was established, under which the prisoner is asked whether he wishes to say anything, and is warned that if he chooses to do so what he says will be taken down and may be given in evidence on his trial. The result of the whole is that as matters stand the prisoner is absolutely protected against all judicial questioning before or at the trial, and that, on the other hand, he and his wife are prevented from giving evidence in their own behalf. He is often permitted, however, to make any statement he pleases at the very end of the trial, when it is difficult for any one to test the correctness of what is said.

This is one of the most characteristic features of English criminal procedure, and it presents a marked contrast to that which is common to, I believe, all continental countries. It is, I think, highly advantageous to the guilty. It contributes greatly to the dignity and apparent humanity of a criminal trial. [2] It effectually avoids the appearance of harshness,

[1] See my *Digest of the Law of Evidence*, Art. 23, and note xvi.

[2] The contrast is described by M. Cottu in a singular passage, p. 103—4. "The courts of England offer an aspect of impartiality and humanity which "ours, it must be acknowledged, are far from presenting to the eyes of the "stranger. In England everything breathes an air of lenity and mildness, "the judge looks like a father in the midst of his family occupied in trying "one of his children" (an extraordinary position certainly for a man to be placed in). "His countenance has nothing threatening in it. According to "an ancient custom flowers are strewed upon his desk and upon the clerk's. "The sheriff and officers of the court wear each a nosegay." . . . . "Every-"thing among us, on the contrary, appears in hostility to the prisoner. He "is often treated by the public officers with a harshness, not to say cruelty, at "which an Englishman would shudder. Even our presiding judges, instead "of showing that concern for the prisoner to which the latter might appear "entitled from the character of impartiality in the functions of a judge, "whose duty is to direct the examination, and to establish the indictment, "too often becomes a party against the prisoner, and would seem sometimes "to think it less a duty than an honour to procure his conviction."

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not to say cruelty, which often shocks an English spectator in a French court of justice, and I think that the fact that the prisoner cannot be questioned [1] stimulates the search for independent evidence. [2] The evidence in an English trial is, I think, usually much fuller and more satisfactory than the evidence in such French trials as I have been able to study.

On the other hand, I am convinced by much experience that questioning, or the power of giving evidence, is a positive assistance, and a highly important one, to innocent men, and I do not see why in the case of the guilty there need be any hardship about it. It must be remembered that most persons accused of crime are poor, stupid, and helpless. They are often defended by solicitors who confine their exertions to getting a copy of the depositions and endorsing it with the name of some counsel to whom they pay a very small fee, so that even when prisoners are defended by counsel the defence is often extremely imperfect, and consists rather of what occurs at the moment to the solicitor and counsel than of what the man himself would say if he knew how to say it. When a prisoner is undefended his position is often pitiable, even if he has a good case. An ignorant uneducated man has the greatest possible difficulty in collecting his ideas, and seeing the bearing of facts alleged. He is utterly unaccustomed to sustained attention or systematic thought, and it often appears to me as if the proceedings on a trial, which to an experienced person appear plain and simple, must pass before the eyes and mind of the prisoner like a dream which he cannot grasp. I will give an illustration of what I mean, which many years ago impressed me deeply.

A number of men, six or seven, I think, were indicted at Lincoln on three separate charges arising out of the same set of facts. The indictments charged, wounding A, with

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

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

intent to do him grievous bodily harm, wounding B, with the same intent, and being to the number of three or more on land armed by night for the purpose of poaching. The facts were that a gang of poachers had fallen in with certain keepers and their assistants, and that A and B, two of the keepers' party were severely beaten and, indeed, nearly murdered. [1] On the first and second indictments some of the party were convicted of unlawfully wounding A and B respectively. On the third indictment all were convicted of night poaching. At the first trial they hardly defended themselves at all, though one of the party slightly cross-examined the leading witnesses for the Crown. One witness said that a dog which he saw with the poachers was white, and another said that it was red. The prisoners pointed out this small difference in a feeble helpless way, without showing that it was at all important, and they were at once convicted on the minor charge of unlawful wounding. As I considered this verdict insufficient the other indictments were tried. On the second trial, as I was informed, the prisoners appeared to understand what was going on much better, and some of them defended themselves with a good deal of energy. On the third trial they fully understood the whole matter and brought out their real defence. The defence was that on the night in question two different parties went out poaching, one with a white dog and the other with a red dog, that they set out together and returned together, but that the fray took place between the keepers and one only of the parties of poachers, and that the evidence confused together the white dog party and the red dog party. The judge who tried the case was so much impressed by the defence, which the jury would not believe, that he made, and caused to be made, independent inquiries, which finally resulted in a grant of free pardons to several of the prisoners. Others were clearly guilty, and, indeed, admitted their guilt. If these men could have been questioned, I think all the innocent members of the party would have been acquitted at once.

The following is another instance which struck me much. I

[1] I was counsel for the crown, but I was not present at the second and third trials, though I was present at the first, and was fully informed at the time of all that happened at the other two.

CH. XII. heard of it on unquestionable authority, though I was not myself present on the occasion:—A man was indicted at a Court of Quarter Sessions for stealing a spade. The evidence was that the spade was safe overnight and was found in his possession next day, and that he gave no account of it. He made no defence whatever, and was immediately convicted. When called upon to say why sentence should not be passed upon him, he replied in a stupid way, "Well, it is hard I should be sent to gaol for this spade, when the man I bought it of is standing there in court." The chairman caused the man referred to to be called and sworn; the jury, after hearing him, recalled the verdict they had given, and the man was acquitted at once.

These are specimens of a considerable number of cases which have led me to form an opinion, that when a wrong conviction does occur in an English criminal court, it is usually caused by treating a poor and ignorant man as if he were rich, well advised, and properly defended. If money enough is to be had to procure the services of skilful counsel and solicitors, and to provide all the evidence which may be required, the presumption that every point is taken which can be taken, and that matters passed over are passed over advisedly, is probably true, and I think nothing can be fairer or more completely satisfactory than a great criminal trial so conducted. A poor and ill-advised man, on the contrary, is always liable to misapprehend the true nature of his defence, and might in many cases be saved from the consequences of his own ignorance or misfortune by being questioned as a witness. I do not think that any evil would ensue to the wealthy and well-advised from being placed in the same position.

The practice suggested would also make it impossible for prisoners to play a trick upon the court which is sometimes practised at present, and which causes great embarrassment. A prisoner, let us suppose, has a defence to offer which he considers doubtful and dangerous. He accordingly keeps it to himself, and takes his chance of an acquittal on the weakness of the case for the crown. After conviction and sentence he brings out his real defence. This, especially in

capital cases, is extremely embarrassing. It is hard to hang a man because he or his advisers have not been candid, and it is also hard to hang a man whose real defence was not put before the jury. In such cases, accordingly, informal inquiries have to be made, which are seldom satisfactory, and often cause failures of justice. If the prisoner was questioned, this result would be generally avoided.[1]

The propriety of making the parties competent witnesses in civil cases is no longer disputed. It is difficult to say why the same rule should not apply to criminal cases also. One objection to the admission of such evidence rests upon the false supposition that a witness is to be believed because he is sworn to speak the truth. The proper ground for admitting evidence is not that people are reluctant to lie but that it is extremely difficult to lie minutely and circumstantially without being found out.

If prisoners are to be made competent witnesses, I think they ought to be competent to testify as well before the magistrate as before the judge. No greater test of innocence can be given than the fact that as soon as he is charged, and whilst there is still time to inquire into and test his statements, a man gives an account of the transaction which will stand the test of further inquiry.

Some precautions might properly be observed in admitting such evidence. If the prisoner did not offer his testimony it would be hard to allow the prosecution to call him. The fact of his refusing to testify would always have its weight with the jury. By leaving him to be examined in chief by his own counsel and cross-examined by the counsel for the crown the danger of placing the judge in a position hostile to the prisoner would be avoided. I should regard this as so important an object that unless it could be fully secured I should prefer to maintain the existing law as it stands. The following provision upon this subject was introduced into the Draft Criminal Code of 1879, though the Commissioners were divided in opinion as to its policy:—

"[2] EVIDENCE OF THE ACCUSED.—Every one accused of any

[1] As an instance, I may refer to the recent case of Lamson, hanged for poisoning his brother-in-law.

[2] See *Report*, p. 37, s. 523.

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" indictable offence shall be a competent witness for himself " or herself upon his or her trial for such offence, and the wife " or husband as the case may be of every such accused person " shall be a competent witness for him or her upon such " trial: provided that no such person shall be liable to be " called as a witness by the prosecutor, but every such witness " called and giving evidence on behalf of the accused shall " be liable to be cross-examined like any other witness on any " matter though not arising out of his examination-in-chief: " provided that so far as the cross-examination relates to the " credit of the accused, the court may limit such cross- " examination to such extent as it thinks proper, although " the proposed cross-examination might be permissible in the " case of any other witness."

2. Another set of rules peculiar to criminal trials are [1] the rules relating to evidence of confessions. These extremely

[1] The rules as to confessions are thus stated in my *Digest of the Law of Evidence*: "Article 21.—*Confessions Defined.*—A confession is an admission " made at any time by a person charged with a crime, stating or suggesting " the inference that he committed that crime. Confessions, if voluntary, are " deemed to be relevant facts as against the persons who make them only.

" Article 22.—*Confessions caused by Inducement, Threat, or Promise, when " Irrelevant in Criminal Proceedings.*—No confession is deemed to be volun- " tary if it appears to the judge to have been caused by any inducement, threat, " or promise, proceeding from a person in authority, and having reference to " the charge against the accused person, whether addressed to him directly or " brought to his knowledge indirectly; and if (in the opinion of the judge) " such inducement, threat, or promise, gave the accused person reasonable " grounds for supposing that by making a confession he would gain some " advantage or avoid some evil in reference to the proceedings against him. " A confession is not involuntary only because it appears to have been caused " by the exhortations of a person in authority to make it as a matter of " religious duty, or by an inducement collateral to the proceeding, or by " inducements held out by a person not in authority. The prosecutor, " officers of justice having the prisoner in custody, magistrates, and other " persons in similar positions, are persons in authority. The master of the " prisoner is not as such a person in authority, if the crime of which the " person making the confession is accused was not committed against him. " A confession is deemed to be voluntary if (in the opinion of the judge) it is " shown to have been made after the complete removal of the impression pro- " duced by inducement, threat, or promise which would otherwise render it " involuntary. Facts discovered in consequence of confessions improperly " obtained, and so much of such confessions as distinctly relate to such facts, " may be proved.

" Article 24.—*Confession made under a Promise of Secrecy.*—If a confession " is otherwise relevant, it does not become irrelevant merely because it was " made under a promise of secrecy, or in consequence of a deception practised " on the accused person for the purpose of obtaining it, or when he was " drunk, or because it was made in answer to questions which he need not " have answered, whatever may have been the form of those questions, or " because he was not warned that he was not bound to make such confession, " and that evidence of it might be given against him."

detailed and elaborate rules were developed by a series of judicial decisions within the last century (Warickshall's case, 1 Leach, 263, decided in 1783, is one of the earliest on the subject), from the general proposition that "confessions "ought to be voluntary and without compulsion." The rule is stated almost in these words in the sixth edition of Gilbert on the *Law of Evidence*, published in 1801, p. 123. [1]A vast number of cases have since been decided by which every branch of the rules given below is established. It would be difficult to give a stronger illustration of the way in which the law of England is gradually made by judicial decisions than is afforded by the growth of this rule. I cannot here go into detail upon the subject, but I may observe in general that the character of the decisions has varied considerably. At one time the courts were disposed to take almost any opportunity to exclude evidence of confessions, almost anything being treated as an inducement to confess. In 1852, however, the law was considerably modified by the decision in the case of [2]R. *v.* Baldry, since which time the disposition has been rather the other way.

The general maxim, that confessions ought to be voluntary, is historically the old rule that torture for the purpose of obtaining confessions is, and long has been, illegal in England. In fact it cannot be said that it ever was legal, though it seemed at one time as if it were likely to become legal.

3. Another rule peculiar to criminal cases is [3]the exception to the rule respecting hearsay evidence which renders dying declarations as to the cause of death admissible in trials for murder or manslaughter. I believe this rule as now limited to be about 100 years old. The earliest emphatic statement

[1] They are collected in Taylor, *On Evidence*, 769—809, and elsewhere.

[2] 2 Den. 430. The latest cases are R. *v.* Jarvis, L. R. 1 *C. C. R.* 96, and R. *v.* Reeve, *ib.* 364.

[3] The rule is thus stated in my *Digest of the Law of Evidence* :—"Article "26.—*Dying Declaration as to the Cause of Death*.—A declaration made by "the declarant as to the cause of his death, or as to any of the circumstances of "the transaction which resulted in his death, is deemed to be relevant only "in trials for the murder or manslaughter of the declarant; and only when "the declarant is shown, to the satisfaction of the judge, to have been in "actual danger of death, and to have given up all hope of recovery at the "time when his declaration was made. Such a declaration is not irrele-"vant merely because it was intended to be made as a deposition before a "magistrate, but was irregular.

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of it commonly quoted is to be found in [1] Woodcock's case, decided in 1789 by Lord Chief Baron Eyre. This case refers to a decision in 1720 by Lord Chief Justice King, and to the case of [2] R. *v.* Reason and Tranter, decided in 1722. That case, however, says nothing as to any limitation on the rule. A series of cases from 1678 to 1765 show that during that period declarations of deceased persons as to the cause of their death were admitted even though the declarants had hopes of recovery when they were made. In the [3] trial of Lord Pembroke for the murder of Mr. Cony in 1678, evidence was given of many statements made by the deceased as to the cause of his death; they must have been made when he hoped to recover, as he said he should demand satisfaction for the injury done him. In the case of [4] Lord Ferrers, tried in 1760, evidence was given as to what Johnson, the steward, said about Lord Ferrers having shot him, without any question being asked as to his hopes of recovery at the time. Lord Mansfield was one of the peers present on this occasion, and took a leading part in the proceedings. Again, in the trial in 1765 of [5] Lord Byron for the murder of Mr. Chaworth, evidence was given by Mr. Cæsar Hawkins, the surgeon, of what Mr. Chaworth said about the transaction, without any such preliminary inquiry as to his expectation of recovery as would now be made. It certainly appeared from the evidence that he was aware of his danger but not that he had no hopes of life.

The rule is in many ways remarkable. It has worked, I am informed, ill in India, into which country it has been introduced together with many other parts of the English law of evidence. I have heard that in the Punjab the effect of it is that a person mortally wounded frequently makes a statement bringing all his hereditary enemies on to the scene at the time of his receiving his wound, thus using his last opportunity to do them an injury. A remark made on the policy of the rule by a native of

[1] Leach, 502. It is singular that Warickshall's case, which contains the earliest statement of the modern law as to confessions, should have been decided by the same judge a few years before. The language used in each case is rather rhetorical and inflated. [2] 1 *St. Tr.* 449.

[3] 6 *St. Tr.* 1325. [4] 19 *Ib.* 918. [5] *Ib.* 1205-6.

Madras shows how differently such matters are viewed in different parts of the world. "Such evidence," he said, "ought never to be admitted in any case. What motive for "telling the truth can any man possibly have when he is "at the point of death?"

4. Lastly, evidence as to the character of the accused person is admitted in criminal cases as a sort of indulgence, though character is usually treated as irrelevant. Before the Norman Conquest (as I have already shown) the character of the accused decided the question whether he was to be allowed to make his purgation by compurgators or was to be sent to the ordeal. In later times the character of the accused must have weighed with the jury who acted as witnesses. Under the Stuarts (as I have shown) evidence was freely given of particular crimes or misconduct, unconnected with the matter in issue, committed by the prisoner. Evidence of his good character was also admitted. An early, perhaps the earliest, instance of this is to be found in [1] the trial of Colonel Turner for burglary in 1664. The report does not give the evidence of the prisoner's witnesses, but he must have called such witnesses, for Lord Chief Justice Hyde said in summing up: "The witnesses he called in point of reputation that I must "leave to you. I have been here many a fair time. Few "men that come to be questioned but shall have some come "and say—He is a very honest man, I never knew any hurt "by him; but is this anything against the evidence of "the fact?"

All through the eighteenth century evidence of character was given on behalf of the prisoner as it is now. Perhaps the most remarkable recorded instance of it occurred in the [2] trial of Mr. Arthur O'Connor for high treason in 1798, when Lord Moira, Mr. Erskine, Mr. Fox, Lord Suffolk, Mr. Sheridan, Mr. Michael Angelo Taylor, Mr. Grattan, and Mr. Whitbread, were called, and "many other gentlemen equally respectable" were tendered to give evidence as to his character for loyalty. Great importance must have been attached to this evidence as the prisoner gave up the advantage of being defended by Erskine for the sake of calling him as a witness.

[1] 6 *St. Tr.* 613.

[2] 27 *Ib.* 31—53.

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The whole of the law as to witnesses to character was greatly discussed in the case of [1] R. v. Rowton, decided in 1863, in which it was decided by all the judges that if evidence of good character was given for the prisoner evidence of bad character might be given against him, and by eleven judges against two (Erle, C. J., and Willes, J.) that evidence of character means evidence of reputation as opposed to evidence of disposition. The decision settled the law, but in practice it is impossible to act upon it, and it may be doubted whether it is desirable to try to do so. The facts in R. v. Rowton set this in so clear a light that comment upon them seems to me superfluous. The prisoner took pupils, and was convicted of committing an indecent assault upon one of them. He called witnesses who gave him "an excellent character as a moral and well-conducted man." Thereupon a witness was called to contradict this evidence, who was asked, "What is "the defendant's general character for decency and morality "of conduct?" He was allowed to answer, "I know nothing "of the neighbourhood's opinion, because I was only a boy "at school when I knew him, but my own opinion, and the "opinion of my brothers, who were also pupils of his, is that "his character is that of the grossest indecency and the most "flagrant immorality." This was held to be a ground for quashing the conviction, so that the case expressly decides that if a man gains a reputation for honesty or morality by the grossest hypocrisy he is entitled to give evidence of it, which evidence cannot be contradicted by people who know the truth.

The examination of the witnesses having been completed if the prisoner is defended by counsel, and if no witnesses (except witnesses to character) are to be called for the defence, the counsel for the Crown may sum up the evidence. His right to do so was given by 28 Vic. c. 18, s. 2, which was passed in 1865. The theory was that matters might come out in evidence which ought to be explained and commented upon by the counsel for the Crown before the defence was made. I doubt the advantage of the change. It adds a speech where there is already speaking enough.

[1] L. & C. 520.

This is followed by the defence. It is a highly characteristic part of an English criminal trial.

[1]M. Cottu observes, in reference to the mildness with which prisoners are prosecuted in England: "It is true that the "liberty of defence, very differently understood in France "from what it is in England, forces us to a much more "rigorous prosecution; it would be almost impossible to "convict a prisoner considering the latitude which our laws "give to the defence, were the prosecution confined within "the limits prescribed in England, that is, were it forbidden "to question the prisoner and his accomplices."

No one at all acquainted with the subject would admit that English barristers are in any degree inferior, either in courage, or in independence, or in resource, to any body of professional men in the world, but it is unquestionably true that the history of English advocacy in criminal cases is far calmer than the history of French advocacy in recent times. Collisions between the Bench and the Bar are exceedingly rare, and when they do occur they arise rather out of individual faults of temper on the one side or the other than from any struggle as to matters of principle, or any attempt on the part of the Bar to prevent the application to the case of the law laid down by the judge.

Several observations arise both upon the history and the causes of this state of feeling. For a great length of time the Bar had no opportunity of defending their clients at all, except in cases of misdemeanour. Misdemeanours of importance on public grounds were usually tried before the Star Chamber, and the discretion of that court was so wide and its decisions so little capable of being checked by any power except Parliament, that there was practically no opportunity for the Bar to say anything of importance. From the Civil Wars to the Revolution of 1688, prisoners in cases of treason and felony had no counsel. Their defences, in cases of misdemeanour, were not very impressive. The only case to the contrary which occurs to me is the case of the seven bishops, which was in every way so exceptional that no inference as to the common course of justice can be drawn from it.

[1] P. 104.

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Since the Revolution the following affirmations with respect to the Bar and the defence of prisoners may fairly be made. In the first place there always has been and still is a degree of sympathy and fellow-feeling between the Bench and the Bar which I believe to be peculiar to this country, and which has had and still has most important, and, as I (naturally) consider, most beneficial effects upon the administration of justice. The judges are simply barristers who have succeeded in the profession [1] of which they still are members, and they carry to the Bench the professional habits and ways of thought acquired in the course of a professional lifetime, beside which they are naturally upon terms of intimacy with the senior members of the profession. This gives them an influence in the administration of justice which those who have neither felt nor exercised it can hardly appreciate. The judges can hardly fail to understand the unwritten rules and sentiments which determine the duties of counsel, and when they do understand them and apply them fairly, they have the sentiment of the profession on their side. These sentiments are to a surprising extent on the side of the existing law. The number of barristers who try to evade its application or who wish to see it defeated by an appeal to prejudice is small. The action of a judge who warns counsel that he is going beyond the limits assigned to him either by trying to intimidate a jury or by attempting to induce them to break the law from motives of prejudice, or by making suggestions which the evidence does not warrant, is never in my experience unpopular amongst those with whom the judge wishes to be on good terms, namely, the members of his own profession. The barrister's province is singularly well defined. It is to say for his client whatever upon the evidence it is by law open to him to say, and which he thinks likely to be advantageous. The judge's province is equally well defined.

[1] In former times judges when dismissed from the Bench returned to practice at the Bar, and I know of no legal reason why if a judge resigned his office he might not resume his practice. The judges are now Benchers of their respective Inns. As members of Serjeant's Inn they formed a domestic tribunal having the authority of a Court of Appeal over the Inns of Court. The present judges of the Queen's Bench Division had been on an average nearly twenty-eight years at the Bar before they were raised to the Bench.

It is to prevent mis-statements of law and of fact and attempts to intimidate or mislead the jury. Again, though the form of the law is clumsy, its substance is on almost every subject so minute and complete that there can be little doubt as to the point at which a barrister begins to mis-state it or to ask the jury to transgress it. Finally, the whole legal profession is a pre-eminently manly one. It is a calling in which success is impossible to the weak or timid, and in which every one, judge or barrister, is expected to do his duty without fear or favour to the best of his ability and judgment.

I am no doubt prejudiced in favour of a system in the administration of which great part of my life is passed, but it seems to me that the result of this state of things has been in the past, and is in the present, eminently satisfactory. Even in times of vehement political excitement the Bench and the Bar have hardly ever been brought into collision, though neither has as a rule failed in its special duty, and though on particular occasions the result of the criminal trials conducted by their agency has been of the highest political importance.

The following are a few instances of this :—

Throughout the eighteenth century counsel were allowed to speak in cases of treason and misdemeanour only. No case of treason which gave rise to any point of much constitutional importance occurred before the trial of Lord George Gordon for the riots of 1780. In the trials for the rebellions of 1715 and 1745, there was no room for doubt as to either the law or the facts. The points connected with the trial of Lord George Gordon I shall consider more fully[1] hereafter, but the matter relevant to the present subject is that Erskine's famous speech in his defence does not in any single instance go beyond the line I have tried to draw as that which limits the duty of an advocate. His whole defence is based upon a view of the law which differs from that which was afterwards laid down by Lord Mansfield mainly in style. The statements of the law made by the advocate and the judge are in substance identical. Nearly the same may be said of the trials for high treason in 1794, and something not unlike it

[1] Vol. II., pp. 273, 274.

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may be observed as to the famous trials for libel which led to Fox's Libel Act. Erskine was by far the most popular and effective advocate who ever appeared at the English Bar, but the more his speeches are studied the more distinctly will it be seen that he was essentially on the side of the law, and that though fearless and independent [1] he was hardly ever brought into collision with the judges.

If time and space permitted it would not be difficult to trace this state of things down to our own times. Strong illustrations of it might be drawn from the trials of the Chartists in 1841, 1842, and 1843, from some of the trials of a later date for trade conspiracies, and from a long series of Irish trials extending from those which arose out of the rebellion of 1798 to those which arose out of the abortive rising of 1848. As a general rule counsel on all these occasions have taken the law as they found it, and have not attempted to induce juries to break it.

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

The defence is followed by the examination of the prisoner's witnesses, if any, the summing-up of his counsel, and the reply of the counsel for the Crown, if he is entitled to a reply.

[1] The famous scene between him and his old tutor, Buller, at the trial of the Dean of St. Asaph is no doubt something of an exception. See Vol. II. p. 331.

But upon these matters I need add nothing to what I have already said.

The trial concludes by the summing-up of the judge.

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

The judge's position is thus one of great delicacy, and it is not, I think, too much to say that to discharge the duties which it involves as well as they are capable of being discharged, demands the strenuous use of uncommon faculties, both intellectual and moral. It is not easy to form and suggest to others an opinion founded upon the whole of the evidence without on the one hand shrinking from it, or on the other closing the mind to considerations which make against it. It is not easy to treat fairly arguments urged in an unwelcome or unskilful mannner. It is not easy for a man to do his best, and yet to avoid the temptation to choose that view of a subject which enables him to show off his special

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

CH. XII. gifts. In short, it is not easy to be true and just. That the problem is capable of an eminently satisfactory solution, there can, I think, be no doubt. Speaking only of those who are long since dead, it may be truly said that to hear in their happiest moments the summing-up of such judges as Lord Campbell, Lord Chief Justice Erle, or Baron Parke, was like listening not only (to use Hobbes's famous expression) to "law living and armed," but to the voice of Justice itself.

CHAPTER XIII.

HISTORY OF LEGAL PUNISHMENTS.

HAVING in preceding chapters described the whole of the procedure in criminal cases up to the end of the trial, I propose in this chapter to give the history of the various punishments inflicted by law for different offences.

The verdict of the jury is followed by the judgment of the court, which is either acquittal or condemnation. A acquittal does not entitle the prisoner to be instantly discharged, though, as a fact, he usually is so discharged. [1] In strictness, when a man is committed to gaol to be tried, he is liable to be detained till the end of the sittings of the next commission of gaol delivery or Oyer and Terminer, when, if he is not indicted, he is entitled to be discharged upon bail, unless it is proved upon oath that the witnesses for the Crown could not be produced, or without bail if he is tried and acquitted or if he has not been indicted and tried at the second sitting after his committal.

If the prisoner is convicted he is sentenced usually at once.

The judgments which may be pronounced are as follows:— Death, penal servitude, imprisonment with or without hard labour, detention in a reformatory school, subjection to police supervision, whipping, fines, putting under recognizances. The history of these punishments is perhaps the most curious part of the history of the criminal law.

I shall consider first the history of the punishment of

[1] 31 Chas. 2, c. 2, s. 6 (the Habeas Corpus Act, 1679).

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death and of benefit of clergy, and the history of the punishments which by degrees were substituted for death. I shall then consider the history of other punishments, especially those inflicted at common law for misdemeanours.

As I have already observed, the punishments inflicted for what we now call treason and felony, varied both before the Norman Conquest, and for some time after it. At some periods it was death, at others mutilation, and it is remarkable that under William the Conqueror the punishment of death was almost entirely replaced by mutilation. Hoveden says that Henry I. "firmissimâ lege statuit quod fures latrocinio deprehensi suspendantur," but he quotes no authority, and he did not write till perhaps fifty years after Henry's time. [1] The *Leges Henrici Primi* speak of some kinds of theft as being capitally punished, and imply that other crimes were capital. Mutilation, however, is the punishment mentioned in the Assizes of Clarendon and Northampton in the time of Henry II.

Capital punishments were [2] certainly in use in Richard I.'s time. In the reigns of Henry III. and Edward I. there is abundant evidence that death was the common punishment for felony; and this continued to be the law of the land as to treason and as to all felonies, except petty larceny and mayhem, down to the year [3] 1826, subject to the singular and intricate exceptions introduced by the law relating to the benefit of clergy.

Of this branch of the law, Blackstone characteristically remarks that the English legislature, [4] "in the course of a "long and laborious process, extracted by noble alchemy rich "medicines out of poisonous ingredients."

According to our modern views it would be more correct to say that the rule and the exception were in their origin equally crude and barbarous, that by a long series of awkward and intricate changes they were at last worked into a system

[1] "Furtum probatum et morte dignum" is mentioned as one of the crimes which "mittunt hominem in misericordiâ regis" (Thorpe, i. 518). So "De "furto autem, et de hiis quæ sunt mortis, faciat," &c., p. 561.

[2] A record is quoted by Sir F. Palgrave of the 10th Richard I. in which a woman was sentenced to be burnt for murder.—*Proofs and Illustrations*, clxxxv. (11).

[3] See 7 & 8 Geo. 4, c. 26, ss. 6, 7.

[4] 4 *Bl. Com.* p. 364 (2nd edition).

which was abolished in a manner as clumsy as that in which it was constructed.

[1] The history of the subject falls naturally into three heads, namely, first, the history of the privilege itself, next the history of its gradual extension to all persons whatever, and lastly, the history of the exclusion from it of a large number of offences. The two processes last mentioned to some extent overlapped each other, but it is obvious that as the privilege ceased to be confined to a comparatively small class of persons, it would be necessary to confine it to a comparatively small number of offences.

Privilege of clergy consisted originally in the right of the clergy to be free from the jurisdiction of lay courts, and to be subject to the ecclesiastical courts only, and it might be compared to the privilege which European British subjects in India still possess of being tried in some cases by tribunals different from those by which natives would be tried in similar cases, and also to the privilege claimed by British and other foreign subjects in Turkey, in Egypt, and in China, of being tried before their own courts.

The following is Bracton's account of it, "[2] When a clerk of "whatever order or dignity is taken for the death of a man "or any other crime, and imprisoned, and an application is "made for him in the Court Christian by the ordinary" . . . . "the prisoner must be immediately delivered up without "making any inquisition. He must not, however, be set at "liberty and allowed to wander about the country, but is to "be safely kept, either in the bishop's prison, or in the King's "prison if the ordinary wishes, till he has duly purged

[1] The subject is described at full length and with the greatest technical minuteness of detail by Hale (2 *P. C.* 323—390). Blackstone (4 *Com.* 358) has given (principally from Hale) an account of the subject as it stood in his time; and an account of the law as it stood in 1826, just before benefit of clergy was abolished, is given in 1 Chitty's *Criminal Law*, 666—90. Hale's account of the law is rendered prolix and intricate by the necessity under which he lay of referring to a number of minute and capricious distinctions which in his time applied to the law relating to accessories and principals and to the varied provisions of the statutes relating to particular crimes, as to cases ended by conviction, by indictment, by appeal, by standing mute, by pleading guilty, or by challenging more than twenty jurors. Blackstone was placed under the same difficulty, though to a smaller extent.

[2] Br. *De Cor.* ch. ix. II. 298.

CH. XIII. "himself from the accusation laid upon him, or has failed to "purge himself, for which he ought to be degraded."

Ecclesiastical purgation is thus described, "[1] The trial was "held before the bishop in person, or his deputy, and by a "jury of twelve clerks, and there first the party himself was "required to make oath of his own innocence; next there was "to be the oath of twelve compurgators, who swore they "believed he spoke the truth; then witnesses were to be "examined upon oath, but upon behalf of the prisoner only, "and lastly, the jury were to bring in their verdict upon oath, "which usually acquitted the prisoner, otherwise, if a clerk, "he was degraded or put to penance." Probably this strange proceeding might be justified by the singular notions which prevailed in the civil law as then understood as to [2] evidence. The burden of proof was on the clerk who had to make his purgation, and it might be thought as improper to allow evidence to be given against him by the king, as to allow evidence to be produced against the king, when the burden of proving guilt lay on him. However this may have been, the claim of the ordinary in Bracton's time went so far as to require that the clerk should be delivered up to him as soon as he was imprisoned on suspicion of any crime whatever.

In the course of the three centuries which followed Bracton, this claim was considerably restricted by the legislature.

The Statute of Westminster the First (3 Edw. 1, A.D. 1275) [3] was interpreted to mean that the prisoner must be indicted before he could be claimed, and afterwards in the reign of Henry VI. it was settled by the practice of the courts that a clerk must be convicted before he could claim his clergy. This was at once an advantage to the prisoner, who had the chance of being acquitted, and a restriction on the privilege of the clergy as a separate order in the state, as it subjected them to the lay tribunals.

In the next place the courts exercised a discretion in de-

[1] R. *v.* Burridge (1735); 3 Peere Williams, 447. See, too, Searle *v.* Williams, Hobart, 288, p. 291 (1620); Staundforde, *Purgacion*, 138. Hobart speaks of purgation as "turning the solemn trial of truth by oath into a "ceremonious and formal lie."

[2] See p. 335, *sup.*; also p. 349, &c.

[3] 2 Hale, 377.

livering the clerk to the ordinary. He might be delivered either to make his purgation, or "absque purgatione," in which latter case he was to be imprisoned in the bishop's prison for life.

The privilege was originally confined to those who had "habitum et tonsuram clericalem," but in 1350, by the 25 Edw. 3, st. 3 (called the statute *pro clero*), it was enacted that "all manner of clerks, as well secular as reli-"gious, which shall from henceforth be convict before the "secular justices . . . shall from henceforth freely have and "enjoy the privileges of Holy Church." The "secular "clerks" here mentioned were,[1] it is said, "persons not strictly "in orders, but assistants to them in doing Divine offices, such as Doorkeepers, Readers, Exorcists, and Sub-deacons, and the statute is said to have been passed because "the said pre-"lates have grievously complained, praying thereof remedy." It seems, however, that whether by the construction given to this statute or otherwise, the courts extended the privilege to every one who could read, whether he had the clerical dress and tonsure or not. This apparent extension of the privilege greatly diminished its value to the clergy as a distinct caste, but considerable traces of the old clerical view of the subject remained for centuries. The most important and least amiable of them was that all women (except, till the Reformation, professed nuns) were for centuries excluded from the benefit of clergy because they were incapable of being ordained. Another exception, which may almost be called grotesque, was that "bigamus" was excluded from clergy. This is recognised by two statutes, 4 Edw. 1, c. 5 (1276), and 18 Edw. 3, c. 2 (1344). "Bigamus" was not a bigamist in our sense of the word, but a man who "hath married two "wives or one widow." By the last-mentioned statute the bigamy was to be tried in the ecclesiastical court. This strange rule was repealed in 1547 by 1 Edw. 6, c. 12, s. 16, which allows clergy to "bigami," "although they or any of them "have been divers and sundry times married to any single "woman or single women, or to any widow or widows, or "to two wives" (? at once) "or more."

[1] Lord Holt in Armstrong *v.* Lisle. Kelyng, p. 143 (edition of 1873); old edition, p. 99.

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In 1487 (4 Hen. 7, c. 13) it was enacted that every person convicted of a clergyable felony should be branded on the brawn of his thumb with an M if his case was murder, and a T if it was theft, and that if any person claimed clergy a second time (which fact the brand would prove), he should be denied it if he was not actually in orders, or if, being actually in orders, he failed within a day to be assigned by the judge to produce either his letters of orders or a certificate of his ordination from the ordinary. This distinction was abolished by [1] 28 Hen. 8, c. 1, s. 7, in 1536, but it was considered to be revived by 1 Edw. 6, c. 12, s. 14 (A.D. 1547), which also gave every peer of the realm ("though "he cannot read") a privilege equivalent to, though not identical with, benefit of clergy. The peer was to be "adjudged, deemed, taken, and used for the first time only to "all intents, constructions, and purposes as a clerk convict," and was to be "in case of a clerk convict which may make "purgation, without any burning in the hand, loss of inheritance, or corruption of his blood." When benefit of clergy was abolished in 1827, by 7 & 8 Geo. 4, c. 28, this act was overlooked, and upon the occasion of Lord Cardigan's trial in 1841 it was doubted whether, if he were convicted, he would not be entitled to the benefit of it, notwithstanding the act of 1827. The question was finally set at rest by 4 & 5 Vic. c. 22, which provided that peers accused of felony should be liable to the same punishment as other persons, and repealed the act of Edward VI.

By the 18 Eliz. c. 7, ss. 2, 3 (1576), purgation was abolished, and it was enacted that persons taking the benefit of clergy should be discharged from custody subject to a power given to the judge to imprison them for any term not exceeding a year.

In 1622, by 21 Jas. 1, c. 6, women obtained a privilege analogous to that of clergy in the case of larceny of goods worth more than 1*s.* and not more than 10*s.*; and in 1692, by 4 Will. & Mary, c. 9, they were put on the same footing as men.

In 1705, by 5 Anne, c. 6, the necessity for reading was abolished.

[1] Made perpetual by 32 Hen. 8, c. 3, s. 8.

In 1717 it was enacted by [1] 4 Geo. 1, c. 11, that persons guilty of clergyable larcenies should be liable to be transported for seven years instead of being branded or whipped.

In 1779, by 19 Geo. 3, c. 74, s. 3, branding was practically abolished, though the words of the act are not absolute.

Shortly, the form which the law relating to benefit of clergy had assumed at the beginning of the eighteenth century was this:—

All felonies were either clergyable or not.

Every one charged with a clergyable felony was entitled to benefit of clergy for his first offence, and clerks in orders were entitled thereto for any number of offences.

Benefit of clergy consisted in being excused from capital punishment, but the person who claimed it was, till 1779 (unless he was a peer or a clerk in orders), branded in the hand, and might be imprisoned for a term not exceeding one year. If his offence was larceny he might be transported for seven years. This result had been reached by the long series of changes above described.

The great importance of benefit of clergy in the history of the criminal law consists in the fact that the existence of the privilege determined the form taken by our legislation on the whole subject of legal punishments for serious common offences. The number of felonies at common law was but small. In Coke's *Third Institute* only seven are mentioned, namely homicide (in its two forms of murder and manslaughter), rape, burglary, arson, robbery, theft, and mayhem. All of these except petty larceny (stealing things worth less than twelvepence) and mayhem were punished with death, and were originally subject to the privilege of clergy.

The result of this was to bring about for a great length of time a state of things which must have reduced the administration of justice to a sort of farce. Till 1487 any one who knew how to read might commit murder as often as he pleased, with no other result than that of being delivered to the ordinary to make his purgation, with the chance of being delivered to him "absque purgatione." That this should have been the law for several centuries seems hardly credible,

[1] And see 6 Geo. 1, c. 23.

CH. XIII. but there is no doubt that it was. Even after 1487 a man who could read could commit murder once with no other punishment than that of having M branded on the brawn of his left thumb, and if he was a clerk in orders he could till 1547 commit any number of murders apparently without being branded more than once.

The claim of the clergy to exemption from the jurisdiction of the lay courts was however never admitted to its full extent by the common law. [1]It is said that high treason against the king was never clergyable, and this is confirmed by the words of the statute *de clero* (25 Edw. 3, st. 3, A.D. 1350) which extends benefit of clergy to "any treason or "felonies touching other persons than the king himself or his "royal majesty."

[2] There were also two forms of felony which were excluded from benefit of clergy at common law, namely, "Insidiatio "viarum, et depopulatio agrorum," or highway robbery and wilful burning of houses.

These, however, appear, according to Hale, to have been the only exceptions to benefit of clergy till the reign of Henry VII., when a statute was passed, 12 Hen. 7, c. 7 (1496), depriving of clergy laymen committing petty treason by "prepensedly murdering their lord, master, or sovereign "immediate." The act is drawn in a singular manner. The preamble recites that whereas "abominable and wilful pre-"pensed murders be by the laws of God and of natural reason "forbidden, and are to be eschewed, yet not the less, many "and divers unreasonable and detestable persons lacking "grace, wilfully commit murder," . . . . "in trust to eschew the "peril and execution of the law by the benefit of their clergy." It then goes on to state that in particular one Grame had then lately murdered his master Tracy, and provides that Grame is to be drawn and hanged as if he were no clerk, and that similar offenders shall for the future be treated in the same way.

In 1512, another statute (4 Hen. 8, c. 2) was passed, depriving persons of clergy who committed murder in churches highways, &c.

In 1531 (23 Hen. 8, c. 1, ss. 3, 4) every one convicted

[1] 2 Hale, 350. [2] *Ib.* 333.

of petty treason, or "for any wilful murder with malice pre- "pensed," or for robbing churches, chapels, or other holy places, or of certain kinds of robbery or certain kinds of arson, was excluded from clergy, except clerks in orders, who, however, were to be imprisoned for life, unless (a somewhat impotent conclusion) they could find two sureties in 20*l.* each for their good behaviour.

In 1536 (28 Hen. 8, c. 15) piratical offences were excluded from clergy. There was a question whether clergy was not restored in these cases by 1 Edw. 6, c. 12, and [1]Hale was with some doubt of opinion that it was restored in some cases which might be described as piratical, but that in cases which we should now describe as piracy by the law of nations clergy was not restored, if it ever existed (which he denies).

In 1547 ([2]1 Edw. 6, c. 12 s. 10) benefit of clergy was taken away in all cases of murder, cases of burglary and housebreaking, in which any person was in the house at the time and was put in fear, highway robbery, horse stealing, and robbing churches. The necessity for using the word "murdravit" in an indictment (which was so essential that murderavit was a fatal flaw) was based on this statute. If the indictment was "felonice et ex malitiâ suâ præcogitatâ "interfecit," or "felonice murdravit," it was an indictment for manslaughter only which was clergyable. What an indictment for "murderavit" would have amounted to I do not know.

In 1565 (8 Eliz. c. 4) clergy was taken away in cases of "felonious taking of any money, goods, or chattels from the "person of any other privily without his knowledge." But this was interpreted to mean above the value of a shilling.

In 1576 (18 Eliz. c. 7) rape and burglary were excluded from clergy, [3] but the part of the statute which relates to burglary was very unskilfully adapted to the statutes of Edward VI. and Philip and Mary.

In 1597 (39 Eliz. c. 9) abduction with intent to marry,

[1] 2 H. *P. C.* 369—71.
[2] 4 & 5 Phil. & Mary, c. 4. applied to accessories in these cases.
[3] See 2 Hale, 360—4.

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which by 3 Hen. 7, c. 2 was a clergyable felony, was deprived of the benefit of clergy.

Finally, by 22 Chas. 2, c. 5 (1671) stealing clothes off the racks, and stealing the king's stores were deprived of clergy.

These are all the cases enumerated by Hale in which clergy was taken away from common law crimes down to his time, but many statutory felonies had also been created which, for the sake of brevity, I have not noticed. These statutes, as well as those which I have noticed, were worded in all sorts of ways. A trial might end, it must be remembered, either by the accused person standing mute and being pressed to death, or by his challenging too many jurors and being hanged, or by his pleading guilty, or by his being convicted and pardoned, or by his being convicted and attainted. If a statute taking away clergy did not expressly mention all these possible cases, and take away clergy in all of them, both from the principal and from his accessories both before and after, clergy remained in every omitted case. Hence questions arose on the special wording of every statute, as to whether it ousted an offender of clergy not only if he was convicted, but if he pleaded guilty, if he stood mute, &c., and similarly as to his accessories. Hardly any branch of the law was so technical and so full of petty quibbles as this. The detailed statement of them makes a large part of Hale nearly unreadable. They were abolished by two successive statutes, 3 Will. & Mary, c. 9, s. 2 (A.D. 1691), which enacted that if any person were convicted of a felony, excluded from benefit of clergy "by virtue of any former statute," if convicted or attainted, the exclusion should extend to cases in which they stood mute, challenged too many jurors, or were outlawed. This was extended to accessories by 1 Anne, st. 2, c. 9, and by 7 Geo. 4, c. 64, s. 7, to all statutory felonies subsequent to the act of William and Mary, or afterwards to be created.

All this legislation shows that the early criminal law was extremely severe, that its severity was much increased under the Tudors, but that it varied little from the time of Elizabeth to the end of the seventeenth century. Before noticing the legislation of the eighteenth century on this subject, it will be

desirable to sum up what has been said. The result of it is as follows:—Towards the end of the seventeenth century the following crimes were excluded from benefit of clergy, and were thus capital whether the offender could read or not: high treason (which had always been so), petty treason, piracy, murder, arson, burglary, housebreaking and putting in fear, highway robbery, horse stealing, stealing from the person above the value of a shilling, rape and abduction with intent to marry. In the case of persons who could not read, all felonies, including manslaughter, every kind of theft above the value of a shilling, and all robbery were capital crimes. It is difficult, if not impossible, to say how this system worked in practice. No statistics as to either convictions or executions were kept then, or till long afterwards. A few vague generalities, with here and there a piece of positive evidence are all that I at least can refer to. I will mention one specimen of each. There are still preserved at Exeter Castle many of the depositions and other records of the Courts of Quarter Sessions, held there from the latter part of the reign of Elizabeth—they begin in 1592. From these materials Mr. Hamilton has compiled a *History of the Quarter Sessions from Elizabeth to Anne*. The following is one result at which he arrives, "[1] At the Lent Assizes of 1598, there "were 134 prisoners, of whom seventeen were dismissed with "the fatal S. P., it being apparently too much trouble to "write *sus. per coll.* Twenty were flogged; one was liberated "by special pardon and fifteen by general pardon; eleven "claimed benefit of clergy and were consequently branded and "set free, '*legunt uruntur et deliberantur*.' At the Epiphany "Sessions preceding there were sixty-five prisoners, of whom "eighteen were hanged. At Easter there were forty-one "prisoners, and twelve of them were executed. At the Mid-"summer sessions there were thirty-five prisoners and eight "hanged. At the Autumn Assizes there were eighty-seven on "the calendar and eighteen hanged. At the October Sessions "there were twenty-five, of whom only one was hanged. "Altogether there were seventy-four persons sentenced to be "hanged in one county in a single year, and of these more

[1] Hamilton's *History of Quarter Sessions*, pp. 30—1.

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"than one-half were condemned at Quarter Sessions." Mr. Hamilton gives[1] a copy of the calendar for the Midsummer Sessions for 1598. It appears that five persons were convicted of sheep-stealing. John Capron was sentenced to death. Stephen Juell, Andrew Penrose, and Anthony Shilston had their clergy. Gregory Tulman was flogged. In Tulman's case the sheep was probably valued at less, or charged in the indictment as being of less value, than a shilling. If the average number of executions in each county was only twenty, or a little more than a quarter of the number of capital sentences in Devonshire in 1598, this would make 800 executions a year in the forty English counties. The number of executions was notoriously very great. A remarkable illustration of this is afforded by the remark with which Coke concludes his *Third Institute*. "What a lamentable case it is to see so many Christian men "and women strangled on that cursed tree of the gallows, "insomuch as if in a large field a man might see together all "the Christians that, but in one year throughout England "come to that untimely and ignominious death, if there were "any spark of grace or charity in him, it would make his "heart to bleed for pity and compassion." He then points out three remedies: education, laws to set the idle to work, and "that forasmuch as many do offend in hope of "pardon, that pardons be very rarely granted." This contrasts oddly with the philanthropic tone of the preceding extract.

When all the restrictions upon benefit of clergy had been taken off at the beginning of the eighteenth century, so that women were entitled to it as well as men, and those who could not read, as well as those who could, the punishment for all the common offences became slight. If a man was not hung he was discharged, or at most imprisoned for a year without hard labour, though under circumstances likely to injure both his health and his morals. At the same time the rapidly increasing trade and wealth of the country brought to light the great defects in the criminal law as it then stood, and especially the crudity and meagreness of its

[1] *History of Quarter Sessions*, p. 33.

provisions, of which I shall give a fuller account in relating the history of the substantive law.

I do not think, however, that these defects were recognised as such. The fact that the revolutions of the 17th century had been conducted with an almost superstitious respect for law, and that the party opposed to the encroachments (as they said) of royal power, had always taken their stand upon what they called the good old laws of England, and the fact that the law was professedly based upon what were regarded as the highest standards of truth and goodness, had surrounded the law with a degree of veneration, which, in these days, it is not easy to understand, but which is represented probably with little exaggeration in the courtly and, indeed, reverential language of Blackstone, who scarcely ever misses an opportunity of extolling the system which he describes, though he may [1] "occasionally find room to "remark some particulars that seem to want revision and "amendment."

Hence, the alterations made in the criminal law by the legislation of the eighteenth century preserved its form and did not greatly alter its substance. The benefit of clergy having been extended at the beginning of the century to all persons whatever, it was in the course of the century taken away from a great variety of offences. This in some cases simply extended the old law relating to women and to illiterate persons to all persons whatever. Sheep-stealing, for instance, though clergyable, was from the earliest times a capital felony if the sheep stolen was over one shilling in value; and, as [2] Mr. Hamilton tells us, one man was hanged for it, and two had their clergy at the Exeter Midsummer Sessions in 1598. By [3] the 14 Geo. 2, c. 6 (1741), and

[1] 4 Bl. *Com.* 3.

[2] *Hist. Quarter Sessions*, p. 83. Mr. Hamilton observes as to the value of sheep in James I.'s time the King was entitled to have sheep at 6*s.* 8*d.* a-piece. . . . It is probable that the average price of sheep at that time was nearer that given by Justice Shallow, "A score of good ewes may be "worth £10."

[3] The first of these Acts applies to "sheep and other cattle." The second defines "cattle" to mean "bull, cow, ox, steer, bullock, heifer, calf, and "lamb, as well as sheep, and no other cattle whatever." It is curious that pigs have never met with any special recognition or protection from the law, nor, I think, donkeys or mules.

CH. XIII. 15 Geo. 2, c. 34 (1742) all sheep-stealers were deprived of benefit of clergy. The process, however, was carried much beyond removing benefit of clergy from offences formerly clergyable. The severity of the criminal law was greatly increased all through the eighteenth century by the creation of new felonies without benefit of clergy. In the second edition of the [1] *Commentaries*, published in 1769, Blackstone says that "among the variety of actions which men are daily "liable to commit no less than 160 have been declared by "Act of Parliament to be felonies without benefit of clergy." This passage has often been quoted, but it must be observed that the number of capital offences on the statute-book is no test of its severity. A few general enactments would be much more severe than a great number of special ones. A general enactment that grand larceny should be excluded from benefit of clergy would have been infinitely more severe than fifty acts excluding the stealing of fifty different sorts of things from the benefit of clergy. By a great number of statutes the forgery of different specified documents was made felony without benefit of clergy. Different statutes provided, for instance, for the forgery of Exchequer bills, South Sea bonds, certain powers of attorney, &c. The real severity of a single general Act about forgeries would have been much greater than that of these numerous scattered provisions, each of which went to swell the number of capital offences. Moreover, the 160 offences mentioned by Blackstone might probably be reduced by careful classification to a comparatively small number. For instance, I know not how many offences of the 160 are included in what was known as the Black Act (9 Geo. 1, c. 27, 1722). This Act provided, amongst other things, that if any persons armed or having their faces blacked, or being otherwise disguised, should appear in any forest, &c., or in any warren or place where hares or rabbits were usually kept, or in any high road, open heath, common, or down, or should unlawfully and wilfully hunt, wound, kill, destroy, or steal any red or fallow deer, &c., they should be guilty of felony, without benefit of clergy. The part of this provision which I

[1] *Com.* 18.

have quoted creates [1] fifty-four capital offences, for it forbids three classes of persons to do any one of eighteen acts. However, after making all deductions on these grounds, there can be no doubt that the legislation of the eighteenth century in criminal matters was severe to the highest degree, and destitute of any sort of principle or system. In practice the punishment of death was inflicted in only a small proportion of the cases in which sentence was passed. The persons capitally convicted were usually pardoned conditionally on their being transported either to the American or afterwards to the Australian colonies for life or for a long term of years. These conditional pardons were recognised by the Habeas Corpus Act (31 Chas. 2, c. 2, ss. 13, 14), and used to be granted by the king through the Secretary of State upon the recommendation of the Judges of Assize. This being thought circuitous and dilatory, it was enacted in 1768 (8 Geo. 3, c. 15) in substance that Judges of Assize should have power to order persons convicted of crimes without the benefit of clergy to be transported for any term they thought proper, or for fourteen years if no term was specially mentioned.

The result of all this legislation as to the punishment of death was in the reign of George IV. as follows:—All felonies except petty larceny and mayhem were theoretically punishable with death, but clergyable felonies were never punished with death, nor were persons convicted of such felonies sentenced to death. When asked what they had to say why sentence should not be passed upon them, they "fell

[1] The classes of persons are: (1) Persons armed, (2) persons with their faces blacked, (3) persons otherwise disguised. The 18 acts are:—

(1) Appearing in a forest.
(2) ,, ,, warren.
(3) ,, ,, place where hares are kept.
(4) ,, ,, ,, ,, rabbits ,,
(5) ,, ,, high road.
(6) ,, ,, open heath.
(7) ,, ,, common.
(8) ,, ,, down.
(9) Unlawfully hunting
(10) ,, wounding
(11) ,, killing } any red deer.
(12) ,, destroying
(13) ,, stealing
(14—18) Same as to fallow deer.

"upon their knees and prayed their clergy," upon which they were liable to imprisonment for not exceeding a year, or in some cases to whipping, or in the case of petty larceny, or grand larceny not excluded from clergy, and in some other cases to seven years' transportation.

A great number of felonies had been excluded from benefit of clergy in the course of the eighteenth century, and when a person was convicted of such an offence he had to be sentenced to death, but the judge might order him to be transported instead, and such an order had all the effects of a conditional pardon.

It came to be considered that to pass sentence of death in cases in which it was not intended to be carried out was objectionable, and accordingly in 1823 an act (4 Geo. 4, c. 48) was passed which authorized the court in cases of capital convictions for any felony except murder to abstain from actually passing sentence of death, and to order it to be recorded, which had the effect of a reprieve. The act is still in force, but as in cases of murder sentence of death [1] must be passed, and practically no other felony is capital, it is hardly ever acted upon.

This state of the law excited great philanthropic indignation, and was completely altered by the first set of Acts passed for the reform of the criminal law. They were conceived in a spirit totally different from that of our earlier legislation. The following were their most important provisions:—In 1827 (7 & 8 Geo. 4, c. 28) benefit of clergy was abolished by s. 6. Standing alone this would have made every case of stealing above the value of a shilling punishable by death. It was therefore provided by s. 7 that no one convicted of felony should suffer death unless for felonies excluded from benefit of clergy, or made punishable by death by some statute subsequently passed. In order to meet the case of acts made felony in general terms it was provided that in such cases the

[1] The repealed statute, 6 & 7 Will. 4, c. 30, s. 2, seems to have extended (4 Geo. 4, c. 48) to cases of murder, but (24 & 25 Vic. c. 100 s. 2) had the effect stated in the text. I remember a case in which Mr. Justice Wightman ordered sentence of death to be recorded upon a conviction for murder. The prisoner, though not quite mad enough to be acquitted, was obviously too mad to be hanged. I have met with cases in which I wished I had a similar power.

punishment should be seven years' transportation or two years' imprisonment, with or without whipping in the case of males. Section 9 provided that in case of a second conviction for felony the offender should be liable to transportation for life, imprisonment up to four years, and public or private whipping once, twice, or thrice. In all such cases the court was authorised to direct that the imprisonment should be with hard labour. This section replaced the old rule that privilege of clergy could be had once only. It is still in force, though seldom acted on, as certain provisions in the Larceny Act have practically superseded it.

The Act of 1827 was followed by several others which were intended to form the nucleus of a criminal code, and to replace the fragmentary and yet indiscriminate legislation of the eighteenth century by laws in which punishments were more carefully adjusted to offences. Each of them retained the punishment of death in a considerable number of cases. The first of them was 7 & 8 Geo. 4, c. 29, "for consolidating "and amending the laws relating to larceny." This Act re-enacted the punishment of death in the following instances, namely, robbery either by force, or by threats to accuse of an infamous crime (ss. 6—9), sacrilege (s. 10), burglary (s. 11), housebreaking and stealing or putting in fear any person in the house, stealing to the value of 5*l.* in a dwelling-house (s. 12), and stealing horses, sheep, and other cattle (s. 25).

[1] By the 7 & 8 Geo. 4, c. 30, which consolidated the law as to malicious injuries, the punishment of death was retained in cases of arson, riotously demolishing houses, &c., destroying ships in certain cases, and exhibiting false signals.

In the following year (1828) an Act was passed for consolidating the law relating to offences against the person (9 Geo. 4, c. 31). [2] By this Act death was retained as the punishment of murder; attempts to murder by poisoning, stabbing, shooting, &c.; administering poison to procure abortion; sodomy; rape; and connection with a girl under ten.

In 1830 was passed 11 Geo. 4, and 1 Will. 4, c. 66,

[1] Ss. 2, 8, 9, 10, 11.

[2] Ss. 3, 11, 12, 13, 15, 16.

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consolidating the law relating to forgery. [1] This Act retained the punishment of death for forging the great seal (which was treated as high treason), public securities, wills, bills of exchange, and promissory notes, making false entries in certain public books of accounts, and forging transfers of stocks.

Each of these Acts repealed and re-enacted a number of Acts passed at various times, but principally in the eighteenth century, excluding particular offences from benefit of clergy, and punished the offences created by those statutes with terms of transportation varying in their maximum length from life to seven years, the court having power to sentence the offender in the alternative to imprisonment with or without hard labour, and in some cases with or without whipping.

The number of cases in which the punishment of death was retained under the Acts of George IV. was considered excessive, and it has since been greatly reduced, though by slow degrees. The history of this legislation is curious, as it traces the gradual growth of a sentiment very characteristic of our generation. It is as follows:—In 1832 the punishment of death was abolished, by 2 & 3 Will. 4, c. 62, in the case of stealing horses, sheep, and other cattle. In 1835 it was abolished in cases of letter-stealing (which was capital under 52 Geo. 3, c. 143, and had not been included in the consolidation Act of 1827), and in cases of sacrilege in which it had been reimposed by that Act. This was effected by [2] 5 & 6 Will. 4, c. 81.

In 1837 several acts were passed which abolished the punishment of death in other cases.

By 7 Will. 4, and 1 Vic. c. 84 capital punishment was abolished in all cases of forgery.

By chapter 85 the punishment of death was modified in regard to attempts to murder by confining it to cases of administering poison or inflicting bodily injury dangerous to life with intent to murder; it was abolished in respect of the other offences made capital by 9 Geo. 4, c. 31, with the

[1] Ss. 2—6, inclusive.

[2] A clerical error in this Act ("act" for "acts") made it doubtful whether any punishment at all could be awarded in cases of letter-stealing and sacrilege. It was set right by 6 & 7 Will. 4, c. 4.

exception of murder, rape, abusing girls under ten, and sodomy, as to which the provisions of that act were left unaltered.

By chapter 86 the punishment of death in cases of burglary was confined to burglary accompanied with actual violence to any person in the house.

By chapter 87 the punishment of death in cases of robbery was confined to cases accompanied by "stabbing, cutting, or wounding."

By chapter 88 the punishment of death in cases of piracy was confined to piracy accompanied by an assault with intent to murder, or by stabbing, cutting, or wounding, or by any act by which the life of any person on board is endangered.

By chapter 89 the punishment of death was abolished in all cases of injury to houses and ships, except only the case of setting fire to a dwelling-house, some persons being therein.

By chapter 91 the punishment of death was abolished in the case of offences against the Riot Act, rescuing persons going to execution, seducing soldiers from their allegiance, administering seditious oaths, slave-trading, and certain forms of smuggling accompanied with violence.

In 1841 by 4 & 5 Vic. c. 38, the punishment of death was abolished in cases of rape and abusing children under ten.

By the [1] Consolidation Acts of 1861 the punishment of death was abolished in cases of robbery with violence, attempts to murder, arson of dwelling-houses, and sodomy.

The only offences now punishable with death are treason, murder, piracy with violence, and setting fire to dockyards and arsenals.

The manner in which the punishment of death has been inflicted for many centuries has been and still is hanging, though in early times beheading was also common, not only as a favour to persons of rank, but as a mode of executing common criminals.[2]

[1] 24 & 25 Vic. ss. 96, 97, 98, 99, 100.

[2] A curious proof of this occurs in the Parliament Rolls for 1314 (8 Edward II.). The land of a person who had been beheaded escheated to the King, and the writ stated that he had been hanged. Upon which "concordatum est "per consilium quod consuetum breve de escaeta non mutetur, et quod illum "verbum 'suspensus,' &c., habeat locum in omni casu quando aliquis "mortem patitur pro felonia per ipsum commissa. Ita quod sive fuerit

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The only exceptions to the general rule were the punishment of treason, which, in the case of men, was hanging, drawing (this anciently meant dragging the offender along the ground at the tail of a horse), and quartering; and in the case of women, burning; and heresy, which was also punished by burning. [1] In Henry VIII.'s time poisoning was declared to be treason, punishable by boiling to death; and it seems that three or four persons were so boiled, but this Act was repealed by the 1 Edw. 6, and it is remarkable as supplying the single instance in which death by torture has been authorised in England as a punishment for any offence except treason and heresy. As to the punishment of treason, [2] in 1283, at a kind of Parliament held at Shrewsbury, David, the last native Prince of Wales, was sentenced to be hanged, drawn, and quartered, and to have his bowels burnt. [3] In

" decollatus, sive alio modo pro felonia per ipsum facta moriatur illud verbum " 'suspensus' locum habeat" (1 *Rot. Par.* 293*a*—296*b*). So in 31 Hen. 3, upon an appeal for murder, "Duodecim juratores dicunt quod prædicti " Albinus et Ricardus" (said to have been murdered) "fuerunt latrones de " bobus et vaccis, et cum latrocinio capti unde fuerunt in sesinâ *et ideo fuerunt* " *decollati*" (Palgrave, *Proofs and Illustrations*, clxxxvii.). There are several references in the Year-books to decapitation as a punishment for flight. See 3 Edw. 3, it. North. FitzHerbert, *Corone*, 346. "It was presented that a " thief indicted was taken and led towards the gaol by four of the town, and " when they came to a church two went in to hear mass, and two stayed out- " side to guard the prisoner. The prisoner fled; the two followed and raised " the hue and cry, whereby the town rose and followed the felon till they " beheaded him, because they could not otherwise take him. The justices " charged the town which ought to have taken him for an escape" (les justiez ag. le pur eschape ss le vill' q̄ luy duit aū amesn̄), "and the twelve said he " was never out of their sight; the justices said that he escaped by the fault " of their guard, and this was a case of escape. *Louth* said that when a thief " is beheaded in pursuing him for a robbery the act can be justified, and this " is more accordant to reason than it is to behead a man who flies, having " been indicted and being under guard, for honest men are sometimes indicted, " so that the law should be more favourable to them than to the others" (*i.e* robbers followed by hue and cry). This seems to be the meaning of the passage, but the wording is rather confused. Cf. FitzHerbert, *Corone*, 290 and 328, which seem to relate to the same case.

[1] *3rd Institute*, p. 48.

[2] *Ante*, p. 146. Lingard, iii. 196, and see Stubbs, *C. H.* ii. 216. The sentence as quoted by Lingard (iii. 196) from a chronicler, is "to be drawn to " the gallows as a traitor to the king who made him a knight, to be hanged " as the murderer of the gentleman taken in the Castle of Hawarden; to have " his bowels burnt because he had profaned by assassination the solemnity of " Christ's passion; and to have his quarters dispersed through the country " because he had in different places compassed the death of his lord the " king." Cumulative punishments were inflicted on Lord Cobham and afterwards on Friar Forrest, each being half hanged as a felon and half burnt as a heretic.

[3] See 2 *Rot. Par.* 3, 4. The form of the sentence in this case is, "Con- " sideratum est quod prædictus Thomas Comes pro prædicta prodition

the time of Edward II., Thomas of Lancaster was sentenced to be hanged, drawn, and beheaded, but on account of his high birth was pardoned all but the beheading. Burning continued till 1790 to be the punishment inflicted on women for treason, high or petty (which latter included not only the murder by a wife of her husband, and the murder of a master or mistress by a servant, but also several offences against the coin). Burning in such cases was abolished by 30 Geo. 3, c. 48. In practice, women were strangled before they were burnt; this, however, depended on the executioner. In one notorious case a woman was actually burnt alive for murdering her husband, the executioner being afraid to strangle her because he was caught by the fire. In the reign of George II. an act was passed which was intended to make the punishment for murder more severe than the punishment for other capital crimes. This was 25 Geo. 2, c. 37, which provided that a person convicted of murder should be executed on the next day but one after his sentence (unless he was tried on a Friday, in which case he was to be hanged on the Monday). He was to be fed on bread and water in the interval, and his body, after death, was either to be dissected or to be hung in chains. The judge, however, had power to respite or to remit these special severities. Under this act murderers were usually anatomized, but sometimes gibbeted. By the 2 & 3 Will. 4, c. 7, s. 16 (for the regulation of schools of anatomy), it was enacted that the bodies of murderers should no longer be anatomized, but that the sentence should direct that they should either be hung in chains or be buried in the prison. Several persons were gibbeted under this act, but by the 3 & 4 Will. 4, c. 26, s. 2, it was enacted that the bodies of murderers should no longer be hung in chains, but that the sentence should direct that they should be buried in the precincts of the prison in which they should last have been confined before their execution, and this direction is repeated in

" trahatur, et pro prædictis homicidiis, depredationibus, incendiis, et roberiis, " suspendatur et pro predicta fugâ in hac parte decapitetur." In each of the cases referred to above as to beheading, the persons were taken whilst running away, and were probably there and then put to death.

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24 & 25 Vic. c. 100, s. 2, which is now in force. These provisions distinguish English law in a marked manner from the continental laws down to the end of the last century. In most parts of the Continent breaking on the wheel, burning, in some cases quartering alive and tearing with red-hot pincers, were in use, as well as simpler forms of death. English people, as a rule, have been singularly reckless (till very lately) about taking life, but they have usually been averse to the infliction of death by torture.

Such is the history of the punishment of death as inflicted by the law of England. The subject is so trite that I feel reluctant to discuss it, but I am also reluctant to pass it over without shortly stating my own opinion upon it. My opinion is that we have gone too far in laying it aside, and that it ought to be inflicted in many cases not at present capital. I think, for instance, that political offences should in some cases be punished with death. People should be made to understand that to attack the existing state of society is equivalent to risking their own lives.

In cases which outrage the moral feelings of the community to a great degree, the feeling of indignation and desire for revenge which is excited in the minds of decent people is, I think, deserving of legitimate satisfaction. If a man commits a brutal murder, or if he does his best to do so and fails only by accident, or if he ravishes his own daughter (I have known several such cases), or if several men acting together ravish any woman, using cruel violence to effect their object, I think they should be destroyed, partly in order to gratify the indignation which such crimes produce, and which it is desirable that they should produce, and partly in order to make the world wholesomer than it would otherwise be by ridding it of people as much misplaced in civilized society as wolves or tigers would be in a populous country. What else can be done with such people? If [1] William Palmer had not been hanged in 1856, he would probably have been alive at this day, and likely to live for many years to come. What is the use of keeping such a wretch alive at the public expense for, say, half a century?

[1] See his case at the end of Vol. III.

If by a long series of frauds artfully contrived a man has shown that he is determined to live by deceiving and impoverishing others, or if by habitually receiving stolen goods he has kept a school of vice and dishonesty, I think he should die.

These views, it is said, are opposed to the doctrine that human life is sacred. I have never been able to understand distinctly what that doctrine means, or how its truth is alleged to be proved. If it means that life ought to have serious aims and to be pervaded by a sense of duty, I think the doctrine is true, but I do not see its relation to the proposition that no one ought ever to be put to death. It rather suggests the contrary conclusion as to persons who refuse to act upon it. If it means only that no one ought ever to be killed, I do not know on what grounds it can be supported. Whether life is sacred or not, I think there are many cases in which a man should be ready to inflict, or, if necessary, to suffer death without shrinking.

As, however, these views are at present unpopular and peculiar, and in the present state of public feeling on the subject it is useless to discuss this matter at length, no good purpose is served by making specific proposals which no one would entertain; but I may remark that I would punish with death offences against property only upon great deliberation, and when it was made to appear by a public formal inquiry held after a conviction for an isolated offence that the criminal really was an habitual, hardened, practically irreclaimable offender. I would on no account make the punishment so frequent as to lessen its effect, nor would I leave any doubt as to the reason why it was inflicted. I suspect that a small number of executions of professional receivers of stolen goods, habitual cheats, and ingenious forgers, after a full exposure of their career and its extent and consequences, would do more to check crime than twenty times as many sentences of penal servitude. If society could make up its mind to the destruction of really bad offenders, they might, in a very few years, be made as rare as wolves, and that probably at the expense of a smaller sacrifice of life than is caused by many a single shipwreck or colliery explosion; but, for this purpose, a change

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of public sentiment would be necessary, of which there are at present no signs.

In relating the history of the punishment of death I have also related by anticipation the greater part of the history of the punishment of transportation. The punishment was unknown at common law, though in [1] one case exile was at common law a consequence of crime. This happened when a criminal took sanctuary and confessed his crime. Upon this he was allowed to leave the kingdom, taking an oath of abjuration, as it was called, which bound him never to return; but sanctuary and abjuration were both abolished by 1 Jas. 1, c. 25, and 20 Jas. 1, c. 18. [2] The earliest instances of transportation as a punishment seem to have occurred in the reign of Charles II., when pardons were granted to persons capitally convicted conditionally on their being transported for a number of years—usually seven. This practice was recognised, as I have observed, by the Habeas Corpus Act, and greatly extended by subsequent legislation, and particularly by the Act of 1768. It was first legalized as a substantive punishment by the Act of 4 Geo. 1, c. 11, already mentioned. In the course of the eighteenth and the early part of the present century an immense number of Acts were passed by which various terms of transportation, with alternative terms of imprisonment, and power, in some cases alternative and in others cumulative, to order whipping more or less frequently, were allotted to particular offences. This legislation was guided by no principle whatever, and was utterly destitute of any sort of uniformity. Its result is given in the [3] fifth and sixth Appendices to the *Fourth Report of the Criminal Law Commissioners.* They contain lists of all the felonies not at that time punishable by death,

[1] Chitty, *Crim. Law*, 789; 2 Hale, *P. C.* 68.

[2] In the "Directions for Justices of the Peace" (prefixed to Kelyng's *Reports*, which were published in 1664), the twelfth direction is "that such "prisoners as are reprieved with intent to be transported be not sent away "as perpetual slaves, but upon indentures between them and particular "masters to serve in our English plantations for seven years, and the three "last years thereof to have wages that they may have a stock when their time "is expired, and that an account be given thereof and by whom they are "sent, and of their arrivals."—Kelyng's *Reports*, 3—4.

[3] Dated 8th March, 1839. See App. v. pp. 10—64; App. vi. pp. 64—101.

and of all statutory misdemeanours, classified according to their punishments. There are thirty-eight classes of felonies and ninety-six classes of misdemeanours. The extreme intricacy of this classification is thus accounted for. In the case of an offence punishable by transportation the enactment providing for its punishment might, and generally did, contain the following matters:—

(1) A maximum term of transportation.

(2) Intermediate terms of transportation.

(3) A minimum term of transportation.

(4) A maximum alternative term of imprisonment with or without hard labour.

(5) A minimum alternative term of imprisonment.

(6) Power to inflict whipping, publicly or privately, and once or more than once.

(7) Power to inflict solitary confinement during a certain part of the term of imprisonment.

These seven elements of punishment were combined and varied in all imaginable ways.

In their [1] Seventh Report the Criminal Law Commissioners refer to many instances of these capricious variations. They say, for instance, "In seventeen different classes of cases the "sentence may be transportation for life; in two the punish-"ment is absolute without any alternative. In another, "power is given to transport for any other term without "fixing any minimum term of transportation or any "alternative term of imprisonment. Of the fourteen other "classes in one only is the minimum of transportation fifteen "years." . . . "In one case only is the minimum term of "transportation ten years. We find fifteen varieties in "punishments where the maximum is transportation for a "term of fourteen or fifteen years. The instances in which "the punishment of transportation for seven years may be "inflicted present twenty-three varieties."

The only point worth special notice in this state of the law is the wide though capriciously restricted discretion left to the judge. In regard to the great majority of offences the judge was able to give as little punishment as he pleased. In

[1] 11 March, 1843, pp. 100—103.

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some few the punishment was absolute. In many a greater or less minimum punishment was inflicted of necessity.

This was to a great extent remedied in the year 1846 by an Act (9 & 10 Vic. c. 24, s. 1), which provided that in all cases where any court is (*i.e.* was then) empowered to pass a sentence of more than seven years' transportation it should have power to pass instead sentence of transportation for any term not exceeding seven years, or sentence of imprisonment with or without hard labour for any term not exceeding two years.

Far the greater part of the criminal law relating to felonies has been recast and re-enacted since the reports to which I have been referring, and though the varieties in punishment are still considerable, and perhaps not always of obvious utility, they are greatly diminished. There is only one [1] common case in which a minimum punishment is still retained. The maximum punishments are penal servitude for life, for fourteen years, for ten years (in a very few cases), for seven years, and for five years. The alternative punishments in all cases are imprisonment for a term not exceeding two years with or without hard labour. Whipping may be added in a very few cases of crimes by adults, and in a larger number of cases of crimes committed by boys under sixteen.

The punishment of transportation was gradually abolished between 1853 and 1864, principally on account of the objection of the colonies to receive the convicts sentenced to it, and [2] penal servitude or imprisonment and hard labour on public works was substituted for it. The Penal Servitude Acts authorize the carrying out of the sentence in any part of Her Majesty's dominions, and under those Acts criminals were kept in confinement at Bermuda and in Gibraltar till very lately. The difference between the two punishments is thus rather a difference in name than in fact, indeed the provisions of the Act which regulated

[1] The case of unnatural offences, for which the minimum punishment is ten years' penal servitude.

[2] 16 & 17 Vic. c. 99 (1853), 20 & 21 Vic. c. 3 (1857), 27 & 28 Vic. c. 47 (1864). The Act as to transportation is 5 Geo. 4, c. 54.

transportation (5 Geo. 4, c. 84) are still in force as regards prisoners under sentence of penal servitude. A singular variation in the scale of punishment produced by the change from transportation to penal servitude deserves notice. The common minimum term of transportation was seven years, but when that punishment was commonly inflicted imprisonment might in many cases be inflicted for three, four, and even [1] seven years, so that the break between a sentence of imprisonment and a sentence of transportation was not necessarily a long one. When penal servitude was substituted for transportation imprisonment had been rendered both [2] more severe and shorter than it had formerly been, so that with hardly an exception the maximum punishment permissible was two years' hard labour. At first the minimum term of penal servitude was three years, so that the break between the longest term of imprisonment and the shortest term of penal servitude was not longer than would be proportional to the greater severity of the former punishment. In 1864, however, the minimum term of penal servitude was raised to five years, at which it still remains, so that at present no sentence can be passed intermediate in severity between two years' imprisonment and hard labour (which, however, is considered so severe that sentences are usually restricted, except in very peculiar cases, to eighteen months) and five years' penal servitude.

The history of the punishment of imprisonment presents some features of interest. Imprisonment is as old as the law of England, and from very early times enactments were made as to the provision of gaols. One of the earliest occurs in the seventh chapter of the Assize of Clarendon (A.D. 1166), [3] which is as follows:—"Et in singulis comitatibus ubi non "sunt gaiolæ fiant in burgo vel aliquo castello regis de "denariis regis et bosco ejus si prope fuerit, vel de alio bosco "propinquo, per visum servientium regis, ad hoc ut vice "comites in illis possint illos qui capti fuerint per ministros

[1] Seven years' imprisonment is still lawful in cases of perjury.

[2] The great increase in the severity of imprisonment was by making the confinement in all case separate. The present Act on the subject is 28 & 29 Vic. c. 126, s. 17.

[3] Stubbs, *Charters*, p. 144.

CH. XIII. "qui hoc facere solent et per servientes suos custodire." This, no doubt, is the origin of the use as prisons of large numbers of ancient castles, some of which are still used for that purpose, as, for instance, at Norwich, Cambridge, and York. These were the original common gaols, but they were far from being the only prisons in the country. Nearly every court had its own particular prison. Thus the Marshalsea was specially the prison of the Marshal of the Court of King's Bench. The Fleet was the prison of the Star Chamber and of the Court of Chancery, but besides and apart from these, there were in many places franchise prisons. The right of keeping a gaol in and for particular districts was a franchise which the king granted to particular persons as he granted other rights connected with the administration of justice, such as the right to execute writs (*retorna brevium*).

In this as in many other cases, the discharge of the legal duty of keeping prisoners in custody was paid for, not by salaries, but by fees, which were levied on the prisoners; and as prisoners accused of crime were, as a rule, poor and wretched to the last degree, fees had to be extorted from them by all kinds of oppression and cruelty. A remarkable illustration both of the manner in which particular prisons came into existence, and of the horrible abuses to which the system was liable, is to be found in the [1] proceedings, recorded in the seventeenth volume of the *State Trials*, against Huggins, Bambridge, Corbett, and Acton, for a series of murders by cruel treatment, said to have been committed by them in the Fleet and the Marshalsea.

The first matter [2] published is a report of a Committee of the House of Commons upon the gaols, and especially upon the Fleet. The Committee reported that the Fleet prison was [3] an ancient prison, and had been used to receive prisoners committed by the Star Chamber. It afterwards became a prison for debtors and for contempts of the Courts of Chancery, Exchequer, and Common Pleas only. In the 3rd Elizabeth (1561) the office of warden was granted in fee simple to Sir Jeremy

[1] 17 *St. Tr.* 297—618.
[2] 17 *St. Tr.* 297—310.
[3] It must have been very ancient if it really gave its name to *Fleta*, which was written in Edward I.'s time.

Whichcot and his heirs for ever. The patent was at last set aside, as it descended to persons unable to execute it, and a grant for life was made to Baldwin Leighton, in consideration of the expense to which he had been put in repealing the former patent. Afterwards Huggins got a grant of it for his own and his son's life, "by giving £5,000 to the late Lord "Clarendon." Huggins, "growing in years, and wishing to "retire from business," sold his and his son's interest to Bambridge and Corbett for £5,000. The rest of the report relates to the horrible cruelties which, in order to make their speculation succeed, Huggins and Bambridge exercised on a variety of prisoners. These cruelties are more particularly described in seven trials for murder and one trial for theft, which are reported in the *State Trials*, and which show the horrible results which such a system not unnaturally produced.

The report of the Committee above referred to was made in 1729, and the trials took place in that year and in 1730. In 1729 an act was passed (2 Geo. 2, c. 22) which was intended to remedy the mischiefs thus exposed. It was, however, a most imperfect measure, and the prisons of England continued for many years afterwards to be in an infamous condition. The first great step made towards their reformation was taken in consequence of the labours of Howard, which began in 1773, when he was sheriff of Bedfordshire. Finding his own gaol in a disgraceful condition on account of the gaoler's being paid by fees, Howard proposed that the gaoler should be paid by a salary, but his brother magistrates refused to agree to this unless a precedent could be found for such a payment. Howard travelled through the whole of England in search of a precedent, and found that none existed. His attention was thus directed to the shameful state of the prisons. After employing himself for several years in collecting information on the subject, for which purpose he travelled all over Europe and part of Asia, his labours resulted in a series of acts of Parliament, the most important of which were 22 Geo. 3, c. 64, passed in 1782, and 24 Geo. 3, c. 54, passed in 1784. The first act applies to the discipline of houses of correction, and the

CH. XIII. second to the building, repairing, and government of county gaols. These acts were of the greatest importance, and recognised many excellent principles, but in practice they left many evils undisturbed. The subject, however, is not so closely connected with criminal law as to justify me in going at any length into the details. It is enough to say that from Howard's time to the present day the attention of the legislature has been specially directed to the whole subject of prison management and discipline. There have been three principal acts passed in relation to it, namely, 4 Geo. 4, c. 64, passed in 1823; the 28 & 29 Vic. c. 126, passed in 1865 (which repealed the Act of 4 Geo. 4), and the 40 & 41 Vic. c. 21—the Prison Act of 1877—which is now the principal Act on the subject. These Acts (there are very many others relating either to particular prisons or to matters connected with prison administration) at first established a distinction between common gaols (of which one was to be provided for every county, and which were to be used principally for the purpose of the confinement of prisoners of all sorts, debtors as well as criminals), and houses of correction, which were to be used principally for the purpose of punishing convicted criminals. The distinction, however, was not maintained, as statutes creating crimes usually provided that the sentence of imprisonment might be carried out either in a common gaol or in a house of correction. Each of the Consolidation Acts of 1861 contains such a clause. The Act of 1865 considerably simplified this state of things, abolishing, for one thing, the distinction between common gaols and houses of correction, directing that imprisonment should in all cases be "separate," which in practice means much the same as solitary, and laying down other regulations tending to make the punishment of imprisonment and the discipline of prisons more uniform than they used to be.

The Prison Act of 1877 lessened the number of prisons, and gave to the Home Secretary and to certain Prison Commissioners appointed on his recommendation extensive powers for their management. It would be foreign to my purpose to enter into details on these matters. It is enough to say that

since the Act of 1865 solitary confinement, which before that Act passed was allowed to be inflicted only for a short part of the whole term of imprisonment, is now, under the name of separate confinement, inflicted in all cases as the regular and appointed mode of punishment.

Shortly to sum up the whole matter, the history of the punishment of death and of the punishments substituted for it is as follows:—

Death was at common law the punishment of all felonies except petty larceny and mayhem. But a large class of persons were exempted from it by the law as to benefit of clergy, which at first applied to the clergy only, then to all men who could read, except the husbands of second wives or widows, and at last to all persons whatever.

On the other hand, when benefit of clergy was extended to all persons, it was taken away from many crimes. This was done to a considerable extent under the Tudors, and to a much greater extent in the eighteenth century, but during that century pardons conditional on transportation were granted in the great majority of cases of capital convictions.

In the reign of George IV. benefit of clergy was abolished and capital punishment was abolished as regards most of the offences which had been excluded from clergy, but the number of offences subject to it was still considerable.

By successive steps, the last of which was taken in 1861, the law was reduced to its present state.

Transportation, having been introduced as a condition of pardon in the case of crimes excluded from clergy, was made a substantive punishment by a great number of statutes passed in the 18th and the early part of the 19th century, but penal servitude was substituted for it between 1853 and 1864.

Imprisonment with hard labour was introduced as a punishment alternative to transportation and penal servitude.

One other consequence of treason and felony remains to be noticed. This is corruption of blood and forfeiture of property. The effect of corruption of blood was that descent could not be traced through a person whose blood was corrupted. Also his real property escheated to the lord of the fee or to

CH. XIII. the king. The personal property of a traitor or felon was forfeited not by his attainder, but by his conviction.

These incidents of treason and felony have their source in the feudal theory that property, especially landed property, was held of a superior lord upon the condition of discharging duties attaching to it, and was forfeited by the breach of those conditions. They have no history at all, but prevailed from the earliest time till the year 1870, when they were abolished by 33 & 34 Vic. c. 23 s. 1, except in the case "of "forfeiture consequent upon outlawry." Some of the provisions by which they were replaced appear to me exceedingly objectionable. It is provided by section 2 that upon a conviction for felony and a sentence of twelve months' imprisonment or upwards or imprisonment with hard labour for any term the convict shall forfeit "any military or naval office "or any civil office under the Crown or other public employ-"ment, or any ecclesiastical benefice, or any place, office, or "emolument in any university, college, or other corporation "which he may hold, and also any pension or superannuation "allowance or emolument" to which he is entitled. I think that the question whether a person should on account of a conviction of felony followed by a sentence of imprisonment and hard labour, be deprived of official employment or ecclesiastical perferment, should be left to his official or ecclesiastical superiors. I do not see why an officer in the army who in a moment of irritation strikes a blow which kills a man and is convicted of manslaughter, should lose his commission because the judge sentences him to imprisonment with hard labour; nor do I think that in considering the sentence the judge ought to be obliged to take into account the fact that a sentence of hard labour will necessarily cost the offender his commission. The matter seems to me to be one for the military authorities, just as the question whether a barrister should be disbarred upon a conviction is a question for the Benchers of his Inn.

To deprive a man of a pension or superannuation allowance, which is in reality deferred pay earned by work done, is to keep up the principle of forfeiture of property as a punishment for crime in a special class of cases when it has been

given up in all others. Two officers of a bank are convicted of a forgery for which each is sentenced to a year's hard labour. One is a retired Indian civilian with a pension of £1000 a year; the other has bought a life annuity of the same amount out of his savings in a profession. Why is the one to lose his pension and the other to keep his annuity? The pension is just as much property as the annuity. It is part of the consideration for which many years of labour were given. Apart from this why when removing an admitted grievance keep up a perfectly irrational distinction between the punishment of felons and the punishment of misdemeanants? Suppose that two other persons—directors of the same bank—had fraudulently misappropriated its funds in concert with the two forgers, but by means amounting only to misdemeanour. If they held pensions or commissions they would forfeit nothing, even if they were sentenced to penal servitude. Surely this is highly unjust. It seems to me that the whole act, except the section which abolishes forfeiture, should be repealed. If its provisions are not wanted in cases of misdemeanour they are not wanted at all. They are practically a dead letter in cases of felony.

I now pass to the punishments provided by law for misdemeanours. As I have already said, they varied in an even more remarkable manner than the punishments for felonies, as in 1839 there were no less than ninety-six classes of them. I will notice only the most important.

A large number of misdemeanours were created by statute at different times, but especially in the eighteenth and nineteenth centuries, which differ in no essential respect from the common crimes distinguished as felonies. For instance, to obtain goods by false pretences, to misappropriate securities intrusted to the offender as an agent, solicitor, or banker, and to commit many other fraudulent or mischievous acts are, as far as moral guilt is concerned, on a level with theft. They have been punished by transportation and imprisonment with or without hard labour in exactly the same way as felonies, and what I have already said of those punishments applies equally to both classes of offences.

But apart from these statutory punishments there are

CH. XIII. punishments appointed by the common law, both for misdemeanours at common law and also for those statutory misdemeanours for which no punishment is provided by statute. These are fine and imprisonment and whipping. Whipping has never been formally abolished for common law misdemeanours, though I believe it has never in modern time been inflicted except under the provisions of some statute.

The statutory rules as to the amount of the fines and the length of the imprisonment which the court may impose, are vague to the last degree. I know, indeed, of two only. The first is the provision of [1] Magna Carta, ch. 20, "Liber "homo non amercietur pro parvo delicto, nisi secundum "modum delicti, et pro magno delicto amercietur secundum "magnitudinem delicti salvo contenemento suo; et mercator "eodem modo salva mercandisa sua; et villanus eodem modo "amercietur salvo wainagio suo." The second is the provision of the Bill of Rights (1 Will. & Mary, sess. 2, c. 2), "that ex-"cessive bail ought not to be required, nor excessive fines "imposed, nor cruel and unusual punishments inflicted." No doubt the floggings to which Oates and some others were sentenced were the "cruel punishments" which Parliament referred to, and the fine of £40,000 to which John Hampden (the grandson of the celebrated Hampden) was sentenced in 1684, would be one of the "excessive fines." The severest sentence for a common law misdemeanour that I am aware of since the Revolution, was passed upon one Hales for forging a promissory note in 1729. He was to stand twice in the pillory, to be fined fifty marks, be imprisoned for five years, and find security for his good behaviour for seven years.

The pillory was abolished in all cases except perjury in 1816 (56 Geo. 3, c. 138), and was abolished absolutely in general terms and without exception in 1837 by 7 Will. 4, and 1 Vic. c. 23.

There were, and in a sense still are, certain exceptional misdemeanours, mostly of a political, or ecclesiastico-political kind, which theoretically subject the offender to punishments so severe that they are never inflicted. It is said that for

[1] Stubbs, *Charters*, 299.

misprision of treason an offender must be imprisoned for life and forfeit his property. [1] There are a variety of offences of an ecclesiastical kind such as "depraving" the Book of Common Prayer, and a minister obstinately refusing to use the said Common Prayer, for which the offender must for a third offence be imprisoned for life. There are also some offences for which the penalty of a "præmunire" is incurred. [2] This is said to involve imprisonment for life, or during pleasure, exclusion from the queen's protection, and forfeiture of property. These, however, are little more than monuments of past times, devoid of any interest except by way of antiquarian curiosity.

In concluding this chapter I may refer shortly to a branch of the law which has been obsolete for ages, but which, when it existed, was connected with benefit of clergy. I refer to the law of sanctuary. In very early times a criminal who took refuge in a church could not be taken from it, but was allowed to take before a coroner an oath of abjuration. That is to say, he admitted his guilt, and swore to leave the realm for life at a place appointed for that purpose. In process of time abjuration became obsolete, but various places came to be privileged, and "sanctuary men" were allowed to live there under regulations, some of which were imposed by statute. The statutes of 27 Hen. 8, c. 19 (1537), & 32 Hen. 8, c. 12 (1540), show how this system worked. The first statute enacts that sanctuary men are to wear badges, carry no weapons, and to be to a certain extent under the control of the governors of the sanctuaries. An abstract of the latter statute, printed in the common edition of *The Statutes at Large*, is as follows. It gives correctly the effect of the act as printed in the *The Statutes of the Realm*. "All sanctuaries and "places privileged which have been used for sanctuary shall "be utterly extinguished, except parish churches and their "churchyards, cathedral churches, and churches collegiate, and "all churches dedicated, used as parish churches, and the "sanctuaries to either of them belonging, and Wells in the

[1] The statutes are abstracted in my *Digest*, pp. 100, 101.

[2] Coke, 1*st Inst.* 130*a*. See offences in *Seventh Rep. C. C. and Com.* p. 37. The Royal Marriage Act, 12 Geo. 3, c. 11, is, I think, the last Act which subjects any one to this penalty.

CH. XIII. "county of Somerset, Westminster, Manchester, Northampton, "Norwich, York, Derby, and Lancaster. None of the said "places shall give immunity of defence to any person which "shall commit wilful murder, rape, burglary, robbery in the "highway, or in any house, or in any church or chapel, or "which shall burn wilfully any house or barn with corn. He "that taketh sanctuary in any church, churchyard, &c., may "remain there forty days, as hath been used, unless the coroner "repair to him to take his abjuration, in which case he shall "abjure to any of the foresaid privileged places, not being full "of the number appointed to them, viz., above 20 persons, "there to remain during life. If a privileged person, duly "called to appear before the governor, shall make default "three days, or if he commit any felony, he shall lose the "benefit of sanctuary. A privileged person, abjuring to any "of the aforesaid places, shall be conducted from constable "to constable directly until he be brought to the governor "of the said privileged place; and if that place be full of "his number then he shall be conducted to the next privileged "place, and so to the next, &c., until, &c."

In 1623 sanctuary was abolished absolutely by 21 Jas. 1, c. 28, s. 7, but in a modified form sanctuaries continued apparently in defiance of the law for another century, so far at least as regards the execution of civil process. This appears from the acts of 8 & 9 Will. 3, c. 27, s. 15, which makes it penal in sheriffs not to execute process in certain "pretended "privileged places," such as Whitefriars and the Savoy; and 9 Geo. 1, c. 28 (1722) and 11 Geo. 1, c. 23, which contain provisions against resistance to process in "certain pretended "privileged places" in the Mint and Stepney.[1]

[1] On Sanctuary, see Pike's *History of Crime*, ii. 252-5, and elsewhere.

CHAPTER XIV.

MANAGEMENT OF PROSECUTIONS.

THE only subject connected with procedure which remains to be treated is that of the manner in which criminal prosecutions are managed. This is a matter of the highest practical importance, though not of so much interest as some of the other topics which I have had to discuss.

In most countries the duty of making a preliminary investigation into the circumstances of an offence, collecting evidence for the trial, and managing the case in court, is in the hands of public officers. Throughout the Continent officers are to be found answering more or less to the French *Procureur Général*, *Procureur de la République*, and *Juge d'Instruction*. Even in Scotland the Procurator Fiscal and his officers have somewhat analogous duties, and in Ireland, where English law prevails with but slight variations, a system exists by which prosecutions are conducted principally by solicitors and counsel, who represent the Crown. In England, and, so far as I know, in England and some English colonies alone, the prosecution of offences is left entirely to private persons, or to public officers who act in their capacity of private persons and who have hardly any legal powers beyond those which belong to private persons.

Incidentally this has already appeared in the course of this work, but I may now put together what has already been stated.

The police in their different grades are no doubt officers appointed by law for the purpose of arresting criminals; but they possess for this purpose no powers which are not also

possessed by private persons. They are, indeed, protected in arresting innocent persons upon a reasonable suspicion that they have committed felony, whether a felony has in fact been committed or not, whereas the protection of a private person in such a case extends only to cases in which a felony has been committed, and they are, and private persons are not, under a legal duty to arrest when the occasion arises, but in other respects they stand upon precisely the same footing as private persons. They require a warrant, and may arrest without a warrant in the same cases. When they have arrested they are under precisely the same obligations. A policeman has no other right as to asking questions or compelling the attendance of witnesses than a private person has; in a word, with some few exceptions, he may be described as a private person paid to perform as a matter of duty acts which, if so minded, he might have done voluntarily.

When a prisoner has been arrested and is brought before a magistrate, the magistrate's duties are now entirely judicial. He hears the evidence, as a rule to which there are hardly any exceptions, in open court. He is provided with no means of making inquiries, though he can issue summonses for the attendance of witnesses if he is informed by others as to their knowledge, but it is no one's legal official duty to inquire into the matter. As a fact the duty is undertaken by the police, who, in cases of any importance, are usually authorised by the superior police authorities to instruct a solicitor, who, in some cases, instructs counsel to appear before the magistrates to prosecute. If, as is often the case, there is a private prosecutor, he can, and does, manage the whole matter, as he might manage any other action at law; he employs a solicitor who may or may not instruct counsel, and who takes the proofs of witnesses, brings them before the committing magistrate and the grand jury, instructs counsel at the trial, and, in a word, manages the whole of the proceedings just as he would in a civil cause.

The course pursued is precisely the same in all cases, and whoever may be the prosecutor. A prosecution for high treason, conducted by the Attorney-General, differs in no one

particular in matter of principle from the prosecution of a servant by his master for embezzling half-a-crown.

No person has any legal power for the collection of evidence, or for its production before the magistrate, or in appearing before the court by which the matter is finally determined in the one case which the person placed in a corresponding situation has not in the other. When the Attorney-General conducts the most important State prosecutions before the Queen's Bench Division, he has (with one or two not very important exceptions) identically the same powers and duties as the youngest counsel at the bar on the prosecution of a petty thief at the Middlesex Sessions.

The Director of Public Prosecutions, when he has instituted a prosecution for the most serious offence, and one in which the whole country has a deep interest, has no other powers than a private person would have in respect of the prosecution of a fraud which affected no one but himself.

It is perhaps even more singular that the converse is true. Every private person has exactly the same right to institute any criminal prosecution as the Attorney-General or any one else. A private person may not only prosecute any one for high treason or a seditious conspiracy, but A may prosecute B for a libel upon C, for an assault upon D, or a fraud upon E, although A may have no sort of interest in the matter, and C, D, and E, may be altogether averse to the prosecution.

The rule of the French law, and I believe of most other continental countries, is that prosecutions having punishment for their object can be instituted only by public authority, but that a person injured by a crime may join in the prosecution as the *partie civile*, under certain rules.

The English system has no doubt its disadvantages, and is capable of being made to look extravagant by crude statements (like those just given) of the results which might follow from it if it were pushed to an extreme. It never is pushed to an extreme, however: first, because a jury as soon as the character of such a prosecution as I have suggested was exposed, would be certain to acquit, unless there were some extraordinary reason for sanctioning it; and secondly, because the result of such an acquittal would be an action

CH. XIV. for malicious prosecution followed by a verdict for exemplary damages. Besides which, the management of a criminal prosecution is so expensive, so unpleasant, and so anxious a business, that no one is likely to undertake it without strong reasons.

On the other hand, no stronger or more effectual guarantee can be provided for the due observance of the law of the land, by all persons under all circumstances, than is given by the power, conceded to every one by the English system, of testing the legality of any conduct of which he disapproves, either on private or on public grounds, by a criminal prosecution. Many such prosecutions, both in our days and in earlier times, have given a legal vent to feelings in every way entitled to respect, and have decided peaceably, and in an authentic manner, many questions of great constitutional importance.

The unlimited power to institute prosecutions does not carry with it an unlimited control over them when they are instituted. When a charge has been made the maker of it is usually bound over to prosecute, and when a bill has been sent before the grand jury, the matter is entirely out of the original prosecutor's hands, and must run its course, unless the court before which it is to be tried sanctions the withdrawal of the charge, or unless the Attorney-General as the representative of the Crown, the nominal prosecutor, enters a *nolle prosequi*, which operates not as an acquittal, but as a stay of proceedings upon the particular case to which it refers.

I do not think that the existence of this state of the law can properly be regarded as the result of design. It seems rather to have been the effect of historical causes already referred to. One cause is no doubt to be found in the system of appeals or private accusations. They were in nearly every respect in the nature of civil actions, and were conducted like other private litigations. But another cause is to be found in the history of trial by jury. So long and so far as trial by jury retained its original character of a report made by a body of official witnesses of facts within their own knowledge, a criminal trial was a public inquiry,

or rather a report upon a public inquiry, into the truth of an accusation of crime, but when the jury assumed its present character the preparation of a case for trial consisted no longer in inquiries made by the jurymen themselves, but in the collection of evidence to be submitted to them. No direct express provision was ever made for this purpose, unless the appointment of justices of the peace is to be regarded in that light. Justices did no doubt concern themselves with the detection and apprehension of offenders and the collection of evidence against them to a greater extent and down to a later period than is commonly known, and to that extent they may be regarded as having for some centuries discharged more or less efficiently and completely the duties which in other countries are imposed upon public prosecutors. By degrees, however, their position became that of preliminary judges, and the duties which they had originally discharged devolved upon the police, who have never been intrusted with any special powers for the purpose of discharging them. It was thus by a series of omissions on the part of the legislature to establish new officers for the administration of justice as the old methods of procedure gradually changed their character, that English criminal trials gradually lost their original character of public inquiries, and came to be conducted in almost precisely the same manner as private litigations. Perhaps the strongest illustration of the length to which this process has gone is to be found in the way in which business is conducted before a coroner. The coroner was the predecessor of the justice of the peace, and it was his duty on the one hand to receive appeals or private accusations, and on the other to inquire into cases of homicide in the interest of the public. The inquiry was made originally by the reeve and the four men of a certain number of townships. It is now made by a jury before which witnesses may be, and are, summoned, but if the inquiry appears likely to result in a criminal charge, the inquest practically assumes the form of a litigation. The friends of the deceased and the suspected person are represented by advocates, and are entitled, or at all events permitted, to examine and cross-examine witnesses exactly as if the suspected person whom it

CH. XIV. is proposed to accuse was on his trial, and the coroner and jury occupy a position closely analogous to those of a judge and a jury, and very unlike the positions of persons holding an inquiry and pursuing their own independent investigations for the discovery of the truth.

One circumstance which practically left the whole business of originating and conducting prosecutions in private hands, and so gave to the whole procedure its character of a private litigation, was the fact that till about a century ago private persons had to pay all the costs of every prosecution. This was complained of by Lord Hale. [1] "It is," he said, "a "great defect in the law, to give courts of justice no power "to allow witnesses against criminals their charges therein, to "their great hindrance and loss." [2] Fielding in his essay on the causes of the increase of robberies, repeats and enforces this complaint. The extreme poverty of prosecutors, he says is one cause of the escape of offenders. "This I "have known to be so absolutely the case that the poor "wretch who hath been bound to prosecute was under more "concern than the prisoner himself. It is true the necessary "cost on these occasions is extremely small: two shillings, "which are appointed by Act of Parliament for drawing the "indictment, being, I think, the whole which the law requires, "but when the expense of attendance, generally with several "witnesses, sometimes during several days together, and often "at a great distance from the prosecutor's home . . . . are "summed up, and the loss of time added to the account, the "whole amounts to an expense which a very poor person "already plundered by the thief must look on with such horror "that he must be a miracle of public spirit" if he prosecutes. The first scheme for the remedy of this evil was [3] to provide by statute rewards for successful prosecutions. But this system was replaced by a more reasonable one authorizing the court to order payment of costs in cases of felony.

[1] Quoted by Fielding, *ubi infra*. [2] *Works*, vol. x. p. 371—72.

[3] A list may be seen in Chitty's *Criminal Law*, 821—24. One of the rewards given was grotesque. If a man prosecuted certain kinds of felons to conviction he was entitled to a certificate (which was originally transferable once) freeing the holder from the obligation of holding certain parish offices. This was called a "Tyburn ticket," and in some parishes at particular times sold for a large sum.

Several statutes dealt with this subject successively. The first statute of importance was 18 Geo. 3, c. 19 (A.D. 1778), which was followed by 58 Geo. 3, c. 52 (A.D. 1818). The Acts now in force on the subject are 7 Geo. 4, c. 64, 14 & 15 Vic. c. 55, and the [1] five Consolidation Acts of 1861. The result of these statutes is that the court may allow costs to prosecutors in all cases of felony, and in all common cases of misdemeanour. The legislation on the subject is scattered, cumbrous, and in some points capricious, as the misdemeanours in respect of which costs may be given are chosen without much reference to principle. It would, however, be foreign to my purpose to go into minute detail on the subject.

In concluding this subject I may mention very shortly some particulars as to the different persons by whom criminal prosecutions are conducted in court, and as to the part which they take in the matter.

The highest in rank are the law officers of the Crown, the Attorney and Solicitor General.

The origin of these offices is, I believe, unknown, but it is obvious that the king must have been represented by counsel in his courts from the earliest time when counsel were employed at all in courts of justice; and that they must have been employed from the very earliest times is obvious from the extremely minute and rigidly technical procedure which was inforced in the case of appeals. It has been conjectured that, as in old times the king had special attorneys or representatives in particular courts, as *e.g.* in the Court of Wards, the title of the Attorney-General means that the person who held it represented the king in all courts. This, however, seems to me doubtful. The expression "general attorney" meant no more than general agent or representative, and other persons besides the king had attorneys-general. Thus, in the Statute of Westminster the Second (A.D. 1283), 13 Edw. 1, c. 10, it is enacted that "such as have land in "divers shires where the justices make their circuit, and "that have land in shires where the justices have no "circuit, that fear to be impleaded and are impleaded of

[1] 24 & 25 Vic. cc. 96, 97, 98, 99, 100.
[2] *Dig Crim. Proc.* arts. 316-331.

CH. XIV. "their lands in shires where they have no circuit, as before "the justices at Westminster, or in the King's Bench, or "before justices assigned to take assizes, or in any county "before sheriffs, or in any court baron, may make a general "attorney to sue for them in all pleas in the circuit of jus- "tices, moved or to be moved for them or against them during "the circuit, which attorney or attorneys shall have full "power in all pleas moved during the circuit, until the plea "be determined or that his master removeth."

This provision forms part of a statute introduced to prevent suits from being brought behind the backs of defendants. It shows that in very early times personal attendance in court was necessary if a man meant to protect his interests, and that persons who had much to lose had need of an attorney-general to protect their interests. A curious instance of this occurs in Shakespeare. In *Richard II.*, Act II. Sc. 1, York, in attempting to dissuade Richard II. from confiscating Bolingbroke's property, says:

> "If you do wrongfully seize Hereford's rights,
> "Call in the letters patent that he hath
> "By *his attorneys-general to sue*
> "*His livery*, and deny his offer'd homage,
> "You pluck a thousand dangers on your head."

However this may be, [1] Mr. Foss gives a list of sixteen "Attornati regis" who held office between 1277 and 1304. They were not originally the highest of the law officers. Till the Civil Wars [2] the King's Serjeant usually managed state prosecutions, and the proclamation made in court when a batch of persons are arraigned for felony, "Whoever can inform the Queen's Serjeant, the Queen's "Attorney-General," &c. In early times before juries heard evidence there could have been but little for the counsel for the Crown to do in criminal trials, and neither Fortescue nor Smith, in their accounts of the routine of criminal justice take any notice of their interference, though the accounts of

[1] *Judges of England*, iii. 45.

[2] Blackstone (iii. 28) gives a table of precedence at the Bar, which begins thus:—(1) The King's Premier Sergeant, (2) the King's Ancient Sergeant, (3) the King's Advocate-General, (4) the King's Attorney-General, (5) the King's Solicitor-General.

various trials in the sixteenth century show that at that time the counsel for the Crown took an even more active and prominent part in the proceedings than they do at present.

When by degrees criminal trials assumed their present form all the counsel in the case on both sides found themselves practically on an equality. The Attorney-General has no authority in court beyond that which his abilities and eminence may give him, with the following exceptions:— He can, by filing a criminal information, put a man on his trial without sending a bill before a grand jury; he can stop a prosecution by entering a *nolle prosequi*, and he has the right to reply whether the prisoner calls witnesses or not.

Till the year 1879 the Attorney-General was the only person who answered in any degree to the description of a public prosecutor, but in that year an Act was passed for the appointment of an officer called "the Director of Public "Prosecutions" (42 & 43 Vic. c. 22). The Act confers no power whatever on the Director of Public Prosecutions which it required legislation to give, except powers of a very technical kind (see ss. 5 and 6), and his duties seem to amount to little else than those which the solicitor to the treasury used to discharge when directed to take up a case for the government, and which any private solicitor might discharge for his client. He is to "institute, undertake, or carry on criminal "proceedings under the superintendence of the Attorney-"General," and to give advice and assistance to "chief officers "of police, clerks to justices, and other persons concerned in "any criminal proceedings."

Though the law of England concedes to private persons a control which in practice is almost unlimited over criminal prosecutions, it nevertheless does not regard a criminal prosecution as being to all intents a private action. Where one person has a civil claim against another he can settle it on such terms as he thinks proper, but he cannot do so with respect to criminal proceedings. The law upon the subject is by no means clear, but in general terms it is as follows:—

1. The fact that the person injured by a crime has agreed not to prosecute the criminal is no defence to the criminal.

CH. XIV. In a civil proceeding it would be a good defence to any claim to allege that it had been compromised, but in criminal proceedings such a plea would not be permitted.

2. It is not quite clear whether an agreement not to prosecute an offender is in itself a crime. [1] It is commonly said to be a misdemeanour to agree not to prosecute a person for felony, but there is singularly little authority on the subject.

In ancient times it was an offence called "theft bote" to receive back stolen property upon an agreement not to prosecute the thief.

3. [2] It does not appear to be a misdemeanour to agree not to prosecute a person for misdemeanour, but such an agreement is generally speaking void, as being contrary to public policy. There probably is an exception to this in the case of misdemeanours in which the public have no substantial interest, as, for instance, the case of a common assault, or a libel on a private person.

[3] In some cases the court will, before passing sentence in a case of misdemeanour, allow the defendant and the person injured to come to terms, in consideration of which the court will pass a light or even a nominal sentence.

4. [4] It is an offence to compound a penal action without the leave of the court, and to take a reward corruptly for helping any person to recover goods stolen, or otherwise criminally obtained.

On the Continent a person injured by a crime may usually come in as what is called in French law the "partie civile" to a criminal proceeding. This is unknown in England, and till very lately it was considered that where a private person was injured by a felony the civil remedy was suspended till the felon was convicted. On the other hand, upon his convic-

[1] See my *Digest*, art. 158, p. 94. The reference there should be 1 Hale, 619, instead of 2 Hale, 619. The article goes a little beyond Hale's authority, but is founded on precedents of indictments given in Chitty. See too Archbold, 896.

[2] The fullest authority on this subject is Keir *v.* Leeman, 6 Q.B. 308, and same case in Cam. Scacc. 371.

[3] Russ. Cr. 298.

[4] See my *Digest*, articles 159 & 354(a), and 18 Eliz. c. 5, ss. 4 & 5, and 24 & 25 Vic. c. 96, s. 101.

tion the remedy ceased to be worth having, as his goods were forfeited. As forfeiture for felony has been abolished, this last remark no longer applies, and the case of [1] Wells *v.* Abrahams has thrown a good deal of doubt on the general doctrine, by showing that even if the rule exists it is practically impossible to enforce it, unless special circumstances make it necessary to do so in the public interest.

[1] L.R. 7 Q.B. 334; and see Osborne *v.* Gillett, L.R. 8 Ex. 89.

CHAPTER XV.

GENERAL AND COMPARATIVE VIEW OF ENGLISH AND FRENCH CRIMINAL PROCEDURE.

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HAVING related at length the history of the criminal courts, and of every step of the procedure pursued in them for the purpose of bringing criminals to justice, I propose in the present chapter to make some general observations upon the system and to point out such of the reforms, which it seems to me to require, as have not been discussed in earlier parts of the work. For this purpose I shall comment upon the provisions relating to procedure proposed to be made by the Draft Criminal Code of 1879; and, in order to set the special character of the whole system in as clear a light as possible, I shall compare or contrast it with the French *Code d'Instruction Criminelle.*

First, as to the English courts of justice. The only point of importance to be observed in connection with them is that though their history is intricate, and though their present condition displays some singular traces of their origin, they form a system of extreme unity and simplicity. There is, practically speaking, only one superior criminal court, judges from which sit four times every year either in or for every county in England, and twelve times a year in and for London and its neighbourhood.

There are numerous local Courts of Quarter Sessions, which sit for the trial of offences of less importance four times a year in every county and borough in England, and in some cases six times a year, and here and there even more frequently.

Some few little alterations as to these courts might be suggested. It would be easy, for instance, to have a single criminal court for all England, and so to supersede the necessity for issuing Commissions of Oyer and Terminer and Gaol Delivery, but this would make no real change either in the constitution or in the procedure of the courts. It would also be possible, and I think it would be desirable, to group the counties for assize purposes at all the assizes, as is now the practice at the spring and autumn assizes, but this is a very small matter. I know of no proposal worth mentioning for any alteration in the constitution of the [1] superior criminal courts, except such as relate to the institution of a Court of Criminal Appeal, as to which I have already expressed my opinion. The same observation applies to the Borough Courts of Quarter Sessions, in which Recorders appointed by the Crown are the judges. As to the County Courts of Quarter Sessions, though the magistrates who are the judges are appointed by the Crown, the chairmen are chosen by the magistrates from their own number. It has sometimes been doubted whether there ought not to be paid chairmen, being barristers. [2] In Middlesex there is such an officer. I should be sorry to see a general change in this matter, as a large proportion of the chairmen of Quarter Sessions whom I have known were judges quite good enough for their duties; but I think that power might be given to the justices of counties to appoint paid chairmen, being barristers of some standing, if the number of prisoners to be tried and the importance of the cases for trial required it. A small payment would be sufficient to secure the services, for such a purpose, of men of considerable professional eminence, as the position would be pleasant and a professional distinction, and as the work would not be great. The jurisdiction of the Courts of Quarter Sessions might also be increased with advantage. There can

[1] Whether the election of the Recorder of London by the Aldermen and the election of the Common Serjeant by the Common Council is a good arrangement, forming, as it does, the only exception of importance to the general rule that judges should not be elective, may be a question. All corporations mentioned in the Municipal Reform Act were deprived by it of the power of appointing their Recorders.

[2] See 7 & 8 Vic. c. 71 ss. 8-10, which empowers the appointment by the Crown of an assistant-judge and a deputy.

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be no reason why they should not try cases of burglary, which in these days are generally little worse than common thefts, but it might be well to restrict them in respect of the sentence to be passed, say to seven or ten years' penal servitude, and to empower them to send cases which seemed to require a more serious punishment (as, for instance, when violence was used) to be tried at the assizes. A proposal to this effect was made in the Draft Code, s. 434.

Passing from the courts of justice to the procedure, I may observe in the first place that, as it now stands, it is from first to last distinguished by one characteristic feature. It has come by the steps already described to be preeminently litigious, and hardly at all inquisitorial. English criminal proceedings are from their very first institution and at every stage closely assimilated to proceedings for the prosecution of a civil action. This may seem not to apply to the preliminary steps in such proceedings—the arrest of the prisoner, his examination before the committing magistrate, and his imprisonment till he is tried. Even here, however, the resemblance is much stronger than would appear at first sight. The arrest and imprisonment of a person suspected of crime are precisely analogous to the law of arrest on mesne process, by which a defendant could, till recent times, be arrested and imprisoned till the trial of an action against him, or till he found bail. The proceedings before the magistrate are a great advantage to the suspected person, as in any case they give him notice of the case against him, and enable him to provide for his defence, and as they may lead practically (though not in theory) to his discharge and virtual acquittal. They put him in a position infinitely more favourable than that of a defendant in a civil action. The defendant in an action must put in a statement of defence, admitting, denying, or explaining every material fact alleged against him in the statement of claim. He must also make an affidavit of the documents in his possession bearing on the subject, give discovery of them to his antagonist, and answer interrogatories. He must in short completely disclose his defence, and to a considerable extent disclose the evidence by which he

proposes to sustain his defence, before he comes to trial. A prisoner charged with crime is subject to no such necessity. He has an opportunity before he is committed for trial of saying whatever he pleases, but he cannot be asked a single question at any stage of the proceedings except the formal one, "Are you guilty or not guilty?" and if he does not answer even that single question the omission to do so has no effect whatever, as a plea of not guilty is entered for him Besides this a prisoner cannot be detained in custody indefinitely in order to enable the prosecutor to get up the case against him. He can insist, under the Habeas Corpus Act, on being tried after one adjournment at most for which definite cause must be shown. Lastly, the trial which determines the question of his guilt or innocence is conducted precisely in the same manner as the trial of a civil action, subject only to the circumstance that the rule which rendered the parties to an action incompetent witnesses in civil cases has not in criminal proceedings been so far relaxed as to make the prisoner competent or compellable to give evidence. This single distinction between civil and criminal proceedings has been made or rather maintained in the supposed interests of the prisoner.

In the earlier chapters of this volume I have made such observations as occurred to me upon the different stages of criminal procedure. I will now, in order to give a general view of the whole subject, review that part of the [1] Draft Criminal Code of 1879, which related to procedure, noticing the changes which it proposed to make in the law as it then stood and still stands. This part of the Draft Code forms Title VII. of the Draft, and contains 125 sections divided into ten parts or chapters. It is arranged very nearly in the same order as the present volume, except that as it did not propose to make any alteration in the constitution of the existing criminal courts, ordinary or extraordinary, or in the constitution of the police establishment it takes no notice of those matters.

The first important alteration in the existing law of proce-

[1] The circumstances in which this bill originated are stated in the preface.

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dure proposed to be made by the Draft Code was[1] the abolition of the distinction between felonies and misdemeanours. This was treated as a matter of procedure, because as the law now stands there is practically no distinction between the punishments allotted to felonies and misdemeanours, many misdemeanours (for instance, conspiracy to murder, frauds by trustees, perjury, and the obtaining of goods by false pretences) being punishable by penal servitude. Hence the practical importance of the distinction has reference entirely to matters of procedure, every part of which is more or less affected by it. A felon may in all cases be arrested without warrant, and is in no case absolutely entitled to be bailed, whereas a misdemeanant cannot be arrested without warrant except in cases specially provided for by statute, and is entitled to be bailed in all cases in which special statutory enactments do not modify his right. A misdemeanant has, and a felon has not, a right to a copy of the indictment. In an indictment for felony one offence only can practically be charged. In an indictment for misdemeanour any number of offences may be charged in different counts. There are, moreover, many distinctions as to the trial of felonies and misdemeanours. The only one of much practical importance is that a person accused of felony has, whereas a person accused of misdemeanour has not, the right of peremptory challenge.

This distinction with all its consequences the Commissioners proposed to abolish. In the definition of each particular offence there was contained a special provision deciding whether persons accused of it should be liable or not to summary arrest, and should or should not be bailable at discretion only. All trials were to be conducted in the same way; all provisions as to indictments were to apply to all offences alike; and as to challenges it was provided that persons indicted for treason should have thirty-five peremptory challenges; persons indicted for offences rendering them liable to death or penal servitude for life twenty, and all other persons six. The right to challenge is hardly ever made use of in the present day, but when it is it seems hard

[1] S. 431.

that a man indicted for theft should possess it, and that a man indicted for perjury, libel, or obtaining goods by false pretences should not.

The existing law as to the local jurisdiction of the courts was considerably altered by the Draft Code. The whole law of venue was swept away by s. 504, which gave every criminal court jurisdiction to try every offence over which it had jurisdiction, wherever it might be committed, subject only to the rule that English offences must be tried in England, and Irish offences in Ireland. In the same spirit the system of backing warrants was abolished, and a justice's warrant was made to run over the whole of England, or the whole of Ireland, an adaptation to England of the Irish practice.

With respect to proceedings to compel the appearance of suspected persons the Draft Code proposed a few alterations in the existing law.

By s. 437 power was given to justices to inquire into any suspected offence, although no person might be charged, by calling before them witnesses able to give material evidence and examining them upon oath. This power was originally given to justices in Ireland by the Peace Preservation Act of 1870 (33 Vic. c. 9, s. 13). A similar section is contained in the Prevention of Crime Act, 1882 (45 & 46 Vic. c. 25, s. 16). It is a power which obviously ought to exist in all cases, as it can inflict no hardship on any innocent person, and may frequently lead to the discovery of criminals. When a crime has been committed, and before any person has been arrested for it, many matters are noticed and remembered which are soon forgotten, but which may be found afterwards to be of great importance. Such inquiries can now be made only by policemen, who have no power to require any one to give the information, and no authority to put people upon their oaths. The power of holding such an inquiry ought to be part of the regular apparatus for the detection of crime. After all, it is only a speedier and less cumbrous form of doing what is done by coroners' inquests in cases of homicide. An attempt to introduce such a system was made by 30 & 31 Vic. c. 35, s. 6, but was defeated by amendments introduced in the passage of that measure through parliament.

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No alteration of any great importance was proposed to be made in the proceedings before magistrates, but an alteration of great importance was proposed as to their position in the general system. As the law stands, as I have already explained at length, it is not necessary for a person wishing to accuse another of a crime to go before a magistrate at all, except in a few cases excepted (in 1859) from the general law by the Malicious Indictments Act (22 & 23 Vic. c. 17). It is thus legally possible that a man might be put upon his trial by an indictment found behind his back upon the evidence of witnesses whose names he would have no means of knowing before his trial. The Draft Code proposed to remedy this by extending the principle of the Malicious Indictments Act to all offences whatever, and by providing further that the verdict of a coroner's jury should no longer have the effect of an indictment, but should operate to bring the case before committing magistrates. The effect of this would have been that on the one hand every one brought to trial before a criminal court would know what was the evidence against him, and that on the other the mere fact that a magistrate, after hearing the evidence produced by the prosecutor, discharged the accused, would not put a stop to the proceedings, as the prosecutor would have a right to call upon the magistrate to bind him over to prosecute. He would then be entitled to send up an indictment on his own responsibility as he is at present. The power of the law officers to indict without going before a magistrate was reserved, and it was also provided that leave to do so might be given by the court or a judge. The grand jury would thus have ceased to be a body which designing persons could convert into an instrument of oppression, whilst it would have continued to afford a protection to the innocent (in my opinion, far from being superfluous) against the disgrace of being publicly accused and put upon their trial for offences which they have not committed. They would also continue to discharge, as they do at present, the function of preventing premature and abortive trials. It is by no means uncommon for offenders to be committed in cases in which the judge sees, though the

committing magistrate did not, that a link in the evidence is wanting, or that the evidence itself is of such a nature that the petty jury would be sure to acquit. In such cases it is usual to advise the grand jury to throw out the bill, and in this way open failures of justice are often prevented. This is specially common in the case of crimes of a disgusting nature imperfectly proved, the open trial of which is in itself an evil, and by no means a small one.

The Draft Code proposed to sweep away completely all the technicalities as to indictments, which have been half effaced already. This was effected by a series of sections, which stated shortly, but in positive terms, what the requisites of an indictment were to be, and then declared negatively that no one of the old objections should be made to them. The following sections speak for themselves, and contain the gist of the proposed alterations:—

"SECTION 482.—FORM AND CONTENTS OF COUNTS.—Every "count of an indictment shall contain and shall be sufficient "if it contains in substance a statement that the accused has "committed some offence therein specified. Such statement "may be made in popular language without any technical "averments or any allegations of matter not essential to "be proved, and may be in the form I (2) in the first schedule "hereto or to the like effect.

"Such statement may be in the words of the enactment "describing the offence or declaring the matter charged "to be an indictable offence, or in any words sufficient "to give the accused notice of the offence with which he "is charged.

"Every count shall contain so much detail of the circum-"stances of the alleged offence as is sufficient to give the "accused reasonable information as to the act or omission to "be proved against him, and to identify the transaction "referred to: Provided that the absence or insufficiency "of such details shall not vitiate the count, but the Court "may order an amendment or further particulars, as herein-"after mentioned.

"A count may refer to any section or sub-section of "any statute creating the offence charged therein, and in

"estimating the sufficiency of such count the Court may "have regard to such reference.

"Every count shall in general apply only to a single "transaction.

"SECTION 483.—OFFENCES MAY BE CHARGED IN THE "ALTERNATIVE.—A count shall not be deemed objectionable "on the ground that it charges in the alternative several "different matters acts or omissions which are stated in the "alternative in the enactment describing any offence or "declaring the matters acts or omissions charged to be an "indictable offence, or on the ground that it is double or "multifarious: Provided that the accused may at any stage "of the trial apply to the Court to amend or divide any such "count on the ground that it is so framed as to embarrass "him in his defence.

"The Court, if satisfied that the ends of justice require it, "may order any count to be amended or divided into two or "more counts, and on such order being made, such count "shall be so divided or amended, and thereupon a formal "commencement may be inserted before each of the counts "into which it is divided."

Illustrations were given in the schedule of forms of the kind of indictments which would have been drawn under this system. They were as follows:—

I (1) *Heading.*

"In the (*name of the Court in which the indictment is "found*).

"The jurors for Our Lady the Queen present that

"[*Where there are more counts than one add at the beginning "of each count*]:

"'The said jurors further present that'

I (2) *Charge.*

Examples of the manner of stating Offences.

"(*a*) *A.* murdered *B.* at on

"(*b*) *A.* stole a sack of flour from a ship called the at on

"(c) *A.* obtained by false pretences from *B.* a horse a cart " and the harness of a horse at on

"(d) *A.* committed perjury with intent to procure the " conviction of *B.* for an offence punishable with penal ser- " vitude, namely robbery, by swearing on the trial of *B.* for " the robbery of *C.* at the Court of Quarter Sessions for the " West Riding of the county of York, held at Leeds on the " day of 1879; first, that he *A.* saw " *B.* at Leeds on the day of ; secondly, " that *B.* asked *A.* to lend *B.* money on a watch belonging to " *C.*; thirdly, *&c.*

or

"(e) The said *A.* committed perjury on the trial of *B.* at a " Court of Quarter Sessions held at Kilkenny on " for an assault alleged to have been committed by the said " *B.* on *C.* at Kilkenny on the day of , by " swearing to the effect that the said *B.* could not have been " at Kilkenny at the time of the alleged assault, inasmuch " as the said *A.* had seen him at that time in Waterford.

"(f) *A.*, with intent to maim disfigure disable or do " grievous bodily harm to *B.*, or with intent to resist the law- " ful apprehension or detainer of *A.* [or *C.*], did actual bodily " harm to *B.* [or *D.*].

"(g) *A.*, with intent to injure or endanger the safety of " persons on the North-Western Railway did an act calculated " to interfere with an engine a tender and certain carriages on " the said railway on at by [*describe* " *with so much detail as is sufficient to give the accused reason-* " *able information as to the acts or omissions relied on against* " *him, and to identify the transaction.*]

"[1](g) *A.* published a defamatory libel on *B.* in a certain " newspaper, called the on the day of " A.D. , which libel was contained " in an article headed or commencing [*describe with so much* " *detail as is sufficient to give the accused reasonable information* " *as to the part of the publication to be relied on against him*], " and which libel was written in the sense of imputing that " the said *B.* was [*as the case may be*].

[1] (*g*) in the original. The lettering is wrong.

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(*h*) "That *A.* without leave of Her Majesty did at [*Birken-*
" *head*] equip, furnish, fit out, or arm, or attempt, or endeavour
" to equip, furnish, fit out, or arm [*this is rendered sufficient*
" *by Section* 483 *of the Code; Section* 71 *renders it unnecessary*
" *to proceed to state that they 'procured, aided, or assisted' in the*
" *equipment*] a ship called the '*Alexandra*,' in order that it
" might be employed in the service of a certain foreign
" power called the Confederate States [*see Section* 484 *of the*
" *Code*] against a foreign power called the United States,
" with which Her Majesty was not then at war.

If these forms are compared with those to which I have referred in Chapter IX., the extent to which they would simplify the law will at once become apparent. The illustration marked (*h*) is the equivalent of the information in [1] R. *v.* Sillem, which contained ninety-five counts, charging separately all the combinations of the different operative words of the statute.

In order to prevent the prisoner from being embarrassed by the generality of indictments so drawn, the Code provided that he should be entitled to particulars of any statement which the court, after having regard to the indictment and to the depositions, believed to be really embarrassing. [2] Counts for different offences were allowed to be joined in all cases whatever, according to the present practice as to misdemeanours. An exception was made in regard to charges of murder, which, it was provided, were to be joined only with counts charging murder, so that if, as sometimes happens, a man set fire to a house, stole part of the property contained in it, and burned several persons to death, he might be charged in one indictment for the murder of all the persons burnt, the murder of each being charged in a separate count. He might also be charged in another indictment for arson and theft, the arson being charged in one count and the theft in another. This limitation upon the general rule was made because it was considered that on a trial for a capital crime the attention of the jury ought not to be diverted by any other inquiry, especially as the introduction of other charges might, under circumstances, invite a compromise. [3] The

[1] 2 Hurl. and Colt. p. 431. [2] S. 493. [3] S. 507.

prisoner was in all cases to be entitled to a copy of the indictment.

With regard to the place and mode of trial, the substance of the Draft Code was that accused persons should be brought before a justice having jurisdiction over the place where the offence was committed, and by him committed for trial to the court having jurisdiction over that place, but that this should be subject to a power in the Queen's Bench Division to direct a trial in any competent court. The court was also to have a right in every case to order a trial by a special jury.

The present law as to process to compel appearance on an indictment found was re-enacted in substance subject to only one alteration.—[1] outlawry was abolished. In the Draft Code of 1878 I proposed that for outlawry should be substituted a power to make a fugitive from justice a bankrupt, which would have involved the forfeiture of his property. The Commission of 1879 did not consider this necessary, but I doubt whether the omission was wise. It is true that under the provisions of extradition treaties offenders may in many cases be arrested abroad and brought back to England, but I do not see why, if a wealthy man committed treason or treasonable felony, he should be able to live in France with no other inconvenience than that of being unable to return to England. If a man will not answer to the laws of his country, I think he ought to forfeit the property which he holds under their protection. Forfeiture was expressly maintained in cases of outlawry by 33 & 34 Vic. c. 23, s. 1. The process of outlawry is practically obsolete, but bankruptcy is well understood; and if flying from justice were made an act of bankruptcy, it would operate as a severe check upon wealthy persons disposed to avoid justice.

Few alterations were suggested in the law relating to the actual trial, and those which were suggested were all in the direction of removing the few technical rules which still hamper the administration of justice.

The alterations proposed were as follows :—

First, with a view to the simplification of the process of appeal, it was proposed to abolish the present record, which is

[1] S. 501.

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a document cumbrous and technical in the highest degree. For it was to be substituted a minute, to be made in a book to be called the Crown Book, kept for that purpose by the officer of the court, which would in every case record in a prescribed form all the essential parts of the proceedings, for the information of the Court of Appeal, if any appeal should take place. [1] The court was empowered to discharge the jury and adjourn the trial for the production of witnesses, but only in cases in which it appeared that the accused had been taken by surprise by the production of unexpected witnesses or that the prosecution had omitted to call witnesses whom they ought to have called. The jury of matrons in cases of pregnancy was abolished, and an examination by medical men substituted for it, and some minor matters which it is unnecessary to notice in detail, were provided for.

Of the proposal made for the examination of the prisoner I have already spoken, and I have also given an account of the alterations proposed as to appeals in criminal cases, as I thought that those proposals would be most naturally and easily considered in connection with a statement of the existing law and its history. One small alteration was not made which I think might be made with advantage. I think the judge ought to have a discretion to clear the court at the trial of indecent cases. At present it is usual to order boys and women to withdraw, but this is not in my judgment enough. The eagerness with which large numbers of men of all ages, especially young men and old men, press to hear cases which would make any decent person sick is revolting, is an insult to all good morals, and I am convinced does infinite mischief. All necessary publicity might be secured, and all possibility of perversions of justice by reason of the exclusion of public opinion might be avoided, by providing that persons having business in the court, and particularly reporters for newspapers, should not be excluded. The wholesome influences of public opinion would thus be retained, whilst the wretched creatures who gloat over the very worst forms of crime and vice would be prevented from turning what ought to be a school of virtue into a scene for the gratification of the lowest forms of vice.

[1] S. 525.

If these proposals had been, or if hereafter they should be, adopted, I think our system of criminal procedure would form a whole as complete, compact, and systematic as if it had been the work of a single mind. It would also have had the advantage of being passed, put together, and tested in every one of its constituent parts, by a succession of judges and legislators reaching back uninterruptedly to remote antiquity; and it would thus represent the experience of many centuries slowly accumulated and at last reduced to a definite, explicit system by a single statute.

No mere statement of such a system can give a full impression of its general character. In order to do this in a satisfactory manner it will be well to contrast it with what may be described as the great rival system of criminal procedure. The English system has extended itself not only over England and Ireland, but with variations over the whole of the North American continent; over all the English colonies, and in particular over Australia, the Cape of Good Hope, and New Zealand; and has formed the foundation of a system established throughout the Indian Empire, of which I shall give a full account in another part of this work.

The French *Code d'Instruction Criminelle* has served as a model for the legislation of a large part of continental Europe. It was the result of a different order of ideas from our own. It is enforced by a system of institutions widely different from ours; and though to a certain extent it has adopted our leading institution, trial by jury, a French jury occupies a position differing in many particulars from that of an English jury. In order to complete this chapter I will now proceed to give some account of French criminal procedure, comparing or contrasting it with our own.

The following is the organisation of the French criminal courts of justice. There are in France [1] twenty-six Courts of

[1] Agen; 2. Aix; 3. Ajaccio; 4. Amiens; 5. Angers; 6. Besançon; 7. Bordeaux; 8. Bourges; 9. Caen; 10. Dijon; 11. Douai; 12. Grenoble; 13. Limoges; 14. Lyons; 15. Montpellier; 16. Nancy; 17. Nimes; 18. Orleans; 19. Paris; 20. Pau; 21. Poitiers; 22. Rennes; 23. Riom; 24. Rouen; 25. Toulouse; 26. Chambèry. Brussels and Liège were also the seats of Courts of Appeal, when they were established by the law of 27 Ventôse, An. VIII., and so were Colmar and Metz. These have ceased to be parts of France. Chambèry was added on the annexation of Nice in 1860 (Cours d'Appel, *Lois Usuelles*, p. 457). These courts have also been called *Cours Impériales* and *Cours*

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Appeal. [1] There are an indeterminate number of Courts of First Instance. [2] There is in every *commune* one *juge de paix* at least. Others are divided between two or more. These are the French courts, from which are taken the Criminal Courts as follows:—

[3] The *Cour d'Assises* is taken from each *Cour d'Appel*. It consists of three judges, one of whom is president. In the departments where the *Cours d'Appel* sit, all the judges are members of the *Cour d'Appel*. In the other departments the president must be a member of the *Cour d'Appel*. The other two members may either be members of the *Cour d'Appel* or presidents or judges of the Tribunal of First Instance for the place in which the *Cour d'Assises* sits.

The *Cour d'Assises* sits in and for every department every three months, but if need be they may sit more often. The *Cours d'Assises* try by a jury and [4] the proper subject of their jurisdiction are *crimes* as distinguished from *délits*; but they have also a special jurisdiction in some particular cases, and if a case tried before them turns out to be a *délit*, or even a police offence, they may deal with it.

[5] The *Tribunal Correctionnel* is the Tribunal of First Instance sitting as a criminal court. It consists of three judges taken from the Court of First Instance. They try without a jury, and have jurisdiction over *délits*, that is to say, over offences which can be punished with more than five days' imprisonment and more than 15 francs fine, but not with death, *travaux forcés*, or *reclusion*. The highest punishment which they can inflict is five years' imprisonment, or, in cases of a second conviction, ten years'. They may also in many cases try persons under sixteen for *crimes* punishable with *travaux forcés* for not exceeding twenty years or *reclusion*.

Lastly, the *juges de paix* are judges in regard to police

Royales. Most of them have three departments under their jurisdiction; six, namely Montpellier, Nancy, Nîmes, Poitiers, Riom, and Toulouse, have four each; one, Rennes, has five; and Paris has seven.

[1] Law of April 20, 1810, ch. 5.

[2] *Code d'Instruction Criminelle*, pp. 141-142. I refer to the Code as *C. I. C.*

[3] See *C. I. C.* pp 251-265.

[4] *C. I. C.* p. 133; and see Hélie, *Prat. Crim.* i. pp. 434, 824.

[5] *C. I. C.* pp. 179-181; and see Hélie, *Prat. Crim.* ii. pp. 187-188.

offences punishable with a fine not exceeding 15 francs, or imprisonment not exceeding five days.

[1] If the *juge de paix* sentences any one to imprisonment or to a fine of more than 5 francs, an appeal lies to the Tribunal of Correctional Police; but it is not expressly stated in the Code whether the defendant only or the prosecutor also may appeal. The appeal suspends the execution of the sentence, and may, if either of the parties or the *Procureur de la République* requires it, be by way of rehearing.

[2] An appeal lies from the Correctional Court to the Court of Appeal in the case of all final judgments, and of such interlocutory judgments as have a direct bearing upon the final judgment. [3] Either the defendant, the *partie civile*, the *Procureur de la République*, or the *Procureur-Général* may appeal. [4] The appeal is heard as if it were a case brought before the court in its original jurisdiction. [5] The court may dismiss the defendant if it thinks that the facts proved constitute neither a *contravention* nor a *délit* nor a *crime*. [6] If they think that the offence was not a *délit*, but was a *contravention*, they may inflict the proper punishment. [7] If they think the facts amount to a *crime* they may take steps for the trial of the case before the *Cour d'Assises*. [8] If they set aside the judgment on account of the violation or omission of forms prescribed by law under penalty of nullity, they may decide upon the merits.

There is no appeal, properly so called, from the decisions of a *Cour d'Assises*.

All the courts, the *Cours d'Assises* as well as the rest, are subject to an appeal, as we should say, on matter of law only, to the Court of Cassation. [9] This court sits at Paris, and is composed of [10] three chambers, in each of which there are sixteen judges. The leading principle as to its duties is thus stated by [11] M. Hélie. "Il est de principe que la Cour

[1] *C. I. C.* 172-178.
[2] *C. I. C.* 199, *seq.*; Helie, *Prat. Crim.* i. p. 248, *seq.*
[3] *C. I. C.* 202. [4] *C. I. C.* 210, 190. [5] *C. I. C.* 212.
[6] *C. I. C.* 213. [7] *C. I. C.* 214. [8] *C. I. C.* 216.
[9] Roger et Sorel, *Lois Usuelles*, p. 414; Law 27 Ventôse, An. VIII.
[10] "La chambre des requêtes, la chambre civile, et la chambre criminelle." —Roger et Sorel, p. 417; Law 15 Jan. 1826, art. i.
[11] *Prat. Crim.* i. p. 551.

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Such are the French courts. The general scheme of their jurisdiction, and their relation to each other, has some points of marked resemblance to our own. The *juge de paix* may be compared to a police magistrate, the Correctional Tribunal to a court of quarter sessions, the *Cours d'Assises* to our Assize Courts, and the criminal chamber of the Court of Cassation to our Court for Crown Cases Reserved, but this general resemblance goes but a little way. Each of the courts in question might be made the subject of a contrast to the corresponding court in England much more striking than any comparison between them could be. In the first place, the whole system is far more systematic than our own, and bears in every part of it the trace of having been formed upon one general design. There is a neatness in the way in which the tribunals of first instance and the courts of appeal are related to each other, to the criminal courts derived out of them, and to the Court of Cassation, which does not exist in our institutions; but I am not sure that there is any special advantage in this. If the English courts were described in terms (so to speak) of the French courts, we should have to say that there is one Court of Appeal in England, namely, the High Court of Justice, that in each county and in every borough having a separate court of quarter sessions there is a correctional tribunal called the Court of Quarter Sessions, and that there are also *juges de paix*, or justices of the peace, in and for each county and borough—some paid, but mostly unpaid; that the correctional tribunal is composed of all the *juges de paix* in the county or borough who choose to attend at the quarter sessions, and that each *juge de paix*, by himself or in company with another, has jurisdiction to try all police cases.

Many observations might be made on the difference of the position of judges in France and England. One is specially characteristic and important—their comparative number. The English Supreme Court of Judicature consists of the Court of Appeal, in which there are five ordinary judges, and four *ex officio* members—the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, and the President of the Probate Division (none of these, except the Master of the Rolls, usually sits in the Court of Appeal). The High Court of Justice consists of three divisions—the Chancery Division, with five judges; the Queen's Bench Division, with fifteen, of whom the Chief Justice of England is one; and the Probate, Divorce, and Admiralty Division, with two judges, of whom the President of the Division is one. The whole number of judges is thus twenty-nine, of whom nine are members of the Court of Appeal. To these may be added three paid judges of the House of Lords and two paid judges of the Judicial Committee of the Privy Council, making up the whole number to thirty-four—or two less than three-fourths of the number of the Court of Cassation. Five of the English judges are appellate judges only. The twenty-nine others discharge not only all the duties of the Court of Cassation, but most of the duties of the twenty-six French courts of appeal, and in particular all the duties of all the *Cours d'Assises* and many of the duties of the Courts of First Instance. [1] By the law of April 20, 1810, the number of judges in the *Cours d'Appel* is fixed as follows:—Paris, forty to sixty, other courts twenty to forty. Taking thirty as the average number of judges of a Court of Appeal, this would give in all 810 judges for duties which in England are performed by twenty-nine.

A [2] law of July 21, 1875, fixes the establishment of the Tribunal of First Instance for the Seine as follows:—One president, eleven vice-presidents, sixty-two judges, fifteen supplementary judges—in all, eighty-seven judges. There are in the Metropolitan District in England only eleven county courts in all (counting the Lord Mayor's court as one), with a single judge for each court. In the Tribunal of First Instance for the

[1] Roger et Sorel, *Lois Usuelles*, p. 469. [2] *Ib.* p. 493.

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Department of the Seine there are more judges than there are county courts in all England and Wales. The largeness of the number of the French judges cannot but diminish very greatly their individual importance in comparison with that of English judges. Indeed, as will appear, the functions discharged by most of them in the actual management of criminal trials are of little importance. Some sort of analogy to this may be found in the number of persons included in our Commissions of Oyer and Terminer and Gaol Delivery almost entirely by way of compliment.

Passing from the constitution of the courts to their jurisdiction, the first remark which occurs is that our courts of summary jurisdiction have a much more extensive power than the French *juges de paix*. There is no definitely fixed limit to the authority of our stipendiary magistrates and justices in petty sessions. Their powers depend in every case on the statutes which create offences and give them jurisdiction for their punishment. There are many instances in which they may sentence offenders to six months' imprisonment and hard labour, some in which they may go as high as nine months, and [1] a few in which they may go as far as twelve months. They may also, in many cases, inflict heavy fines and forfeitures; as, for instance, £100 and £50 for offences against the law relating to explosive substances. Power to fine up to £10, £20, or £30, is given in almost innumerable cases. This is in marked contrast to the French law, which limits the *juge de paix* to imprisonment for not exceeding five days, and fine not exceeding 15 francs.

It may be observed that as there is an appeal from the *juge de paix* to the Tribunal of First Instance, so there is in many cases an appeal by statute from a conviction by a Court of Summary Jurisdiction to the Court of Quarter Sessions.

I now come to compare the Court of Quarter Sessions to the Correctional Tribunal. As far as regards the Constitution of the Courts the resemblance is greatest in the case of the Borough Courts of Quarter Sessions, as they, like the correctional tribunals, are held before professional judges,

[1] *E.g.* in the case of certain offences by convicts, under 34 & 35 Vic. c. 112, s. 7 (Prevention of Crimes Act, 1871).

namely, the Recorders and Deputy-Recorders of boroughs. In the English courts, however, there is only one judge, whereas in the French courts there must be at least three. The County Quarter Sessions, with their volunteer judges and chairmen are altogether unlike any French tribunal. In the English courts there is a jury. In the French courts there is none. As regards the extent of the jurisdiction of the courts, the English Courts of Quarter Sessions may (subject to certain specified exceptions) try any cases which are neither capital nor punishable on a first conviction with penal servitude for life, but on a second conviction they can (theoretically) sentence to penal servitude for life. In practice such sentences are exceedingly rare. The French courts are limited to *délits*, and can pass no heavier sentence than five years' imprisonment on a first conviction, or ten years on a second.

The French correctional courts may thus be regarded as having most of the jurisdiction of our Courts of Quarter Sessions, and much of the jurisdiction of our Courts of Summary Jurisdiction. The right of appeal from a French Correctional Court to the *Cour d'Appel* is unlike anything in our Courts of Quarter Sessions. No appeal lies from their decisions, which, no doubt, is a consequence of their trying by a jury. Trial by jury is inconsistent with an appeal by way of rehearing, though not with an order for a new trial before another jury.

The Courts of Assize, the Central Criminal Court, and the Queen's Bench Division in its original jurisdiction, have much in common, as far as jurisdiction goes, with the French *Cours d'Assises*. They differ, however, in the circumstance that they can, and not unfrequently do, try causes of small importance, although their principal function is to try cases of the more serious kind.

I now pass to the procedure followed in these various courts in order to bring particular offenders to justice. The first point to be noticed in connection with this subject is the existence and organisation in France of a body to which nothing at all analogous exists in England. I have already explained at length and in detail in what sense it is true

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that the administration of criminal justice in England is in the hands of private individuals, and I have pointed out that though a standing army for the suppression of crime has been established in England in the course of the present century, the police who constitute it can do hardly any single act for the suppression of crime or the apprehension and discovery of offenders which might not in case of need be done, and which indeed is not constantly done, in fact, by private persons.

This is diametrically opposed to the principles and practice of the French. The first article of the *Code d'Instruction Criminelle* is in these words, "L'action pour l'application des "peines n'appartient qu'aux fonctionnaires auxquels elle est "confiée par la loi. L'action en réparation du dommage "causé par un crime, par un délit, ou par une contravention "peut être exercée par tous ceux qui ont souffert de ce dom-"mage." The detection and punishment of crime is thus theoretically as well as practically regarded by the French as essentially a matter of public concern to be provided for by public officials appointed for that purpose. On the other hand, in every French criminal proceeding, from the most trifling to the most important, any person injured by the offence may make himself *partie civile*. In certain cases he may, by doing so, be made liable in damages to the accused. A French criminal trial may thus be also a civil proceeding for damages by the party injured by the crime, and at the same time an action by the accused for what we should call a malicious prosecution.

The French police accordingly is organised in a totally different manner from our own, and has very different duties. Section 8 of the *Code d'Instruction Criminelle* is as follows: "La police judiciaire recherche les crimes, "les délits, et les contraventions, en rassemble les preuves, "et en livre les auteurs aux tribunaux chargés de les "punir."

A complete body of persons is organised for this purpose. At the *Cours d'Appel* there is a staff of officers who act as public prosecutors and are described collectively as the *Ministère Public*. [1] The *Ministère Public* at the *Cours d'Assises*

consists of the *Procureur Général*, and the *Avocats Généraux*, who are his substitutes. By Article 279 of the *Code d'Instruction Criminelle* it is enacted that "tous les officiers de police "judiciaire, même les juges d'instruction, sont soumis à la "surveillance du Procureur Géneral. Tous ceux qui d'après "l'article 9 du present code sont à raison des fonctions même "administratives appelés par la loi à faire quelques actes de "la police judiciaire, sont, sous ce rapport seulement soumis à "la même surveillance."

The officers of the judicial police are as follows:—

[2]In every *arrondissement* there must be a *Juge d'Instruction*, who is appointed to that office for three years by the President of the Republic, but is capable of being reappointed. He must be a judge or supplementary judge of the civil tribunal of the *arrondissement*, and more than one may be appointed if necessary. At Paris there are six. In every tribunal of first instance there is a *Procureur de la République* with substitutes who form the *Ministère Public* for that court. In the court of the *juge de paix* the commissary of police is the *Ministère Public*. The *juges de paix*, the *maire* and their *adjoints*, the commissaries of police, the gendarmerie, the *gardes champêtres*, and the *gardes forestiers* are also officers of the judicial police.

Their functions and the procedure adopted differ according to the nature of the offences to be inquired into.

[3]If the offence is a contravention of police, and if the offender is "en flagrant délit," or as our own law says, "found committing" the offence, or if he is "dénoncé par la clameur publique," the *gardes champêtres* or *gardes forestiers* may at once arrest him and take him before the *juge de paix* or the *maire* if he is liable to imprisonment.

[4]In other cases the *garde champêtre* or *forestier* draws up a *procès-verbal* for the purpose of recording the circumstances, the time of the supposed contravention and such proofs or evidence of it as they can find. A *procès-verbal* is a document unlike anything which we make use of in English procedure.

[1] *C. I. C.* 252.
[2] *C. I. C.* 55; and see Hélie, p. 63.
[3] *C. I. C.* 16.
[4] *C. I. C.* 16.

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It is thus defined by M. Hélie :—

[1] "Les procès-verbaux sont les actes dans lesquels les "officiers publics constatent les faits qualifiés par la loi "crimes, délits, ou contraventions, leurs circonstances, les "traces qu'ils ont laissées et tous les indices propres à en "signaler les auteurs." [2] A *procès-verbal* must be made within a short time, not precisely fixed, but differing in different cases, after the matters it records are observed. It must be written, signed and dated by the person who makes it. It must state the facts constituting any *délit* or *contravention* which it records, and the name, if possible, of the offender, and it ought to contain a list or description of any articles seized. In some cases it is, and in others it is not verified upon oath before a *juge de paix* or a *maire*. [3] A *procès-verbal* may be a mere *renseignement*, it may be *primâ facie* evidence of the matters stated, and this is the case with the *procès-verbaux* of *maires*, commissaries of police, *gendarmes*, *gardes champêtres* and *forestiers*, and many others. It may be evidence "jusqu'à l'inscription de faux," *i.e.* till legal means are taken to set it aside as being false. This is the case with the *procès-verbaux* of Custom House officers in some cases, and other executive officers of importance.

[4] When the *procès-verbaux* have been made, the party to whom they refer is either cited before the *juge de paix* or informed verbally, or indeed in any way, that his case is to be heard. If there is a citation there must be a day's notice. [5] The commissary of police acts as public prosecutor, the *juge de paix* as judge. [6] The hearing must be public and in the following order: The *procès-verbaux* are read by the [7] *greffier*. The witnesses summoned by the *Ministère Public* or the *partie civile* are heard; the *partie civile* and the defendant are heard, and the defendant calls his witnesses; the *Ministère Public* sums the matter up, and states its conclusions, after which the defendant "pourra proposer ses observations," as it is in all French trials a rule that the

[1] *Prat. Crim.* i. p. 146.
[2] *Ib.* pp. 147-148.
[3] *Ib.* p. 151.
[4] *C. I. C.* 21 and 137-154.
[5] *C. I. C.* 144.
[6] *C. I. C.* 153.
[7] In all French courts there is a greffier, who answers to our clerk of assize, clerk of the peace, and clerk to the magistrate.

accused shall have the last word. Finally the court gives judgment either at the hearing or at latest at the next hearing.

[1] The proceedings before a correctional court are very similar to those which take place before a *juge de paix*. The defendant may appear if he likes on a mere statement that his case is to be heard. If he does not appear he must be cited to appear by a citation stating the facts, which may be given either by the *partie civile* or by the *Procureur de la République* who in these courts acts as public prosecutor. [2] If a defendant is taken "en flagrant délit" he may be brought at once before the *Procureur de la République*, who is to interrogate him and take him at once before the tribunal "s'il y a lieu," that is, as it has been held if the defendant is a vagabond or a *repris de justice*. The court, however, even in this case will give three days' time to the defendant to prepare his defence if he asks for it. If the defendant is a person of good character and known domicile he is to be cited.

The proceedings before the court differ from those before the *juge de paix* principally in the circumstance that the defendant must be interrogated. This procedure differs from that which is followed in our courts of summary jurisdiction, to which it should be compared, principally in being more summary in cases other than those of *flagrant délit*. Where an offender is found committing an offence for which he may be imprisoned in a summary way, he is dealt with in France much as he is in England. In other cases there is this difference. In English courts of summary jurisdiction there must, as a rule, be a summons, and if the person summoned does not appear, a warrant may be issued for his apprehension. In the French police courts and correctional courts, a person who does not appear on citation may be tried in his absence [3] by default, but he has a right to set aside such a judgment by "forming opposition" to it within a certain time, in which case he has a right to be heard at the next sitting of the court.

[1] *C. I. C.* p. 179-200.
[2] Hélie, *Prat. Cr.* i. p. 196, quoting law of May 26, 1863.
[3] *C. I. C.* 149, *seq.* and 185, *seq.*

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I come now to the more careful and elaborate procedure which is followed in the case of *crimes*, though it may also be applied to the case of *délits* and *contraventions*. The summary methods already described are peculiar to the case of *délits* and *contraventions*.

There are various ways in which the first steps may be taken towards the commencement of serious criminal proceedings. They seem to be four in number, though they are not specifically distinguished in the *Code d'Instruction Criminelle*. All are more or less affected by the definition of *flagrant délit*, which is as follows:—[1] "Le délit qui se "commet actuellement, ou qui vient de se commettre est "un flagrant délit. Seront aussi reputé flagrant délit, le cas "où le prévenu est poursuivi par la clameur publique et celui "où le prevenu est trouvé saisi d'effets, armes, instruments, "ou papiers faisant presumer qu'il est auteur ou complice, "pourvu que ce soit dans un temps voisin du délit."

With regard to cases of *flagrant délit*, where the punishment involves any "peine afflictive ou infamante," any one is authorised, and indeed required, to arrest the offender at once. [2] "Tout dépositaire de la force publique, et même "toute personne, sera tenu de saisir le prevenu surpris en "flagrant délit, et de le conduire devant le Procureur de la "République sans qu'il soit besoin de mandat d'amener si "le crime ou délit emporte peine afflictive ou infamante." This resembles, as closely as the nature of the case permits, our law as to arrest without warrant in cases of felony and in other cases subjected to it by statute. When the prisoner is brought before the *Procureur de la République*, he is to be dealt with by him as if he had been brought before him otherwise.

In the second place, proceedings may begin by a "*dénonciation*," which is [3] defined by M. Hélie as "l'avis donné "au Ministère Public des crimes ou délits dont on a con-"naissance." [4] The *Code d'Instruction Criminelle* requires all constituted authorities, functionaries, and public officers who in the exercise of their functions come to know of a *crime*

[1] *C. I. C.* 41.
[2] *C. I. C.* 106.
[3] Hélie, *Prat. Cr.* i. p. 49.
[4] *C. I. C.* 29-31.

or *délit*, and all persons who have witnessed a violent attack (*attentat*) either upon the public safety or the life or property of an individual, to give notice of it to the *Procureur de la République*,[1] or to the *maire*, commissary of police, [2] *juge de paix*, or officer of gendarmerie, who are to [3] transmit the *dénonciation* to the *Procureur de la République*.

In the third place, any person injured by a *crime* or *délit* may make a complaint (*plainte*), and [4] constitute himself *partie civile* before a *juge d'instruction*.

In the fourth place when any of the officers of the judicial police have become aware of the fact that a crime has been committed they are empowered and required at once to take proceedings for the detection and apprehension of the criminal.

The principal officers by whom these duties are discharged are the *Procureur de la République* and the *Juge d'Instruction*. Their duties are similar, and the *Code d'Instruction Criminelle* seems to assume that the *Procureur de la République* will first appear upon the scene, and that he will be followed by the *Juge d'Instruction* [5] to whom, as well as to the *Procureur Général*, the *Procureur de la République* is bound to give notice of his proceedings, and upon whose appearance the matter will, to some extent, be taken out of his hands. To begin then with the duties of the *Procureur de la République* [6] in every case of *flagrant délit* punishable with death, *travaux forcés*, transportation, detention, *reclusion*, banishment, or civil degradation, he is bound at once to go to the place, to draw up the *procès-verbaux* necessary to ascertain and record the fact that the offence has been committed (*constater le corps de délit*), its nature, and the state of the place where it was committed, and to receive the declarations of the persons who were present or who have information to give. He must call before him all persons presumed to be in a state to give information, and take down their declarations in writing. He has a right to

[1] *C. I. C.* 50. [2] *C. I. C.* 48. [3] *C. I. C.* 54.
[4] *C. I. C.* 63, *seq.* [5] *C. I. C.* 22, 32.
[6] *C. I. C.* 32-47. "Lorsque le fait sera de nature a entrainer une peine "afflictive ou infamante." The punishments are those so described in the *Code Penal*, 7 and 8.

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forbid any one to leave the house or place where the inquiry is going on under penalty of ten days imprisonment and 100 francs fine; he is to seize arms used in the crime, things acquired by it, and, "in short, everything which can be "of service for the manifestation of the truth." He is to question the suspected person on all these matters, and to make *procès-verbaux* of them. He may also search for papers and seal up all he finds. His *procès-verbaux* ought to be made in the presence of and countersigned by the commissary of police, the maire, or two citizens. He may arrest any suspected person against whom there are strong presumptions (*indices graves*), or if he does not appear may issue a warrant (*mandat d'amener*) against him. He may also summon experts, and in particular medical experts. The results of all these inquiries, and all *procès-verbaux*, papers, and other matters are to be transmitted by the *Procureur de la République* to the *Juge d'Instruction.*

[1] In any case in which the master of a house calls upon the *Procureur de la République* to record the commission in that house of any *crime* or *délit*, *flagrant* or not, the *Procureur de la République* has the same powers as he has in the case of *flagrant delit.*

[2] In cases where the *Procureur de la République* learns by any means that a *crime* or *délit*, not *flagrant*, has been committed, or that a person suspected of any *crime* or *délit* is in his arrondissement he is bound to call on the *Juge d'Instruction* to inquire into the matter, but cannot proceed himself in the manner just described.

I now come to the functions of the *Juge d'Instruction.* [3] In the first place, in all cases of *flagrant délit* or apparently requisition by the master of a house he may do himself all the acts which may be done by the *Procureur de la République* as already described, and he may call upon the *Procureur de la République* to be present, but not so as to delay operations in which he may be engaged. He is bound to examine all documents transmitted to him by the *Procureur de la République*, and may go over them again if he considers them incomplete.

[1] *C. I. C.* 46. [2] *C. I. C.* 47. [3] *C. I. C.* 59-60.

[1] By whatever means he becomes informed of a crime he must send for every one mentioned to him as having knowledge of the circumstances, and must examine them upon oath separately,[2] secretly, and in the absence of the accused. Their depositions are signed by the judge, by the *greffier* who takes them down, and by the witnesses themselves.

As to the manner in which the depositions are to be taken M. Hélie makes the following observation, [3] "Il est généralement reconnu que le juge d'instruction ne doit point procéder vis-à-vis des temoins par forme d'interrogatoire, il doit les entendre et recueillir leurs declarations, il doit à la fois maintenir dans le procès-verbal leurs expressions, leurs phrases, en un mot l'originalité de la deposition. Il doit constater les circonstances qui'impriment à chaque declaration un caractère plus ou moins marqué de certitude."

The judge may search the house of the suspected person, or search for and seize documents or other things in the same way as the *Procureur de la République.*

[4] With respect to procuring the presence of suspected persons who have not been arrested by the *Procureur de la République,* the *Juge d'Instruction* may issue either a *mandat de comparution,* which answers to our summons, or a *mandat d'amener* which answers to our warrant. If the defendant is arrested in the manner described above by the *Procureur de la République,* [5] he is "en état de mandat d'amener," till he is brought before the *Juge d'Instruction.* [6] When the suspected person appears before the *Juge d'Instruction* either upon a *mandat de comparution,* or upon a *mandat d'amener,* he must be interrogated in the case of a *mandat de comparution* at once; in the case of a *mandat d'amener* within twenty-four hours. If his answers are satisfactory he is discharged, if not he is remanded under a *mandat de dépôt.* This *mandat de dépôt* may be changed into a *mandat d'arrêt* (which however can be issued only upon the requisition of the *Procureur de la République*), at any period

[1] *C. I. C.* 71-79.
[2] This is not stated in words in the Code, but the practice is so, and the Code does not prescribe publicity.
[3] *Prat. Crim.* i. 84.
[4] Hélie, *Prat. Crim.* i. 99-102.
[5] *C. I. C.* 45.
[6] *C. I. C.* 93.

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of the instruction. The principal difference between them is, that the *mandat d'arrêt* is definitive, the *mandat de dépôt* provisional.

The interrogatory of the accused by the *Juge d'Instruction* is one of the most characteristic parts of the French procedure, and it is certainly the part which is most opposed to our English notions. [1] It is mentioned in the slightest possible way in the *Code d'Instruction Criminelle*, and in such a manner as to give no idea of its importance. [2] M. Hélie gives a fuller account, it is as follows, "Tout inculpé "contre lequel une procédure est instruite doit être interrogé "par le Juge d'Instruction. Ce n'est qu'en cas de flagrant "délit que cette formalité peut être remplie par le Ministère "Public et les officiers auxiliaires de la police judiciaire l'art "40 *C. I. C.* et l'art 1 de la loi du 20 Mai 1863, sur les "flagrants délits attribuent dans ce cas reputé urgent, ce droit "exceptionnellement au Procureur de la République. Mais "alors même le Juge d'Instruction qui peut refaire les actes "de cette procedure peut faire subir à l'inculpé un nouvel "interrogatoire.

"L'interrogatoire est à la fois un moyen de défense et "un moyen d'instruction. Il a pour but d'entendre les ex- "plications de l'inculpé pour les vérifier, de consigner "ses dénégations ou ses aveux, de chercher dans ses de- "clarations la vérité des faits. De ce qu'il constitue un "moyen de défense, il suit qu'il est considéré comme une forme "essentielle de l'instruction, et que la procédure serait frappée "de nullité si elle était close sans que le prevenu eût été en- "tendu ou dûment appelé. *De ce qu'il constitue un moyen "d'instruction, il suit que le Juge peut la réiterer toutes les fois "qu'il le juge utile.*

It is important to add here though it is not noticed by M. Hélie, that article 613 of the code which forms part of a chapter relating to prisons contains the following provision.

"Lorsque le Juge d'instruction croira devoir prescrire à "l'égard d'un inculpé une interdiction de communiquer il ne

[1] Dans le cas de mandat de comparution il interrogera de suite: dans le cas de mandat d'amener dans les vingt-quatre heures au plus tard.—*C. I. C.* 93. This is the only mention made of the interrogatory.

[2] *Prat. Crim.* i. 97 *seq.*

"pourra le faire que par une ordonnance que sera transcrite "sur le registre de la prison. Cette interdiction ne pourra "s'étendre au-delà de dix jours, elle pourra toute fois être renou- "velée. Il en sera rendu compte au Procureur Général."

The result is that a suspected person may at the discretion of the *Juge d'Instruction* be put in solitary confinement for an indefinite time, during which he may be interrogated by the *Juge d'Instruction* as often as the latter pleases. No limit is provided as to the time during which the "instruction" may last.

[1] M. Hélie has some observations on the principles on which the interrogation should proceed which are creditable to him, but which to judge from such reports of French trials as I have seen do not appear to receive in all cases the degree of attention of which they are worthy. "Il est aujourd'hui "de principe que le Juge d'Instruction doit se borner dans "l'interrogatoire a poser loyalement et clairement toutes les "questions qui resultent de l'étude consciencieuse des faits, "qu'il doit s'abstenir de ces demandes captieuses ou sugges- "tives employées dans notre ancienne jurisprudence pour "surprendre le prevenu, et provoquer ses contradictions enfin "qu'il ne doit se servir d'aucun detour d'aucun artifice pour "obtenir des revelations. Il peut sans doute lui adresser, "quoique avec prudence et reserve, de sages exhortations, il "peut lui démontrer par un raisonnement simple, l'insuffisance "de ses réponses, mais il ne doit point substituer à l'examen "un combat où le plus faible doit necessairement succomber. "Le droit d'interroger n'emporte pas celui de débattre les "reponses et de leur dresser des embûches au moyen de "questions habilement tissues. Le juge ne cherche pas un "coupable mais seulement la verité." He adds, "La règle "légale est qu'il doit être interrogé avant la communication des "charges" (evidence), "que cette communication doit lui "être donnée ensuite, et qu'il doit alors être interrogé de nou- "veau et être mis à même d'y répondre." The interrogatory is secret, the accused is not allowed to have counsel present. What he says is taken down in the form of a narrative in the

[1] Hélie, *Prat. Crim.* 97. Compare the conduct of the *juge d'instruction* in the case of Léotade, Vol. III. pp. 475-477.

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first person. [1] He may lay *mémoires* or written arguments before the *Juge d'Instruction*, but he has no legal right to see the depositions of the witnesses or other evidence against him. It is, however, usual to communicate to him in a final interrogatory all the evidence collected during the *instruction* that he may discuss them and prepare his defence.

[2] The *Juge d'Instruction* is bound to keep the *Procureur de la République* advised of all his proceedings, and the latter may demand to see all the documents as they are drawn up, but he must not keep them for more than twenty-four hours. If the *Juge d'Instruction* goes to any place for the purpose of his inquiry he must be accompanied by the *Procureur de la République*.

When the *Juge d'Instruction* has completed his inquiries, he must inform the *Procureur de la République* of the fact, and he within three days must make such requisitions as he thinks fit of the *Juge d'Instruction*.

[3] The *Juge d'Instruction* must deliver an interlocutory judgment (*ordonnance*) on these requisitions. If the *Juge d'Instruction* thinks that the facts proved do not amount to an offence against the law, or that the probability of the guilt of the accused is insufficient to put him on his trial, the judgment may be that "il n'y a pas lieu de poursuivre," upon which the defendant is set at liberty.

If the offence is regarded as a *contravention* the prisoner must, if in custody, be set at liberty, but sent before the tribunal of police.

If the offence is a *délit* the prisoner must be sent before the Correctional Court, and if the offence is one for which he may be imprisoned, he must be kept in custody if he is in confinement.

The *Procureur de la République* is to send the documents to the Court before which the prisoner is sent, and that Court disposes of the matter in the way already described.

If the *Juge d'Instruction* thinks that there is evidence enough to put the accused on his trial for a *crime*, he must order the documents in the case and a list of the exhibits

[1] *Prat. Crim.* 112.
[2] *C. I. C.* 61-62.
[3] *C. I. C.* 127-135; Hélie, *Prat. Crim.* 111-117.

(pièces servant à conviction) to be sent to the *Procureur Général* or the *Cour d'Appel*. Thereupon the *mandat d'arrêt* or *de dépôt* is continued until the Court of Appeal makes its order on the matter.

[1] The *Procureur de la République* or the *partie civile* may oppose the interlocutory judgment before the *chambre d'accusation*, but the prisoner is not allowed to do so unless the order has reference to his being admitted to bail and in some other rare cases.

[2] Every prisoner may, if both he and the *Procureur de la République* join in requesting it, be provisionally set at liberty on his undertaking to appear when required. In cases in which the maximum punishment is two years' imprisonment the prisoner has a right to be so set at liberty if he has a domicile, and has not been previously convicted of a crime or sentenced to a years' imprisonment. In cases in which the provisional liberation is not a matter of right the defendant may be held to bail.

This part of French Criminal Procedure is the part which differs most widely and most characteristically from our own, the *Procureur de la République* and *Juge d'Instruction*, their power of holding inquiries, drawing up *procès-verbaux*, examining suspected persons secretly, and without informing them even of the accusation or evidence against them, taking depositions behind their backs, and keeping them in solitary confinement till (whatever soft words may be used about it), every effort has been made to extort a confession from them, are contrasted in the strongest way with everything with which we are familiar, and which I have described, in detail, in the preceding chapters. To keep a man in solitary confinement and question him till he is driven into a confession is not the less torture because the process is protracted instead of being acute.

The instruction being completed the next step to be taken is the *mise en accusation*. This is the business of the *Chambre d'Accusation*, a body which answers roughly to our Grand Jury, though they differ widely, both in their constitution

[1] *C. I. C.* 135. [2] *C. I. C.* 113.

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and in their functions. [1] The constitution of the *Chambre d'Accusation* is determined, not by the *Code d'Instruction Criminelle*, but by the laws which regulate the *Cours d'Appel*. By these laws the *Cours d'Appel* (then called *Cours Impériales*) are divided into three chambers, the Chamber for Civil Affairs, the Chamber of Accusation, and the Chamber of Appeals in Correctional matters. The Chamber of Accusation must consist of five judges at least, and in the ordinary course of things [2] sits once a week, but the *Procureur Général* may convene them when he thinks fit. The *Procureur Général* and his substitutes the *Avocats Généraux* form the *Ministère Public* of the *Cours d'Appel* as well as of the *Cours d'Assises*.

[3] When the *Procureur Général* has received the documents in any case of accusation of a crime from the *Juge d'Instruction*, he must make an oral or written report (in general in five days) to the *Chambre d'Accusation*. During this time the *partie civile* and the suspected person may write memoirs for the use of the *Chambre d'Accusation*. The *Procureur Général's* report must conclude by requisitions in writing addressed to the chamber. The written evidence must also be read to them.

The *Chambre d'Accusation* takes the whole matter into consideration and has power to direct a further inquiry upon any point which it thinks requires it. But they examine no witnesses, and none of the parties except the *Procureur Général* appears before them. They may not only consider the question whether there is a case made out by the *Ministère Public*, but also consider the question whether the accused has established what (in the Roman law sense of the word) is described as an exception, such as madness, prescription, or *chose jugée*, which is the equivalent of our pleas of autrefois convict or acquit. The Chamber of Accusation is in no way bound by the views of the *Juge d'Instruction*. They form their own opinion upon all the points which they consider to be raised by the inquiry, [4] and take cognizance of all offences which

[1] 20 Ap. 1810 ; 6 July 1810. Roger and Sorel, *Lois Usuelles*, pp. 468 and 473.
[2] *C. I. C.* 218.
[3] *C. I. C.* 217-222.
[4] *C. I. C.* 226-227.

are connected either by having been committed at the same time by several persons, or at different times and places in consequence of a previous agreement, or when one offence is committed to facilitate, complete, or prevent the discovery of another.

As the result of all these operations the *Chambre d'Accusation* may either discharge the suspected person, or make an order for the trial of the party by the *Cour d'Assises*, or other competent court, according as they consider the matter charged to amount to a *crime*, *délit*, or *contravention*. The one order is called an *arrêt de non-lieu* and the other an *arrêt de renvoi*. Each must be *motivé* that is, it must state in the case of the *arrêt de non-lieu* either that the matter charged does not amount to an offence or that the proof is insufficient, and in the case of the *arrêt de renvoi* that there is sufficient evidence of guilt, and that the fact charged is an offence against some specified penal enactment. In the case of an *arrêt de non-lieu* the suspected person must be set at liberty and cannot be prosecuted again for the same fact unless the *arrêt* was based upon insufficiency of the evidence and new evidence is discovered.

If an *arrêt de renvoi* is made the *Procureur Général* must draw up an *acte d'accusation*. This is usually drawn up by an *Avocat Général* and signed by the *Procureur Général*. It is based on the *arrêt de renvoi* and must not go beyond it.

[1] "L'acte d'accusation a pour objet de faire connaitre le "sujet de l'accusation, mais il n'en est point la base; la seule "base de l'accusation est l'arrêt de renvoi. C'est cet arrêt "qui fixe la nature et les limites de l'accusation; il est le "point de départ et la source unique de la procédure ultérieure "et des questions posées au jury." The *Code d'Instruction Criminelle* [2] says the act of accusation shall set forth (1) the nature of the offence which forms the base of the accusation (2) the fact and all the circumstances which can aggravate or diminish the punishment: the accused shall be named and clearly designated. The act of accusation shall end with the following *résumé*.

"In consequence N. is accused of having committed such a

[1] Hélie, *Prat. Crim.* i. 297. [2] *C. I. C.* 241.

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"*meurtre*, such a theft, or such other crime with such and such "circumstances." M. [1] Hélie says that it is not a "plaidoyer." It ought to be rigorously exact. It ought to be drawn up with complete impartiality. It ought to be simple, clear and precise, as it is not a literary work but an act of procedure. In point of fact such of these actes as I have read, appear to me to be the most ingenious of "plaidoyers." [2] They are like the opening speeches of English counsel for the Crown, they consist entirely of statements of fact, but the facts are so arranged as to develop in the strongest way and set in the clearest possible light everything which can be said against the prisoner. They are often drawn up with great literary skill and read like pungent and pointed abstracts of French novels. Moreover they often give an account of the character of the prisoner and of any discreditable incidents in his previous life. There is nothing in the written proceedings in an English court which in any degree resembles an *acte d'accusation*, though, as I have said, it has some resemblance to the opening speech of the Counsel for the Crown.

[3] The *acte d'accusation* and the *arrêt de renvoi* must be notified to the accused, and a copy of each must be given to him; and within twenty-four hours of this notification the accused himself must be transferred from the prison in which he had previously been confined to the *maison de justice* attached to the court before which he is to be tried, [4] and the documents and exhibits connected with the case are to be taken to the office (*greffe*) of the court where the prisoner is to be tried, unless he is to be tried at the place where the *Cour d'Appel* sits, in which case they are already there.

I have already described the constitution of the *Cour d'Assises*. Some remarks may now be made as to the powers of its members. The President of the Court is not, like the Lord Chief Justice, or other president of a division of the High Court, *primus inter pares*, but has a position and powers peculiar to himself. [5] He is nominated for each sitting either by the *Premier Président* of the *Cour d'Appel*, or by the

[1] *Prat. Crim.* i. 297. [2] See Vol. III. p. 509, for an instance.
[3] *C. I. C.* 249. [4] *C. I. C.* 291. [5] Hélie, *Prat. Crim.* i. 309-310.

Minister of Justice, commonly in practice by the Minister, but the *Premier Président* may sit himself if he thinks proper. [1] His special duties are defined by the *Code d'Instruction Criminelle.* He is intrusted with "la police de l'audience," that is, the duty of keeping order; "la direction des débats," that is, the general superintendence of the proceedings subject of course to the express directions of the law. In illustration of the nature of this power [2] M. Hélie says it has been held that he may examine different accused persons separately, refuse to examine witnesses as to the credit of one of their number, or to put questions to them which he considers useless, or forbid the prisoner's counsel to read to the jury the decisions of other juries in analogous cases. These powers are similar to those which an English judge possesses of deciding all questions of law, including questions as to procedure which may arise in the course of a trial, but more seems to be left to the discretion of a president than is left to the discretion of our judges.

In addition to these powers the President [3] is "investi " d'un pouvoir discretionnaire. En vertu duquel il pourra " prendre sur lui tout ce qu'il croira utile pour découvrir la " vérité, et la loi charge son honneur et sa conscience d'em- " ployer tous ses efforts pour en favoriser la manifestation." The next article specifies some of the most important of the cases in which this power may be used. The President " pourra dans le cours des débats appeler même par mandat " d'amener et entendre toutes personnes ou se faire apporter " toutes nouvelles pièces qui lui paraitraient, d'après les nou- " veaux développements donnés à l'audience, soit par les ac- " cusés, soit par les témoins pouvoir repandre un jour utile " sur le fait contesté. Les temoins aussi appelés ne prêteront " point serment, et leurs déclarations ne seront considereés " que comme renseignements."

This discretionary power is bounded only by very general rules. It ought to be so employed as to bear upon the subject of the trial in progress. It ought not to be so employed as to contradict the general law. The words which enable the President to hear "all persons" permit him, how-

[1] *C. I. C.* 267-270. [2] *Prat. Crim.* 324. [3] *C. I. C.* 268.

ever, to hear all witnesses who by law are prohibited from testifying, or who on other grounds cannot be called by the parties.

I now pass to the procedure at and immediately before the trial itself.

[1] The President must interrogate the accused secretly within twenty-four hours after the arrival at the office of the papers and exhibits. This it is [2] said is "un acte "d'instruction qui doit surtout constater ou la persistance "de l'accusé dans ses précédentes déclarations, ou les modifications qu'il croit devoir y apporter."

This important act it is also said "ouvre enfin, en faveur "de l'accusé l'exercice des droits de sa défense, et prepare "en recueillant ses dernières déclarations écrites, l'instruc- "tion orale de l'audience." This may be so, but it may also be regarded in another light—that is to say, as an advantage given to the President in the oral debate between himself and the accused at the public hearing. On this occasion the judge must ask the accused if he has counsel, and if he has not he must nominate one for him "*d'office*." [3] He must also inform the accused that he has five days in which to move (as we should say) to quash the proceedings (former une demande en nullité). [4] The prisoner's counsel may communicate with the accused after the interrogatory, and inspect all the documents and exhibits, and take copies of such of them as they think proper. [5] The prisoner has a right to one copy of the *procès-verbaux* recording the offence, and of the depositions of the witnesses, gratuitously.

[6] A panel, as we should say, of thirty-six jurors and four supplementary jurors is drawn by lot from [7] a general list of persons qualified to serve as jurors, and of these thirty at least must be present before the jury of twelve is formed.

[8] The list of jurors is notified to the accused the day before the trial. When the day for the trial arrives all the names

[1] *C. I. C.* 266-293.
[2] Hélie, *Prat. Crim.* i. 344.
[3] *C. I. C.* 296.
[4] *C. I. C.* 302.
[5] *C. I. C.* 305.
[6] *C. I. C.* 388.
[7] The rules as to the qualifications of jurors and the formation of the general list are contained in *C. I. C.* 381, *seq.*
[8] *C. I. C.* 395.

are put into a box and drawn out by chance. [1] As they appear the accused or his counsel first, and then the *Procureur Général* either challenge or do not challenge until no more than twelve names remain, or until twelve names are unchallenged. [2] If an odd number of jurors appear, the accused has one challenge more than the prosecution. If the number is even, they have an equal number of challenges, namely, the difference between the number of jurors who appear and twelve, divided by two.

If the trial is likely to be long, two supplementary jurors are chosen, who sit as jurors, but do not deliberate or give their verdict unless any of the twelve are incapacitated by illness or otherwise.

The trial before the *Cour d'Assises* is as follows. The prisoner being introduced [3] without irons but guarded, the president asks his name, profession, place of abode, and place of birth. He then [4] warns, or ought to warn, the counsel for the defence to say nothing against his conscience or the respect due to the law, and to express himself with decency and moderation. As this slightly absurd ceremony is not commanded under the penalty of nullity it is commonly omitted. It is indeed useless and disrespectful to the person to whom it is addressed. The president then [5] swears the

[1] *C. I. C.* 399.

[2] *C. I. C.* 401. Suppose *e.g.* thirty-one jurors appear, the two sides have nineteen challenges between them, the prisoner ten and the prosecutor nine. If thirty appears each has nine.

[3] "L'accusé comparaîtra libre, et seulement accompagné de gardes pour "l'empêcher de s'évader." I know of no better illustration of the true meaning of "libre." A man being tried for his life, actually in prison and seated between two gendarmes, is "libre" because he has no handcuffs on, and so he is, free from handcuffs.

[4] *C. I. C.* 311.

[5] *C. I. C.* 312. The form of oath is, "Vous jurez et promettez devant Dieu "et devant les hommes d'examiner avec l'attention la plus scrupuleuse les "charges qui seront portées contre N ; de ne trahir ni les interêts de l'accusé "ni ceux de la société qui l'accuse ; de ne communiquer avec personne jusqu' "après votre déclaration ; de n'écouter ni la haine ou la mechanceté ni la "crainte ou l'affection ; de vous décider d'après les charges et les moyens de "defense, suivant votre conscience et votre intime conviction avec l'impartia-"lité et la fermeté qui conviennent à un homme probe et libre."

Contrast this wordy, lengthy, tiresome formula with the words of our juryman's oath, which it seems to me impossible to improve and difficult even to vulgarise:—"You shall judge and truly try and true deliverance make, "between Our Sovereign Lady the Queen and the prisoner at the bar whom "you shall have in charge, and a true verdict give according to the evidence. "So help you God."

"Jurez et promettez devant Dieu et devant les hommes" is much

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jury, and [1] exhorts the accused to be attentive, which he is likely to be in any case. The *acte d'accusation* is then read, and the prisoner is to be thus addressed:—"Voilà de quoi " vous êtes accusé: vous allez entendre les charges" (evidence) " qui seront produites contre vous." This statement, if made (it is not necessary), is immediately falsified, for instead of hearing the evidence against him the accused is in practice interrogated himself.

It is a singular fact that throughout the *Code d'Instruction Criminelle* there is no reference to this process. Article 319 says, after several provisions as to the evidence of the witnesses: "Après chaque déposition le Président demande au témoin si c'est de l'accusé present qu'il a entendu " parler: il demandera ensuite à l'accusé s'il veut répondre "à ce qui vient d'être dit contre lui." This, if interpreted by English lawyers, would be held to indicate at least that the prisoner was not to be otherwise interrogated, but a totally different view has been taken in France. The following account of the matter is given by M. [2] Hélie: "Aucune disposition du Code ne prescrit en termes précis et " formels l'interrogatoire de l'accusé. De là on a pu induire " que dans son système, l'accusé ne doit pas nécessairement " subir cette forme de la procédure inquisitoriale, et qu'assistant aux déclarations des témoins et ayant la faculté " de les discuter il n'est tenu de faire connaître ses explications, et son système de défense qu'après que ces dépositions sont terminées. Ce système, qui est celui de la " procédure accusatoire, n'a point en général été admis dans " notre pratique. On a fait dériver l'interrogatoire du droit " que l'Article 319 reconnait, soit au président, soit aux juges " et aux jurés, soit aux parties elle-mêmes, de demander " à l'accusé après chaque déposition tous les éclaircisse-

less vigorous than "so help you God." "Examiner avec l'attention la plus "scrupuleuse" is inferior to "judge and truly try," and an abstraction like "la société qui l'accuse" is less impressive than "Our Sovereign Lady the "Queen." The "impartialité et la fermeté qui conviennent à un homme probe "et libre," would be better taken for granted. Moreover, from what are the jury "libres"? On the one hand, it is not necessary to say that they are not serfs; on the other, they are liable to be fined up to 2,000 francs if they do not appear. The word is thus either insulting or inaccurate.

[1] *C. I. C.* 313. "Le président avertira l'accusé d'être attentif."

[2] *Prat. Crim.* i. 373.

" ments qu' il croira nécessaire à la manifestation de la " vérité. Il est certain que l'interrogatoire, étant à la fois " un moyen de défense et un moyen d'instruction, peut " être employé dans l'instruction orale aussi bien que dans " l'instruction écrite. Il suit de là que le magistrat qui " adresse à l'accusé des questions, et lui demande des " éclaircissements, a le droit de l'interpeller pour provoquer sa " justification ou l'aveu de sa culpabilité; il doit sans le " presser ni le troubler, mais en le mettant à même de " s'expliquer favoriser le libre développement de sa parole; " il doit chercher enfin avec la plus complète impartialité et " uniquement la vérité. L'interrogatoire n'est ni une argu- " mentation ni une lutte; ce n'est point le débat; son but " principal est d'indiquer le système de la défense, et par " conséquent de poser les termes du débat et les points qui " doivent y être vérifiés." He adds that though the interrogatory is not essential, yet the president can interrogate the accused either before or after the witnesses are heard, the former being the common course. If there were any doubt as to the legality of the interrogatory, I suppose it would fall well within the discretionary powers of the president.

Whatever may be the law on the subject, the fact unquestionably is that the interrogation of the accused by the president is not only the first, but is also the most prominent, conspicuous, and important part of the whole trial. Moreover, all the reports of French trials which I have seen, and I have read very many, suggest that the views taken by M. Hélie as to the proper object of the interrogatory, and the proper method of carrying it on, are not shared by the great majority of French Presidents of *Cours d'Assises*. [1] The accused is cross-examined with the utmost severity, and with continual rebukes, sarcasms, and exhortations, which no counsel in an English court would be permitted by any judge who knew and did his duty to address to any witness. This appears to me to be the weakest and most objectionable part of the whole system of French criminal procedure, except parts of the law as to the functions of the jury. It cannot

[1] See *e.g.* Vol. III. p. 476.

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but make the judge a party—and what is more, a party adverse to the prisoner—and it appears to me, apart from this, to place him in a position essentially undignified and inconsistent with his other functions. A man accused of a crime ought as such to be an object of pity and something approaching to sympathy on the part of all but those whose special duty it is to bring him to justice. This is the special duty of those who accuse him, and they are always keen enough to discharge it. The duty most appropriate to the office and character of a judge is that of an attentive listener to all that is to be said on both sides, not that of an investigator. After performing that duty patiently and fully, he is in a position to give a jury the full benefit of his thoughts on the subject, but if he takes the leading and principal part in the conflict—and every criminal trial is as essentially a conflict and struggle for life, liberty from imprisonment, or character, as the ancient trials by combat were—he cannot possibly perform properly his own special duty. He is, and of necessity must be, powerfully biased against the prisoner. That in the opinion of the French in general this has been the case with French judges appears to be indicated by the fact that by a very recent enactment they have been deprived of the right which they have hitherto possessed of closing the trial by a *résumé* which in some respects resembled our English summing-up.

[1] The *Procureur Général* states the case to the jury, and puts in the list of witnesses to be heard, of which list a copy must have been given to the accused twenty-four hours before the trial. "Il doit se borner à exposer les faits sans les discuter," says [2] M. Hélie; adding, "Toute discussion serait prématurée "et donnerait à la défense le droit de répondre à l'instant "même." This part of the proceedings appears to be of little importance. The *Procureur-Général's* position in the *Cour d'Assises*, though in some respects analogous to that of an English counsel for the Crown, is in others contrasted to it. The *Ministère Public*, consisting of him and his substitutes, the *avocats généraux*, are part of the court. [3] "La

[1] *C. I. C.* 315.
[2] Hélie, *Prat. Crim.* i. 369.
[3] *Ib.* 318.

"Cour d'Assises" . . . "n'est constituée que par la présence "d'un membre du Ministère Public. La présence de ce "magistrat à tous les actes de la procédure orale, à toutes les "opérations de la Cour est donc nécessaire; et la nullité des "débats serait encourue par le seul fait qu'un expert aurait "été entendu, ou qu'un témoin aurait déposé en son absence." [1] Whenever what the French call an "incident" arises in a trial, that is to say, a question rendering necessary some decision or act on the part of the court or president, the *Procureur Général* has a right to make requisitions, to be heard upon them, and to have a judgment from the court from which he may appeal to the Court of Cassation.

[2] When the *Procureur Général* has made his statement the witnesses are heard upon oath in an order decided on by the *Procureur Général.* Witnesses in France are not examined as with us, and they can hardly be said to be subject to cross-examination. [3] "Le témoin ne pourra être interrompu: "l'accusé ou son conseil pourront le questionner par l'organe "du président après sa déposition, et dire tant contre lui que "contre son témoignage tout ce qui pourra être utile à la "défense de l'accusé. Le président pourra également "demander au témoin et à l'accusé tous les éclaircissements "qu'il croira nécessaires à la manifestation de la vérité. Les "juges" (*i.e.*, the two assessors to the president), "le Pro-"cureur Général, et les jurés auront la même faculté, en "demandant la parole au président. La partie civile ne "pourra faire de questions, soit au témoin, soit à l'accusé, que "par l'organe du président."

[4] M. Hélie remarks upon this: "Les témoins doivent être "*entendus* dans leur dépositions; ils ne doivent pas être "*interrogés.* Cette règle resulte de tous les textes du Code. "L'audition laisse parler le témoin comme il le veut; elle "reçoit sa déposition dans les termes où il la conçue, ou il a "voulu la faire; elle lui conserve sa spontanéité et sa liberté. "La forme interrogative, qui n'est employée que vis-à-vis des "prévenus, dirige, trop souvent les réponses des témoins et "quelquefois les suggère; elle les conduit, par les questions

[1] *C. I. C.* 276-278.
[2] *C. I. C.* 317.
[3] *C. I. C.* 319.
[4] Hélie, *Prat. Crim.* pp. 396-397.

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"qu'elle pose, à des déclarations irréflechies ou embarrassées. "Le président peut, sans aucune doute, après la déposition "faite, demander au témoin tous les éclaircissements néces- "saires, toutes les explications qui doivent en compléter; "mais il doit le faire avec l'esprit de lui venir en aide, de lui "signaler les faits qu'il oublie, de lui rappeler le sujet de son "témoignage, et d'en écarter les additions superflues, et non "pour imprimer à ce témoignage un caractère que le témoin "n'a pas voulu lui donner, pour forcer le sens et la portée de "ses déclarations, pour enchaîner ses hésitations quelquefois "légitimes, et vaincre les doutes que son esprit conserve "réellement." M. Hélie's cautions would hardly have been given if his experience had not shown that they were necessary.

[1] The president must require the *greffier*, and the *Procureur Général* and the accused may call upon the president to require the *greffier*, to take a note of any variations between the evidence of the witnesses at the trial, and their depositions made before the trial.

[2] The jury, the *Procureur Général*, and the judges (the president is not expressly mentioned), are expressly authorised to take notes of anything said by the witnesses which they consider important, "provided that the discussion is not "interrupted by it."

Taken together these provisions form a strong contrast to our English practice and principles. The whole of the English procedure proceeds upon what I cannot but regard as the true theory, that the only way by which oral testimony can be made full and relevant is by bringing it out by questions asked by the side which calls the witness, and that the only way in which it can be made tolerably trustworthy is by subjecting it in every detail to the severest possible adverse criticism. This with us is effected by cross-examinations in which the adverse party criticises everything said by the witness which he thinks he can shake, besides attacking, if he thinks it right, the character of the witness himself. Moreover our procedure is based upon the theory that all the facts should, as far as possible, be ascertained before they are discussed.

[1] *C. I. C.* 318. [2] *C. I. C.* 328.

Under the French system the effect of each witness's evidence is discussed as soon as it is given, and a highly important, if not the principal, part of the discussion consists in cross-examining the prisoner about it. The direct cross-examination of the witness is confined to the president, who has not those strong motives for doubting the witness's truthfulness which alone make cross-examination really effective. The parties, and especially the prisoner, have to cross-examine through him, and to cross-examine a witness through a third person, who may probably be hostile or at least indifferent to the cross-examiner, is as ineffectual as it would be to carry on a fight by telling a proxy where to strike. The fact that a trial is a combat must be realised and carried out in every detail if the fight is to be fair. The witnesses called against either side are for the time being the enemies of that side, and its representative should be allowed to attack them hand to hand.

The provision as to the taking of notes is noticeable. According to our practice, it is the indispensable duty of the judge (though no law imposes it on him)[1] to take a careful note of everything said by a witness; and in order to do this it is essential that the witness should be carefully and deliberately questioned, and that he should not be allowed to run on saying whatever he likes. If this were not done, there would be endless disputes as to what the witness really said, which disputes could never be decided. The provisions of the French Code taken as a whole, suggest that the preliminary *instruction* must in practice settle what the witnesses are going to say at the trial; and this is one of many circumstances which leads me to think that the *instruction* and the interrogatories to which the accused are subjected form the real trial in France, and constitute in practice the materials on which the jury have to decide.

There are some rules of evidence contained in the *Code d'Instruction Criminelle*, as to the capacity of witnesses to testify. Article 322 excludes the evidence of all

[1] This is, if not the most anxious, at all events the most fatiguing part of a judge's duty. To take notes incessantly for eight or even ten hours is an exertion which no one who has not known what it is could properly appreciate.

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the lineal ancestors and descendants, the brothers and sisters, the husband and wife of the accused, and also the evidence of such of the *dénonciateurs* as are entitled by law to any money recompense for their denunciation. They may, however, testify if none of the parties object, and even if the parties do object, the president, in virtue of his discretionary power, can hear them without oath, by way as it is said of *renseignement*. [1] Some other persons (as, for instance, some convicts) are incapacitated to the same extent.

These rules are of an altogether different kind from those which regulate trials in an English court. When closely examined, our rules of evidence will be found to be reducible to the following:—(1) Proof may be given of facts in issue, and relevant or treated as relevant to the issue, and of no others, with a few rare exceptions. There are careful and elaborate rules as to what does and does not constitute relevancy; most of them are, more or less consciously, founded on the principle that the causes and effects of any given event are relevant to its existence. (2) When a fact may be proved at all, it must be proved by direct evidence, namely, if it is an event or occurrence, by the evidence of some person who perceived it by the use of his own senses; if it is the existence of a document by the production of the document itself, or, under circumstances, a copy of it or statement as to its contents.

These leading rules, though qualified by important exceptions, are rigidly enforced in practice, and their enforcement gives to English trials that solid character which is their special characteristic. They seem to be quite unknown in French procedure. Witnesses say what they please and must not be interrupted, and [2] masses of irrelevant, and often malicious, hearsay which would never be admitted into an English court at all, are allowed to go before French juries and prejudice their feelings. The old rules of evidence which were in use before the Revolution, and were derived from the middle age version of the Roman law, were exceedingly technical and essentially foolish. They were accordingly abolished absolutely, and nothing was put in their place. The essentially scientific though superficially technical rules of

[1] Hélie, *Prat. Crim.* i. pp. 372-380.

[2] See *e.g.* Vol. III. p. 485.

evidence which give their whole colour to English trials, and which grew up silently and very gradually in our courts, seem to me to be just what is wanted to bring French trials into a satisfactory shape; but the evils of the old system were so strongly impressed on the authors of the *Code d'Instruction Criminelle*, that destruction was the only policy which presented itself to their minds.[1]

After the witnesses have been examined, the jury are addressed by the *partie civile*, the *Ministère Public*, and the prisoner, in succession. The *partie civile* and the *Ministère Public* reply, and the accused, or his counsel, or, indeed, both in succession, rejoin. There might thus be six, or counting the opening statement of the *Ministère Public* seven, or if the prisoner spoke as well as his advocate eight, speeches in one case, besides all the discussions at the end of each witness's evidence. The greatest possible number of speeches in an English trial would be four, supposing the prisoner to call witnesses, and to sum up as well as open their evidence, and so to give the reply to the crown.

A much wider field is open to French advocates in criminal trials than to English advocates, and French taste differs widely from our own as to the kind of speeches which should be made. This is due to many causes, some arising out of the difference between the characters of the two nations, but some from the difference between the laws in force in them.

[1] The strongest possible illustration of this is given by Article 342 of the *Code d'Instruction Criminelle*, which characteristically provides that, when the jury has retired, "le chef des jurés lui fera lecture de l'instruction suivante "qui sera en outre affichée en gros caractères dans le lieu le plus apparent de "leur chambre. 'La loi ne demande pas compte aux jurés des moyens par les-"'quels ils se sont convaincus; elle ne leur prescrit point de règles desquelles "'ils doivent faire particulièrement dépendre la plenitude et la suffisance d'une "'preuve. Elle leur prescrit de s'interroger eux-mêmes dans le silence et le "'recueillement, et de chercher, dans la sincerité de leur conscience, quelle "'impression ont faites sur leur raison les preuves rapportées contre l'accusé, et "'les moyens de sa défense. La loi ne leur dit point:—*Vous tiendrez pour "'vrai tout fait attesté par tel nombre de temoins;* elle ne leur dit pas non plus:— "'*Vous ne regarderez pas comme suffisamment établie toute preuve qui ne sera pas "'formée par tel procès-verbal, de telles pièces, de tant de témoins, ou de tant "'d'indices;* elle ne leur fait que cette seule question, qui renferme toute la "'mésure de leurs devoirs:—*Avez-vous une intime conviction?*" There is a great deal more of it, but as it does not matter whether these forms are gone through or not, they are probably important only as throwing light on the views of the authors of the *Code*. An English foreman reading to his colleagues a sermon of this sort would look and feel silly.

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The *Procureur Général*, as I have observed, being something between counsel and judge, is allowed to say nearly what he pleases. [1] "L'indépendance de la parole du Ministère "Public dans le dévéloppement de ses requisitoires est une "règle incontesté. Il a le droit de dire tout ce qu'il croit con- "venable et nécessaire au bien de la justice, et le Président "ne peut lui opposer aucune entrave. Il peut s'appuyer sur "des renseignements qui lui sont fournis par des faits "étrangers au procès, et faire connaître aux jurés les consé- "quences légales de leur déclaration. Il peut produire tous "les documents utiles à l'accusation, et il a été jugé même qu'il "peut faire usage de déclarations reçues dans une autre affaire, "et des déclarations écrites d'une instruction supplémentaire "non communiqué à la défense. Cependant il est préferable de "produire dans le cours des débats les pièces dont on veut se "servir. Il ne faut pas transporter l'instruction dans le "requisitoire et lui ôter la garantie de la contradiction."

The effect of this is that the *Procureur Général* may use arguments to persuade the jury to convict the prisoner which we should regard as wholly improper. For instance, in a prosecution for an agrarian murder in Ireland, the counsel for the Crown might, if he was in the position of a *Procureur Général*, enlarge upon every kind of political and social topic, read articles in newspapers which he thought likely to excite the indignation of the jury, dwell upon the importance of making examples, and point out the bad effects of the laxity of former juries in acquitting when they ought to have convicted and the good effects which in cases alleged to be analogous to the one being tried had followed from convictions. He might also appeal to evidence alleged to have been given in private in some other case, and read letters alleged to have been intercepted since the prisoner's committal, in which it was alleged that the prisoner was the agent of a secret society. This last might be regarded as going a long way, but would still be quite legal.

The counsel for the defence has a good deal of latitude, though not quite so much as the Procureur Général. The following [2] is strange to an English reader. "En ce qui

[1] Hélie, *Prat. Crim.* i. p. 449.

[2] *Ib.* p. 421.

"concerne les droits de la défense il a été décidé que le "président peut, sans fixer à l'avance la durée des plaidoiries, "[2] inviter les défenseurs à être brefs" (a valuable privilege), "qu'il peut interdire à un accusé de présenter sa défense en "vers, la sevérité des formes judiciaires repoussant cette forme "de langage, qu'il peut interdire de citer les décisions de jury, "dans les affaires analogues, qu'il peut également interdire la "discussion dans la plaidoirie sur le fond de questions relatives "à l'application de la peine. Mais le défenseur peut soutenir "que les faits incriminés ne constituent pas le crime que "poursuit l'accusation, par exemple, que l'homicide commis en "duel n'est pas un meurtre, que la rétention d'une chose trouvée "n'est pas un vol. Il peut quoique ce point soit contesté faire "connaître aux jurés les conséquences légales de la déclaration "qu'ils vont rendre. Il peut enfin soutenir et développer, non "seulement les excuses légales, mais les faits d'atténuation qui "résultent des débats, et qui peuvent motiver l'application "des circonstances atténuantes."

Whether an English prisoner may put his defence into verse is a question which has not yet arisen, and which may be dealt with when it does arise, but the other points mentioned are of great interest.

Whatever may be the law as to the prisoner's right to refer to other cases, or to the consequences of the verdict, it is hardly possible that the *Procureur Général* should be permitted to enter upon topics on which the prisoner is not to be at liberty to reply, so that if these topics are once introduced, their full discussion cannot be avoided, and this may easily leave the question of guilty or not guilty to be lost sight of in the discussion of general questions connected with or suggested by the case.

The right of the counsel for the defence to address the jury on questions of law, as for instance, whether killing in a duel is *meurtre*, is one of the features in which the administration of justice in France differs essentially from the administration

[1] English judges have the same right, but they do not always succeed. "Mr. ——, this is the last day of term, and we have many cases in the "paper." "In none of which has my client any interest whatever, my "lord."

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The power of the jury to return a verdict of guilty with extenuating circumstances, and thereby to prevent the Court from passing the extreme sentence allowed by law, and the right (which follows from it), of advocates to address themselves to the question of the existence of such circumstances, naturally introduces into the speeches of counsel an element almost unknown in English defences.

In practice these points taken together give to an advocate for the prisoner in France a far wider field for comment of all kinds than belongs to an English barrister. He can practically urge the jury on every kind of ground, general and special, to mitigate the law, or even to set it aside altogether, on the ground that they disapprove of it, either in general or in its application to the particular case, and this contention is constantly successful. For instance, a common, perhaps the commonest and most effectual argument in favour of *circonstances atténuantes* in capital cases, is declamation against capital punishment.

My own opinion is that in this matter the English practice

is in every way superior to the French. To put sentiment in the place of law, or to allow the administration of criminal justice to be overridden or interrupted by appeals to sentiment, is to deprive the criminal law of its most characteristic, most effective, and most wholesome attributes. It can never be a real terror to evil-doers and a real encouragement to the healthy indignation of honest men against criminals unless it is put in force inflexibly, and recognised and complied with even if the case is one in which much is to be said in mitigation of punishment. Murder should be called murder, though it may well be that the particular murderer ought not to be put to death. Whether he should or should not be put to death is a question on which I think the jury ought to have nothing decisive to say, though their expressed wish that a convict should be treated mercifully ought always to be considered by those in whose hands the power of showing mercy is vested.

After the speeches are concluded the President used, till the year 1882 to make a *résumé*. The [1] Code says: "Le "président résumera l'affaire. Il fera remarquer aux jurés "les principales preuves pour ou contre l'accusé. Il leur "rappellera les fonctions qu'ils auront à remplir." Of the *résumé* [2] M. Hélie says only that it should be short, "parce-"que la loi n'a voulu qu'un résumé," and that it should be absolutely impartial. It never was anything like so important as an English summing up, which in important cases includes a restatement to the jury of all the important points in the evidence. Practically, it is scarcely possible that after interrogating the accused not only on the whole affair at the beginning of the case, but in reference to every detail after the evidence of each witness, the President should sum up impartially.

Besides making his *résumé* the President is required by the [3] Code to state to the jury in writing the questions which they are to answer. In a technical point of view this is one of the most important parts, if not the most important part of the whole procedure, for the questions so proposed together with

[1] *C. I. C.* 336. [2] *Prat. Crim.* i. p. 425.
[3] *C. I. C.* 337-340.

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the answers returned are a principal part of the materials on which the Court of Cassation has to decide if there is an appeal.

The subject is dealt with [1] in four short articles in the Code which give no idea of the number and intricacy of the questions connected with it. [2] M. Hélie's exposition of these matters fills more than thirty pages, some of the principal points of which I will refer to. It is a general principle that the jury are to find all the facts, including the existence of states of mind (*circonstances de moralité*) which collectively constitute the prisoner's guilt, and that the Court of Assize (not the President) is to say what is the legal effect of the facts found by the jury, and what the punishment to be inflicted if they amount to a conviction. The object of the questions to each of which the jury must answer Yes or No, is to constitute when taken with the answers a statement of facts which will enable the Court to discharge their duty. The result therefore of a French trial by jury is not to get a verdict of guilty or not guilty, but to get the facts of the case stated in a form analogous to a special verdict with us, or to a special case in civil matters.

From this general theory result four general rules, first, the questions must reproduce the operative words (*le dispositif*) of the *arrêt de renvoi* made by the *Chambre d'Accusation*. Secondly, the questions must dispose of all the facts which, though not expressly found by the *arrêt de renvoi*, are implied by it, and ought to have been included in it if the other parts of the instruction had been fully studied. But the accusation must not go beyond the *arrêt de renvoi*, though it may apply to facts not specifically stated in it if they are "accessoires ou modificatifs de l'accusation principale."

The third rule is that questions may be asked as to the commission of *délits* which are connected with the accusation, although the *Cour d'Assises* deals in general only with *crimes*. For instance if a man is accused of theft, as a vagrant or vagabond, questions may be asked as to vagrancy or beggary. If he is accused of *meurtre*, committed whilst poaching, questions may be asked as to poaching; if of fraudulent

[1] *C. I. C.* 337-340. [2] *Prat. Crim.* i. 426-460.

bankruptcy connected with cheating, questions may be asked as to cheating.

The fourth rule is that the facts must be found by the jury, however authentic and conclusive may be the evidence given of them.

These rules have relation to the *arrêt de renvoi*, but apart from this it is also the duty of the President to put to the jury questions on all facts relevant to the accusation which are proved in the course of the trial. For instance, he may put to the jury the question whether a circumstance of aggravation (*e.g.* that a theft was committed at night) was proved, and the President decides *primâ facie* whether there is evidence of a circumstance of aggravation to go to the jury. If his decision is disputed, the Court has to settle the question.

Matters of excuse recognised as such by the law must be left to the jury if the accused requires it. Thus for instance provocation by blows is an excuse for *meurtre*, but drunkenness is not, nor is a provocation by words or threats. The jury may therefore be asked whether a man accused of *meurtre* was provoked by blows, but not whether he was provoked by words.

Matter which if true would modify the accusation by reducing the criminality to an offence of a lower grade than the one charged must be left to the jury. The principle has been stated as follows: "The jury ought to try the accusation as the trial (*les debats*) moulds it, and not as the written procedure establishes it." Hence if a fact is proved which is not, but ought to have been, stated in the *arrêt de renvoi* a question may be asked upon it. I suppose for instance that if a man were [1] charged with colouring money circulating in France, and it appeared that he did so in order to deceive as to the metal, the question whether he did so in order to deceive as to the metal, might be asked even if the *arrêt de renvoi* had omitted to state it. Secondly, the facts on the trial may come out otherwise than they did before the *Juge d'Instruction*. The president may put questions founded upon this. Thus if a man is accused of a complete offence

[1] *Code Pénal*, 133.

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the jury may be asked whether there was a *tentative?* If he is accused of *meurtre* they may be asked whether he was guilty of striking or wounding? Thirdly, if facts are proved at the trial which though distinct from, are accessory to the principal accusation, a question may be founded on them. For instance on a charge of robbery a question may be asked as to receiving, on a charge of infanticide a question as to the suppression of the *état civile* of a child. If, however, the facts are distinct from the accusation such a question cannot be asked. Suppose, *e.g.*, that if it incidentally appeared upon a trial, say for robbery, that the accused must on some other occasion have committed perjury, as by swearing in some other case that he was at a different place from that where the robbery was committed, questions could not be asked as to the perjury. The line between accessory facts and distinct facts is said to be at times hard to draw, which seems natural.

Besides the rules as to the subject-matter to which the questions put to the jury must refer, there are a variety of rules as to the form in which they must be put. [1] Every question must begin with "L'accusé est-il coupable?" These words are considered as involving a criminal intention, and must apparently be used even if the definition of the crime given in the *Code Pénal* specifies the mental element of the crime. It is not enough to ask whether a man accused of theft has "frauduleusement soustrait la chose d'autrui." The question must be "Est-il coupable d'avoir frauduleusement "soustrait la chose d'autrui?" On the other hand it is enough to ask whether a man "est coupable" of having passed bad money without asking if he knew the money was bad, as guilty knowledge is implied in the word "coupable."

It would be foreign to my purpose to attempt to enter at length into this subject. It is sufficient to say that there is a considerable degree of resemblance between the French rules as to the degree of minuteness with which the jury are to be questioned and the English law as to certainty in an indictment. The following observations of M. Hélie state the principle clearly and give an excellent illustration of it. "[2] La double competence du jury et de la Cour d'Assises est

[1] Hélie, *Prat. Crim.* p. 440. [2] *Ib.* p. 450.

" fondée sur le distinction du fait et du droit; la loi a attri-
" bué aux jurés la déclaration des faits, et aux juges l'appli-
" cation de la loi. Les questions doivent donc être posées de
" manière à ne présenter aucune question de droit à résoudre
" aux jurés. Ils doivent être interrogés sur les faits qui
" sont les éléments de la qualification légale, et non sur
" cette qualification elle-même." The following illustration is given: " Dans une accusation de faux, le jury
" n'est point appelé à déclarer s'il y a faux et si l'écri-
" ture falsifiée est privée, commerciale ou publique, mais
" il doit déclarer si l'accusé a commis dans telle acte
" telle altération matérielle de nature à préjudicier à
" autrui, si l'écriture emane d'un officier public, et si
" elle constitue un acte du ministère de cet officier, si elle
" emane d'un commerçant, et si elle a pour objet une opéra-
" tion de commerce." The difficulty of clearly dividing questions of fact from questions of law has, however, been experienced in France as well as in England. Many common names of crimes and many words used in describing the constituent parts of crimes involve a legal element. [1] " Il y a
" des cas où la separation du fait et du droit est très difficile.
" Dans une accusation de fausse monaie la question de savoir
" si les pièces contrefaites ont cours légal, circonstance con-
" stitutive, appartient au jury. Le jury est également com-
" petent pour statuer dans une accusation d'extorsion, sur la
" question de savoir si l'écrit extorqué opére obligation, dis-
" position, ou décharge"—" si l'accusé a commis un viol,
" une subornation de témoins, un complot, un attentat à la
" sureté de l'État." There are rules into which I need not enter as to " complex questions " which are in some cases forbidden and others permitted. They have a resemblance to the rule of English criminal pleading against duplicity in the counts of an indictment. The object of these rules is to get a direct yes or no from the jury upon every question in the case. The effect of this if strictly applied must be to make the catechism addressed to the juries exceedingly long and intricate. Thus it is wrong to ask whether a *meurtre* has been committed with premeditation and waylaying. The

[1] Hélie, *Prat. Crim.* i. p. 452.

premeditation and waylaying must be separated. This seems as if, upon a trial for assassination, the questions might be: Is A. guilty of having intentionally killed B.? Is A. guilty of having formed a design before the act to make an attack on B.'s person? Is A. guilty of having waited for B. in a place in order to kill him? Is A. guilty of having waited for B. in a place in order to inflict upon him other acts of violence?

It will be seen from all this that our own procedure, since the extremely technical but very skilful reforms which have been made in it, is considerably simpler than that of France. The leading difference between the two in reference to this particular matter is remarkable. Each system recognizes in the strongest way the principle that questions of law should be separated from questions of fact, and that the former should be decided by the judge and the latter by the jury. The English system is based upon the assumption that judge and jury will each perform their respective parts fairly and in good faith, that the judge will tell the jury what is the law applicable to the whole case, and that the jury will be guided by the judge's direction in finding their general verdict of guilty or not guilty. Both history and contemporary experience show that this system has in fact worked admirably, and does so still. The judge's direction, even if it is unpopular, is usually received by the jury as conclusive upon the law of the case. I could mention many instances in my own experience in which juries have found people guilty of murder and of other crimes in the face of the very strongest topics of prejudice, because the judge directed that the law required them to do so.

In cases in which the jury do go against the direction of the judge in point of law, the worst that can happen is that the law on that particular occasion is not carried into effect, which may be no great evil. It is an established principle in English law that the verdicts of juries are not precedents, and that they must not be referred to even in argument in other trials.

Under the French system elaborate and even intricate precautions are devised to keep apart the facts and the law, to leave the law for the court while the facts are for the jury,

but in spite of these precautions the jury continually decide in the teeth of the law, and are in practice judges both of law and of fact. The court gives them no directions at all in point of law and never did so. It draws up for them a sort of catechism intended to raise legal points which the court can decide, but it is obvious that the questions will be answered according to the general view which the jury take of the law of the case and of the result which they wish to bring about, and that in the absence of any direction in point of law from the court, they will be guided principally by their own ideas on the subject, which may, and probably will, be extremely vague. I have found no trace in any part of the *Code d'Instruction Criminelle* of any provision for the information of the jury as to the law relating to the cases, except only the provisions described above as to the questions to be put to them. It is not surprising under these circumstances that they should take the law into their own hands as they notoriously do on many occasions; and this is one principal reason why so large a number of French verdicts, especially in crimes of violence arising from passion, are so unsatisfactory and weak.

[1] The questions being drawn up are delivered in writing to the jury together with the act of accusation, the *procès-verbaux* which record the offence, and all the other papers in the case except the depositions of the witnesses. The effect of this can hardly fail to be to make them take as true the version of the facts given in the *acte d'accusation*, which contains a clear and easy narrative of them, difficult to correct by a recollection of the oral evidence, especially as a French jury cannot, as an English jury can and often does, appeal to the judge's notes to know what some particular witness said. They are told that if the majority thinks that there are extenuating circumstances they must say so expressly, and that they are to vote upon each question secretly. The foreman is required to read to the jury before they begin their deliberations the long formula, part of which I have quoted above, which is also to be written up in large letters in the room.

[1] *C. I. C.* 341-349.

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The performance of this ceremony is practically optional, as its omission involves no consequences.

[1] The jury deliberate and then vote on each question proposed to them. [2] Each juryman has two tickets marked yes and no for each question. The tickets are counted and burnt after each vote, and the result yes or no is recorded on the margin of the paper of questions. The matter is decided by a bare majority, and the jury are expressly forbidden to state the number of the votes.

How these arrangements may be suited to France I do not venture to say. If they were applied to English trials I believe they would be most injurious. According to our experience a jury is a useful but a somewhat rough instrument, the duty of which in criminal trials is to say whether a prisoner is proved to be guilty beyond all reasonable doubt. If twelve people of the class from whence jurors are drawn say yes, he is guilty, he probably is so. If any of them doubt, even though they may be a minority, the proper course is to discharge them and have a new trial. In such cases there is no reason why the majority should be right. Many of the jury are men of little intelligence, and apt to follow any lead, so that the minority may probably be more intelligent and independent than the majority. I should say that if a jury were seven to five or even nine to three, there was a reasonable doubt in the case. I should also think that the rule that juries should vote by a secret ballot would be a direct inducement to impatience, and fatal to any real discussion of the matter.

There is one other point in which the English and French systems are strongly contrasted. This is the French system of *circonstances atténuantes* and the English system of recommendations to mercy. The finding of *circonstances atténuantes* by a French jury ties the hands of the Court and compels them to pass a lighter sentence than they otherwise would be entitled to pass. It appears to me to be as great a blot upon the French system as the way in which that system sets the judge in personal conflict with

[1] *C. I. C.* 345.
[2] Hélie, *Prat. Crim.* i. p. 466 ; Law 13 May, 1836 ; Roger et Sorel, 825.

the prisoner. It gives a permanent legal effect to the first impressions of seven out of twelve altogether irresponsible persons, upon the most delicate of all questions connected with the administration of justice—the amount of punishment which, having regard to its moral enormity and also to its political and social danger, ought to be awarded to a given offence. These are, I think, matters which require mature and deliberate consideration by the persons best qualified by their position and their previous training to decide upon them. In all cases not capital the discretion is by our law vested in the judge. In capital cases it is practically vested in the Secretary of State for the Home Department advised by the judge, and inasmuch as such questions always attract great public interest and attention and are often widely discussed by the press, there is little fear that full justice will not be done. To put such a power into the hands of seven jurymen to be exercised by them irrevocably upon a first impression is not only to place a most important power in most improper hands, but is also to deprive the public of any opportunity to influence a decision in which it is deeply interested. Jurymen having given their decision disappear from public notice, their very names being unknown. A secretary of state or a judge is known to every one, and may be made the mark of the most searching criticism, to say nothing of the political consequences which in the case of a secretary of state may arise from mistakes in the discharge of his duty.

On the other hand, our English system allows the jury to exercise at least as much influence on the degree of punishment to be inflicted on those whom they may convict as they ought to have. It is true that the recommendation to mercy of an English jury has no legal effect and is no part of their verdict, but it is invariably considered with attention and is generally effective. In cases where the judge has a discretion as to the sentence, he always makes it lighter when the jury recommend the prisoner to mercy. In capital cases, where he has no discretion, he invariably in practice informs the Home Secretary at once of the recommendation, and it is frequently, perhaps generally, followed

by a commutation of the sentence. This seems to me infinitely preferable to the system of *circonstances atténuantes*. Though the impression of a jury ought always to be respectfully considered, it is often founded on mistaken grounds, and is sometimes a compromise. It is usual to ask the reason of the recommendation, and I have known at least one case in which this was followed first by silence and then by a withdrawal of the recommendation. I have also known cases in which the judge has said, "Gentlemen, you would hardly "have recommended this man to mercy if you had known "as I do that he has been repeatedly convicted of similar "offences." There are also cases in which the recommendation is obviously grounded on a doubt of the prisoner's guilt, and in such cases I have known the judge tell the jury that they ought to reconsider the matter and either acquit or convict simply, the prisoner being entitled to an acquittal if the doubt seems to the jury reasonable. This will often lead to an acquittal.

The French jurors bring their declaration into court when it is finished, and it is read for the first time in the absence of the accused, who is afterwards called in and hears it read by the President. If the prisoner is acquitted he is set at liberty at once, and [1] may recover damages from his *dénonciateurs* for calumny if they are private persons. The claim against the *dénonciateur* must be made before the *Cour d'Assises* if, before the case is over, the accused knows who the *dénonciateur* is.

[2] If the accused is convicted the *Procureur Général* calls for the application of the law. The accused may be heard upon this requisition. [3] If he can show that the facts proved by the declaration of the jury, which is conclusive as to their truth, do not amount to an offence known to the law "he is entitled to absolution." If not he must be sentenced.

An *arrêt d'absolution*, [4] it is said is usually pronounced when "la declaration de non-culpabilité n'est pure et simple, "lors qu'une déliberation de la Cour d'Assises est necessaire "pour l'apprécier." As for instance in a case where the jury

[1] *C. I. C.* 358.
[2] *C. I. C.* 362.
[3] *C. I. C.* 364.
[4] Hélie, *Prat. Crim.* i. p. 481.

found the fact alleged, but declared that the accused acted without fraud or criminal intention. If the prisoner is improperly "absous" the Court of Cassation may, upon an appeal by the *Procureur Général*, set aside the order of absolution. If the appeal succeeds on the ground that the Court denied the existence of a penal law still in force the order may be pronounced absolutely. If it is pronounced on any other ground it can be set aside only "in the interest of the law," *i.e.* to avoid the establishment of a bad precedent, but without prejudice to the interests of the parties absolved, [1] so at least M. Hélie explains article 410. What is to happen if the accused ought to have been "absous," and absolution was refused is not expressly stated. I suppose the case would fall under the general rule and involve a new trial.

A trial in the *Cour d'Assises* is subject to the following incidents:—

1. [2] When it has once begun it must go on till it is finished, subject to necessary adjournments for rest, unless a witness fails to appear, in which case it may be adjourned till the next session.

2. [3] If the prisoner is convicted, and the court is convinced that the jury are mistaken on the merits, the court may respite judgment, and adjourn the case to another session to be tried before a new jury, but their decision is final.

3. [4] The accused may appeal to the Court of Cassation upon any matter of law apparent upon the face of the proceedings, but the utmost result that can be obtained by this appeal is a declaration of the nullity of the trial, and an order for a new trial.

4. [5] If the accused is acquitted the public prosecutor may appeal and have the order set aside but only "in the interest "of the law," *i.e.* to prevent the establishment of a bad precedent, and without prejudice to the acquitted person.

5. [6] A demand for review may be made before the Court of Cassation in three cases:

[1] Hélie, *Prat. Crim.* i. p. 532.
[2] *C. I. C.* 352.
[3] *C. I. C.* 353, 354.
[4] *C. I. C.* 373, 408, *seq.*
[5] *C. I. C.* 409.
[6] *C. I. C.* 443.

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(1). When after a conviction for homicide the person supposed to have been killed is found alive.

(2). [1] When inconsistent convictions have taken place.

(3). When a witness on whose evidence a person has been convicted has been himself convicted of false evidence given at the trial.

In either of these cases a new trial must be ordered before a different court.

These are the principal provisions of the *Code d'Instruction Criminelle* of sufficient general interest to be noticed in this place.

I have only one remark to add to those already made. The whole system from first to last bears upon it the clearest traces of being a compromise between two different systems. If the jury were left out the whole system would be symmetrical and harmonious. A crime is committed, a number of careful preliminary inquiries are made by subordinate officers under the general direction of a sort of judge-advocate who has to satisfy other official personages who are judges but not advocates: first, that the suspected person should be tried. and then that he is guilty. The prisoner is closely interrogated at every step in the proceedings, the evidence is sifted and arranged with the greatest care before it comes before the court. If the court had merely to satisfy itself and to declare its satisfaction or the reverse, the whole scheme would be harmonious, but either the jury or the judges are superfluous. The presence of the jury turns the judge into an additional advocate. The presence of the judge renders necessary a cumbrous apparatus for reserving points of law which after all leaves the jury in the position of being judges of the law to whatever extent they choose to act as such.

The English system, formed by very slow degrees and with absolutely no conscious adaptation of means to ends, is intrinsically more coherent and systematic than the French system. By the steps which I have traced in detail, trial by jury has come to be in substance an action in which the prosecutor is plaintiff and the prisoner defendant. The quarrel between

[1] See l'affaire Lesmer, Vol. III. p. 509.

the two is fought out before a tribunal consisting of the judge and the jury. After hearing all that is to be said on both sides, the judge repeats to the jury the evidence given on each side, indicates as far as he thinks proper his own view of the facts, and authoritatively lays down the law for their guidance. They ultimately decide the whole matter, fact and law, being guided in their decision by the judge's statement of the law but acting with perfect independence in their own sphere. Though our system of criminal procedure has many defects, and is extremely ill expressed, it possesses an internal organic unity which seems to me to be wanting in the system established by the *Code d'Instruction Criminelle*, though that document is, speaking generally, arranged with admirable perspicuity, and on a coherent systematic plan which contrasts very unfavourably for us with the mixture of statutes, decided cases, and common law which holds our code in suspension.

This comparison of French and English criminal procedure naturally suggests the question—Which of the two is the best? To a person accustomed to the English system and to English ways of thinking and feeling there can be no comparison at all between them. However well fitted it may be for France, the French system would be utterly intolerable in England. The substitution of a secret "instruction" for our open investigation before the committing magistrate would appear to us to poison justice at its source. An English judge would feel himself degraded if he were required or expected to enter into a personal conflict with the prisoner, and extort admissions from him by an elaborate cross-examination. All our notions of dignity, order, and calmness would be overthrown by the prolonged wrangle between the court and the prisoner renewed after every witness had made his statement. The practical abolition of cross-examination would in our eyes deprive the evidence of the strongest security for its truthfulness and accuracy, and the admission of unrestricted appeals to prejudice and sentiment on the part of the counsel on both sides in their addresses to the jury would appear to us to crown by feeble sentimentality a proceeding instituted secretly and carried on oppressively. The whole temper and

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spirit of the French and the English differs so widely, that it would be rash for an Englishman to speak of trials in France as they actually are. We can think of the system only as it would work if transplanted into England. It may well be that it not only looks, but is, a very different thing in France.

The only advantage which could be ascribed to it over our own system would be that of superior efficiency, and no doubt if it were true that it does, in fact, discriminate guilt from innocence and bring the guilty to justice more effectually than our own system, it would be necessary to admit that, at however high a price, its principal object had been attained. But is this the case? It can hardly be asserted that life and property are more secure in France than they are in England, but it would hardly fall within the province of this work to enter into a detailed inquiry on this subject. The best way of comparing the working of the two systems is by comparing trials which have taken place under them. For this purpose I have given at the end of this work detailed accounts of seven celebrated trials, four English and three French, which afford strong illustrations of the results of the two systems. It seems to me that a comparison between them shows the superiority of the English system even more remarkably than any general observations which may be made on the subject. In every one of the English cases the evidence is fuller, clearer, and infinitely more cogent than it is in any one of the French cases, notwithstanding which, far less time was occupied by the English trials than by the French ones, and not a word was said or a step taken which any one can represent as cruel or undignified.

Apart from the comparative merits of French and English criminal procedure, this appears to be the place for some observations on the positive value of trial by jury as practised and understood in England. It is perhaps the most popular of all our institutions, and has certainly been made the subject of a kind and degree of eulogy which no institution can possibly deserve. All exaggeration apart, what is its true value?

It may be regarded in several different lights.

The first question is, Are juries just? The second, Are they intelligent enough for the duties they have to perform?

The third, What are the collateral advantages of the institution? Upon each of these points it is necessary to compare juries to judges sitting without juries, for the choice lies between these two tribunals. Our experience of trials by judges without juries, in criminal as well as in civil cases, has in the last two generations become very extensive. In the first place, the judges of the Chancery Division of the High Court are continually called upon to determine questions of fact which in many instances are exactly like those which are determined in criminal cases; as, for instance, where fraud is alleged as a ground for setting a transaction aside. The same is true of the county court judges and of the courts of summary jurisdiction, which have extensive powers of fine and imprisonment. Applications to the judges of the Queen's Bench Division sometimes involve the determination of similar questions. I have, for instance, known a case in which the decision of the question whether a father should be deprived of the custody of his child depended upon the question whether he had committed a crime, which question was tried and determined by a judge without a jury. The trial of civil cases without juries has also become a matter of everyday occurrence. Finally, in British India, trial by a judge alone is in all criminal cases the rule, and trial by jury the rare exception.

There is a considerable difference in the manner in which cases are tried by judges sitting alone. In cases tried without a jury by a judge of the High Court, notes are taken just as if the case was tried by a jury; and in the case of an appeal, they are forwarded to the Court of Appeal for their information. If serious criminal cases were to be tried by judges without juries, I think that notes should be taken both by the judge and, in capital cases, by a shorthand writer as well; and I think the judge should give his reasons for his decision, and that if he did not give them in writing they should be taken down by a shorthand writer, and read and corrected by the judge. In such cases I think there should be an appeal both on the law and on the facts to the Court for Crown Cases Reserved, or whatever court might be substituted for it. In comparing trial by jury with trial by a judge without a

jury, I assume the establishment of such a form of trial as this.

First, then, as to the comparative justice to be expected of trials by jury and trials by a judge without a jury. Trial by a judge without a jury may, I think, be made, practically speaking, completely just in almost every case. At all events, the securities which can be taken for justice in the case of a trial by a judge without a jury are infinitely greater than those which can be taken for trial by a judge and jury.

1. The judge is one known man, holding a conspicuous position before the public, and open to censure and, in extreme cases, to punishment if he does wrong: the jury are twelve unknown men. Whilst the trial is proceeding they form a group just large enough to destroy even the appearance of individual responsibility. When the trial is over they sink back into the crowd from whence they came, and cannot be distinguished from it. The most unjust verdict throws no discredit on any person who joined in it, for as soon as it is pronounced he returns to obscurity.

2. Juries give no reasons, but judges do in some cases, and ought to be made to do so formally in all cases if juries were dispensed with. This in itself is a security of the highest value for the justice of a decision. An unskilled person may no doubt give bad reasons for a sound conclusion, but it is nearly impossible for the most highly skilled person to give good reasons for a bad conclusion; and the attempt to do so would imply a determination to be unjust which would be most uncommon.

3. From the nature of the case there can be no appeal in cases of trial by jury, though there may be a new trial. There can be an appeal where the trial is by a single judge.

This may not, at first sight, be obvious, but it is a consequence of the circumstance that a jury cannot give their reasons. An appeal, properly so called, implies a judgment on the part of the court appealed from and an argument to show that it decided wrongly, which cannot be unless the reasons of the decision are known. If an appeal proper lay from the decision of a jury, and if it took the form of a

rehearing before a court of judges, trial by jury might as well be abolished. CH. XV.

4. Experience has proved that the decisions of single judges are usually recognised as just. There are very few complaints of the decisions either of magistrates or of county court judges on the ground of injustice. I never heard of a complaint of injustice in a trial by a judge of the High Court without a jury. Arbitrations, in which the arbitrator gives no reasons and is subject to no appeal, are not only common but are on the increase. This would scarcely be the case if confidence were not felt in the justice of arbitrators.

As to juries, experience no doubt has shown, and does continually show, that their verdicts also are just in the very great majority of instances, but I am bound to say I think that the exceptions are more numerous than in the case of trials by judges without juries.

In cases of strong prejudice juries are frequently unjust, and are capable of erring on the side either of undue convictions or of undue acquittals. They are also capable of being intimidated, as the experience of Ireland has abundantly shown. Intimidation has never been systematically practised in England in modern times, but I believe it would be just as easy and just as effective here as it has been shown to be in Ireland. Under the Plantagenets, and down to the establishment of the Court of Star Chamber, trial by jury was so weak in England as to cause something like a general paralysis of the administration of justice. Under Charles II. it was a blind and cruel system. During part of the reign of George III. it was, to say the least, quite as severe as the severest judge without a jury could have been. The revolutionary tribunal during the Reign of Terror tried by a jury.

There are no doubt some things to be set against this. It is often said in delicate terms that some degree of injustice is a good thing. The phrases in which this sentiment is conveyed are to the effect that it may sometimes be desirable that the strict execution of the law should be mitigated by popular sentiment, of which juries are considered to be the representatives. Whether it is a greater evil that a bad law

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should be executed strictly or capriciously is perhaps disputable, but it admits of no doubt that laws unfit to be strictly executed ought to be repealed or modified. Parts of the criminal law were no doubt formerly cruel and otherwise objectionable. I can understand, though I do not share, the sentiment which admires juries who perjured themselves by affirming a five-pound note to be worth less than forty shillings in order to avoid a capital conviction, or who refused to give effect to the old law of libel; but these are things of the past. I know of no part of our existing law which requires to be put in force capriciously. I see, for instance, no advantage in acquittals in the face of clear evidence for bribery, or for sending ships to sea in a dangerous condition, or for libels on private persons who happen to be disreputable and unpopular, or for frauds committed upon money-lenders, or for crimes committed by pretty women under affecting circumstances.

The cases commonly referred to as those which reflect the highest honour upon juries are—the trial of the seven bishops in 1688, the trials for libel in the last century, and the trials for treason in 1794. As to the trial of the seven bishops, their acquittal was, no doubt, right; but their conviction would have done no great harm, it would have merely hastened the Revolution, and given them a little martyrdom. Besides, if they had been tried by the presiding judges, they could not have been convicted, for the judges were two to two. In the case of libel, I think there can be no doubt that the alteration of a bad law was to some extent caused by the unwillingness of juries to enforce it, though (as will appear in a subsequent chapter) they were extremely capricious in their verdicts, and though the amendment of the law was due, after all, rather to Parliament than to the juries. In the case of the trials for treason in 1794, the case turned, not upon the law, but upon the evidence. I do not think that the prisoners would have been convicted if they had been tried by a judge without a jury. [1] Chief Justice Eyre's summing up was scrupulously fair, and cannot be said to have been calculated to procure a conviction. Even [2] Lord Eldon, not long

[1] 24 *State Trials*, p. 1293 *et seq.*
[2] Campbell's *Lives of the Chancellors*, ix. p. 197.

after the trial, said "the evidence was, in his opinion, so nicely "balanced, that had he himself been on the jury he did not "know what verdict he should have given." If so, he must have given the prisoners the benefit of the doubt. I shall refer more particularly to these matters elsewhere. It is sufficient for the present purpose to observe that I think that as a matter of history trial by jury has been less of a bulwark against oppressive punishments than many of the popular commonplaces about it imply.

The next point to consider is the comparative wisdom or intelligence of judges and juries. I think that a judge ought to be, and that he usually is, a man of far greater intelligence, better education, and more force of mind, than any individual member of the juries which he has to charge, but it must be remembered that there is a great difference between jury and jury. The force and effect of evidence can hardly be tested better than by the impression which it makes on a group of persons large enough to secure its being looked at from many different points of view and by people of different habits of mind. But this advantage is obtained only when all the jurors listen to the whole of the evidence; and it continually happens that several of them are half asleep, or listen mechanically, or think about something else, and that when the verdict is considered they follow the lead of any member of the jury who chooses to take the lead. Again, as to experience, it is very unlikely that any judge should have greater experience of the kind required upon a criminal trial than all the twelve men in the jury-box put together, unless indeed they are unusually stupid. A really good special jury will usually consist of, or as a rule contain, men in every respect as competent to judge of the effect of evidence as any judge, and the probability that they or some of them will possess experience bearing on the case which has not come in the judge's way is considerable. I think that as far as skill and intelligence go it would be impossible to have a stronger tribunal than a jury of educated gentlemen presided over by a competent judge. I cannot, however, say much for the intelligence of small shopkeepers and petty farmers, and whatever the fashion of

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the times may say to the contrary, I think that the great bulk of the working classes are altogether unfit to discharge judicial duties, nor do I believe that, rare exceptions excepted, a man who has to work hard all day long at a mechanical trade will ever have either the memory, or the mental power, or the habits of thought, necessary to retain, analyse, and arrange in his mind the evidence of, say, twenty witnesses to a number of minute facts given perhaps on two different days. Jurors almost never take notes, and most of them would only confuse themselves by any attempt to do so, and I strongly suspect that a large proportion of them would, if examined openly at the end of a trial as to the different matters which they had heard in the course of it, be found to be in a state of hopeless confusion and bewilderment. I should be far from saying this of good special juries, but I think that the habit of flattering and encouraging the poor, and asserting that they are just as sensible and capable of performing judicial and political functions as those who from their infancy have had the advantages of leisure, education, and wealth, has led to views as to the persons qualified to be jurors which may be very mischievous. I think that, in all criminal cases of any considerable difficulty or importance, there ought to be at least a power to summon special juries. In short, I think a good judge and a good special jury form as strong a tribunal as can be had, but I think a judge without a jury would be a stronger tribunal than a judge and an average common jury.

There is a third point of view from which trial by jury must be considered, namely, its collateral advantages, and these, I think, are not only incontestable in themselves, but are of such importance that I should be sorry to see any considerable change in the system, though I am alive to its defects. They are these :—

In the first place, though I do not think that trial by jury really is more just than trial by a judge without a jury would be, it is generally considered to be so, and not unnaturally. Though the judges are, and are known to be, independent of the executive Government, it is naturally felt that their sympathies are likely to be on the side of authority. The

public at large feel more sympathy with jurymen than they do with judges, and accept their verdicts with much less hesitation and distrust than they would feel towards judgments however ably written or expressed.

In the next place, trial by jury interests large numbers of people in the administration of justice and makes them responsible for it. It is difficult to over-estimate the importance of this. It gives a degree of power and of popularity to the administration of justice which could hardly be derived from any other source.

Lastly, though I am, as every judge must be, a prejudiced witness on the subject, I think that the position in which trial by jury places the judge is one in which such powers as he possesses can be most effectually used for the public service. It is hardly necessary to say that to judges in general the maintenance of trial by jury is of more importance than to any other members of the community. It saves judges from the responsibility—which to many men would appear intolerably heavy and painful—of deciding simply on their own opinion upon the guilt or innocence of the prisoner. If a judge sums up for a conviction and the jury convicts, they share the responsibility with him and confirm his views by their verdict; and the same may be said if they follow his suggestion in acquitting. If they acquit when he suggests a conviction, he is spared from what is always a painful task—that of determining on the sentence to be passed. If they convict when he suggests an acquittal, he can, if he is decidedly of opinion that the prisoner is innocent, in practically all cases, procure a pardon; I think he ought to have a legal right to direct a new trial. On the other hand, he may not unfrequently feel that the jury have done substantial justice in overlooking some deficiency or weakness in the legal proof of the case which had occurred to his mind, and in this case the result is that, without any default on his part, a criminal meets his deserts, although the proof against him may not quite come up to the legal standard. I remember a case many years ago in which a surgeon was convicted of manslaughter for causing the death of a woman in delivering her of a child. The judge (the late Baron Alderson) summed up

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strongly for an acquittal, remarking on the slightness of the evidence that the man was drunk at the time; but the jury convicted him, well knowing that he was a notorious and habitual drunkard.

For these reasons, the institution of trial by jury is so very pleasant to judges that they may probably be prejudiced in its favour. I think, however, that the institution does place the judge in the position in which, with a view to the public interest, he ought to be placed—that of a guide and adviser to those who are ultimately to decide, and a moderator in the struggle on the result of which they are to give their decision. The interposition of a man, whose duty it is to do equal justice to all, between the actual combatants and the actual judges of the result of the combat, gives to the whole proceedings the air of gravity, dignity, and humanity, which ought to be, and usually is, characteristic of an English court, and which ought to make every such court a school of truth, justice, and virtue. In short, if trial by jury is looked at from the political and moral point of view, everything is to be said in its favour, and nothing can be said against it. Whatever defects it may have might be effectually removed by having more highly qualified jurors. I think that to be on the jury list ought to be regarded as an honour and distinction. It is an office at least as important as, say, that of guardians of the poor, and I think that if arrangements were made for the comfort of jurors, and for the payment of their expenses when on duty, men of standing and consideration might be willing and even desirous to fill the position.

There is one further question connected with trial by jury on which a few words may be said. This is the question:—Which is right—the present system according to which skilled witnesses are called by each side at the discretion of the parties and are examined and cross-examined like other witnesses, or a proposed system according to which such witnesses should be appointed by the court and occupy a position more or less resembling that of assessors? The matter has been often discussed, especially by medical men. I have the strongest possible opinion in favour of the maintenance of the present system for the following reasons.

Our present system provides a definite place and definite rights and duties for the parties, the judge, the jury, and the witnesses. What room there is for any other person in the proceedings I do not see. It is impossible to say what an expert is to be if he is not to be a witness like other witnesses. If he is to decide upon medical or other scientific questions connected with the case so as to bind either the judge or the jury, the inevitable result is a divided responsibility which would destroy the whole value of the trial. If the expert is to tell the jury what is the law—say about madness—he supersedes the judge. If he is to decide whether, in fact, the prisoner is mad, he supersedes the jury. If he is only to advise the court, is he or is he not to do so publicly and to be liable to cross-examination? If yes, he is a witness like any other. If no, he will be placed in a position opposed to all principle. The judge and the jury alike are, and ought to be, instructed only by witnesses publicly testifying in open court on oath. It never would be, and never ought to be, endured for a moment that a judge should have irresponsible advisers protected against cross-examination. Again, suppose that some arrangement or other as to experts were devised by which they were to be not quite witnesses but something rather like it, what rule is to be laid down as to witnesses? Are the prisoner and the Crown to be allowed or to be forbidden to call them as at present? To forbid a prisoner to call a witness to say that in his opinion the symptoms of a given death were not those of poisoning would be an intolerable denial of justice; but if such witnesses are called, what becomes of the experts? When the jury have heard sworn witnesses, examined and cross-examined for the parties, what will they care, or what ought they to care, for the opinion of experts appointed by the Crown? Counsel would say with perfect truth, Listen to sworn testimony tested by cross-examination; what have you to do with people whose evidence, if evidence it is to be called, you are not allowed to test?

The truth is, that the demand for experts is simply a protest made by medical men against cross-examination. They are not accustomed to it and they do not like it, but I

CH. XV. should say that no class of witnesses ought to be so carefully watched and so strictly cross-examined. There is one way in which medical men may altogether avoid the inconveniences of which they complain, and that is by knowing their business and giving their testimony with absolute candour and frankness. There have been, no doubt, and there still occasionally are, scenes between medical witnesses and the counsel who cross-examine them which are not creditable, but the reason is that medical witnesses in such cases are not really witnesses but counsel in disguise, who have come to support the side by which they are called. The practice is, happily, rarer than it used to be; but when it occurs it can be met and exposed only by the most searching, and no doubt unpleasant, questioning. By proper means it may be wholly avoided. If medical men laid down for themselves a positive rule that they would not give evidence unless before doing so they met in consultation the medical men to be called on the other side and exchanged their views fully, so that the medical witnesses on the one side might know what was to be said by the medical witnesses on the other, they would be able to give a full and impartial account of the case which would not provoke cross-examination. For many years this course has been invariably pursued by all the most eminent physicians and surgeons in Leeds, and the result is that in trials at Leeds (where actions for injuries in railway accidents and the like are very common) the medical witnesses are hardly ever cross-examined at all, and it is by no means uncommon for them to be called on one side only. Such a practice of course implies a high standard of honour and professional knowledge on the part of the witnesses employed to give evidence, but this is a matter for medical men. If they steadily refuse to act as counsel, and insist on knowing what is to be said on both sides before they testify, they need not fear cross-examination.

END OF VOL. I.

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