

A HISTORY  
OF  
THE CRIMINAL LAW  
OF ENGLAND.

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NOTE TO PAGES 386—392, VOL. II.

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

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

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

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

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# CRIMINAL LAW.

## CHAPTER XVI.

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

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

#### <sup>1</sup> I.—TIME.

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

<sup>1</sup> See *Digest of Criminal Procedure*, art. 15.

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

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

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

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

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

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

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

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

#### <sup>1</sup> II.—PERSONS.

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

<sup>1</sup> *Dig. Crim. Proc.* art. 14.



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

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

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

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

<sup>1</sup> 1 Com. 253.

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

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

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

<sup>1</sup> The principal authority referred to by Blackstone for this is *4th Institute*, chap. xxvi. p. 152—157. Coke goes much further in restraining the privileges of ambassadors than Blackstone. "If a foreign ambassador being  
<sup>2</sup> *pro reo* committeth here any crime which is *contra jus gentium*, as treason, felony, adultery, or any other crime which is against the law of nations, he loseth his privilege . . . and may be punished here as any other private alien." In the last edition of Stephen's *Commentaries* (ii. 485—486, edition of 1880) this passage of Blackstone is not modified. <sup>3</sup> P. 188.

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

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

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

<sup>1</sup> This was disapproved in the case of R. v. Johnson, 29 *St. Tr.* 398. Lord Ellenborough said, “it certainly is not law,” and Grose, J., agreed with him.

<sup>2</sup> 1 *Taunton*, 26.

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

In 1845 <sup>2</sup>a case was tried at Exeter which supplies an illustration of the line at which the jurisdiction of the

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

<sup>2</sup> *R. v. Serva and others*, 1 *Den. C. C.* 104.

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

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

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

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

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

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

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

<sup>1</sup> D. and B. 525.

<sup>2</sup> *Ib.* 543.

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

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

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

### III.—PLACE.

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

- (1) Crimes committed on land in England.
- (2) Crimes committed on land out of England.
- (3) Crimes committed at sea, whether within the realm of England or without.
- (4) Crimes committed on foreign ships of war in British waters.
- (5) Crimes committed in places to which the Foreign Jurisdiction Acts extend.

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

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

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

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

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

<sup>1</sup> Vol. I. p. 276.

<sup>2</sup> L. R. 2 Ex. see p. 103 (judgment of Denman, J.), p. 158 (judgment of Lord Coleridge, C.-J.), pp. 232—235 (judgment of Cockburn, C.-J.).



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

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

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

<sup>1</sup> L. R. 2 Ex. 28.

<sup>2</sup> Leach, 389.

<sup>3</sup> United States v. Davis, 2 Sumner, 432.

<sup>4</sup> L. R. 2 Ex. 234.

<sup>5</sup> This would now be altered by the operation of the Territorial Waters Act.

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

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

CRIMES COMMITTED ON LAND OUT OF ENGLAND.—With regard to offences of this class also there is little difficulty.

<sup>1</sup>I am not aware of any exception to the rule that crimes committed on land by foreigners out of the United Kingdom are not subject to the criminal law of England, except one furnished by the Merchant Shipping Act of 1854 (17 & 18 Vic. c. 104, s. 267), noticed below. There may be exceptions in the orders made under the Foreign Jurisdiction Acts.

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

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

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

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

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

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

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

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

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

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

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

<sup>1</sup> 3rd Institute, p. 27.

CH. XVI. the acts prohibiting the slave trade are locally confined to the queen's dominions. <sup>1</sup>It seems that they apply to all parts of the world, but this is doubtful.

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

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

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

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

<sup>1</sup> See *R. v. Zulueta*, 1 *C. and K.*, 226-227; also *Santos v. Illidge*, 8 *C. B.* (N. S.), 861.

<sup>2</sup> *4th Institute*, 143.

<sup>4</sup> *Rot. Par.* 569, 571.

<sup>3</sup> *Ib.* 145.

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

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

<sup>1</sup> Published by the orders of the Master of the Rolls in 1871, and edited by Sir Horace Twiss. The rules and orders are at vol. i. p. 41 and following. They are supposed to have been written about the middle of the fourteenth century, and perhaps for the government of the fleet preparatory to the expedition which terminated in the great battle of the Swin, in 1340. (Vol. i. ~~xxx~~.) <sup>2</sup> P. 45.

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

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

The ordinance quoted may have been local and temporary, but, however this may have been, it is clear that in early times the jurisdiction of the Admiralty courts was ill-defined, and was the subject of great dispute. No doubt the Admiralty judges would do their utmost to extend it by all means in their power. That they did so appears from statutes passed in the reign of Richard II. The first of these (13 Rich. 2, st. 1, c. 5, A.D. 1389) recites that "a great and common clamour and complaint hath been oftentimes made before this time, and yet is, for that the admirals and their deputies hold their sessions within divers places of this realm, as well within franchises as without, encroaching to them greater authority than belongs to their office, in prejudice of our Lord the King and the common law of the realm, and in diminishing of divers franchises, and in destruction and impoverishing of the common people." Two years afterwards (in 1391) this recital was repealed by 15 Rich. 2, c. 3, and it was enacted that the admiral's court shall have no cognizance of "contracts, pleas, and quarrels, and all other things rising within the bodies of the counties. Nevertheless," it is added, "of the death of a man and of a mayhem done in great ships, being and hovering in the main stream of great rivers, only beneath the <sup>1</sup>bridges of the same rivers nigh to the sea, and in none other places of the same rivers, the admiral shall have cognizance."

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

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



“ or his lieutenant and commissary, after the course of the  
 “ civil laws, the nature whereof is that before any judgment of  
 “ death can be given against the offenders, either they must  
 “ plainly confess their offences (which they will never do  
 “ without torture or pains), or else their offences be so plainly  
 “ and directly proved by witnesses indifferent, such as saw  
 “ their offences committed, which cannot be gotten but by  
 “ chance at few times, because such offenders commit their  
 “ offences upon the sea, and many times murther and kill such  
 “ persons being in the ship or boat where they commit their  
 “ offences which should witness against them on their behalf.”

It is enacted by way of remedy that “ all treasons, felonies,  
 “ robberies, murders, and confederacies, hereafter to be com-  
 “ mitted upon the sea, or in any other haven, river, creek, or  
 “ place where the admiral or admirals have, or pretend to  
 “ have, power, authority, or jurisdiction, shall be inquired  
 “ tried, heard, determined, and judged according to the course  
 “ of the common law, and as if they had been committed on  
 “ land, in shires or places,” within the realm limited by the  
 king’s commission to the admiral or his deputy, “ and to three  
 “ or four such other substantial persons ” as the king should  
 appoint. These “ substantial persons ” were always in practice  
 judges of the common law courts.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>1</sup> Passed in consequence of the case of *R. v. Mount*, *L. R.* 6 *P. C.* 283.

<sup>2</sup> 24 & 25 Vic. c. 96, s. 115; c. 97, s. 72; c. 98, s. 50; c. 99, s. 36; c. 100, s. 68.

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

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

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

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

<sup>1</sup> 17 & 18 Vic. c. 104. ss. 260--263, 268, and 270.

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

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

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

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

<sup>1</sup> 2 Hale, P. C. 13. These cases are carefully examined by Cockburn, C.-J.,

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

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

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

<sup>1</sup> See Coke, *4th Institute*, ch. xxii. p. 134, &c.

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

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

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

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

<sup>1</sup> R. v. Cunningham, Bell *C. C.* 72.

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



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

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

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

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

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

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

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

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

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

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

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

<sup>1</sup> L. R. 2 Ex. Div. 63—239.

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

<sup>3</sup> Lord Coleridge, C.-J., Brett and Amphlett, L.-J.J., Grove, Denman, and Lindley, J.J.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>1</sup> *L. R. 2 Ex. Div.* 153.

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

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

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

<sup>1</sup> *L. R. 2 Ex. Div.* p. 202.

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

<sup>1</sup> *L. R. 2 Ex. Div.* 176—181.

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

<sup>1</sup> *L. R.* 2 *Ec. Dic.* 191.

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

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

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

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

<sup>1</sup> *L. R. 2 Ex. Div.* 153—154.

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

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

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

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

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

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

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



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

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

<sup>2</sup> The Lord Chief Justice, Mr. Justice Archibald, Mr. Thesiger, Sir H. Holland, myself, and Mr. Rothery.

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

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

Three distinct sets of rights and duties appear to be in-  
 cluded under this description:—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"The jurisdiction of the nation within its own territory is

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

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

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

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

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

The rule rests upon the following grounds :—

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

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

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

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

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

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

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

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

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

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

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

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

My hesitation arises from a doubt whether the commanding



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

“commandant ait une certaine latitude d’appréciation, CH. XVI.  
 “et un pouvoir de se décider et d’ordonner lui-même  
 “immédiatement.”<sup>1</sup>

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

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

<sup>1</sup> *Dipl. de la Mer.* i. 298, 299.

<sup>2</sup> *B. & C.* 448.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

<sup>2</sup> 41 & 42 Vic. c. 67, s. 5.

<sup>3</sup> *Ib.* s. 6.

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

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

<sup>1</sup> China and Japan Order, 1865, s. 69.

<sup>2</sup> Order for Courts of the Dominions of the Porte, 268, 269.

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

<sup>4</sup> At present Sir A. Gordon, Governor of New Zealand (*Colonial Office List*, 1882).

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

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<sup>7</sup> There are provisions in certain cases for an appeal to the Supreme Court either generally or on a point of law.

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

## IV.—ACTS OF STATE.

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

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

<sup>1</sup> Order, ss. 23 and 23.<sup>2</sup> S. 27.<sup>3</sup> Ss. 25, 26.<sup>4</sup> S. 28.<sup>5</sup> S. 31.<sup>6</sup> S. 47.<sup>7</sup> S. 54.

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

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

The difficulty arises when acts which are in their nature

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

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

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

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

<sup>1</sup> Alison, xi. 261.

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

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

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

<sup>1</sup> 2 *Ex.* 167.

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

<sup>3</sup> 13 Moore, *P. C. C.* 22; see especially p. 86.

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

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

<sup>1</sup> V.—EXTRADITION.

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

<sup>1</sup> *Dig. Crim. Proc.* ch. xviii. arts. 141-146.

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

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

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

<sup>1</sup> Clarke on *Extradition*, second edition, p. 24-25.

<sup>2</sup> *Ib.* p. 109.



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

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

<sup>2</sup> The general scheme of the first of these acts (for the second is only an amending act) is as follows:—

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

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

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

<sup>1</sup> Clarke, pp. 117, 122, 135.

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

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

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

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

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

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

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

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

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

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

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

<sup>1</sup> For many years past it has been held to be "*meurtre*" within Article 296 of the *Code Pénal*, but between 1810 and 1838 it was held not to be a crime at all. This, however, does not affect the illustration.

<sup>2</sup> S. 3.

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

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

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

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

<sup>1</sup> See note <sup>2</sup>, p. 67, *supra*.

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

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

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

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

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

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

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

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

<sup>3</sup> S. 8, 1.

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

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

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

<sup>1</sup> S. 9.

<sup>2</sup> S. 10.

<sup>3</sup> S. 11.

<sup>4</sup> S. 12.

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

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

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

<sup>1</sup> Note in Chitty's *Statutes to Extradition Act*, vol. ii. p. 1041, and see Appendix to Clarke on *Extradition*, 1874.

<sup>2</sup> *Dig. Crim. Proc.* ch. xix. arts. 147-163.



## CHAPTER XVII.

## OF CRIMES IN GENERAL AND OF PUNISHMENTS.

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

CH. XVII.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>1</sup> I quote from memory, not having thought it worth while to verify the reference.

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

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

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

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

<sup>1</sup> See 1 & 2 Will. 4, c. 13.

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

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

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

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

The expression and gratification of these feelings is how-



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>1</sup> 9 & 10 Vic. c. 24.

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



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

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

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

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

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

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

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

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

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

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## CHAPTER XVIII.

## CRIMINAL RESPONSIBILITY.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>1</sup> Art. 66-67.

<sup>2</sup> *Strafgesetzbuch*, 52.

<sup>3</sup> 56. “Die zur Erkenntniss ihrer Strafbarkeit erforderliche Einsicht nicht besaß.”

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

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



practical solution for many questions which present great theoretical difficulties. CH. XVIII.

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

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

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

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

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

<sup>1</sup> 1 Hale, P. C. 434.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"It does not apply to high treason or murder.

"It probably does not apply to robbery.

"It applies to uttering counterfeit coin.

"It seems to apply to misdemeanours generally."

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

<sup>1</sup> See my *Digest*, p. 17, art. 30.

<sup>2</sup> See my *Digest*, note ii. p. 332, in which the authorities are examined.

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

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

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

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

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

<sup>1</sup> *R. v. M'Growther*, 18 *St. Tr.* 894 ; *R. v. Crutchley*, 5 *C. & P.* 183. See my *Digest*, art. 31, p. 18.

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



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

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

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

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

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

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

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

<sup>1</sup> Commonwealth v. Holms, 1 Wall Jr. 1.

<sup>2</sup> I suppose this means by lot. There is something almost grotesque in the notion of a right to vote in such a case.

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

<sup>1</sup> 21 *St. Tr.* 1224.

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

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

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

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

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

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

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

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

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

<sup>1</sup> *R. v. Woodbourne and Coke*, 18 *St. Tr.* 54. But see the case of *R. v. Williams*, 1 *Leach*, 529, in which a doubt is expressed as to *R. v. Woodbourne*.

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

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

<sup>1</sup> In the Draft Criminal Code by the Commissioners of 1879, which substantially re-enacted the existing law, the following crimes by omission were punished:—S. 78 (b), not giving information of high treason. S. 111, not fighting pirates. S. 116, disobeying the lawful order of a court, &c. SS. 117, 118, not assisting when required in the apprehension of offenders or the suppression of crime. S. 180, nuisance by omitting to the public injury to discharge a duty. Homicide by omission to discharge a duty. SS. 185, 186, omission to make preparation for the birth of a child. (These provisions were new.) S. 193 (f), wilful omission to discharge a duty whereby passengers on a railway are injured or put in danger. S. 194 (e), culpable neglect, having the same result. SS. 388 (f), 389, same as the two last, except that they relate to injuries to carriages, &c. S. 201, negligent injury to the person. SS. 223, 224, 225, neglect of duties to children. S. 282, fraudulent omissions from accounts. S. 412, omissions by bankrupts to discharge their duties towards trustees and creditors. In nearly all these cases the neglect to be criminal must be intentional. The only common exceptions are nuisances by neglect (these are rather civil than criminal cases), homicide by neglect, the infliction of personal injury by neglect (by the present law this is criminal only in cases of neglect by railway servants, and causing injury by furious driving), neglect of certain duties to children.

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

<sup>1</sup> L.R. 2 C.C.R. 154.

<sup>2</sup> L.R. 5 Q.B.D. 259.

CH XVIII. party to the marriage is dead, he is or is not guilty of bigamy if the other party is in fact alive. <sup>1</sup>There are decisions both ways on the subject.

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

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

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

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

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

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

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

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

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

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

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

<sup>1</sup> The exceptions are ss. 36, 47, 50, 52, 53, 54.

<sup>2</sup> See my *Digest*, art. 223, and note xiv. p. 354.

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

(c) An intent to commit any felony whatever.

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

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

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

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

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

<sup>1</sup> See my *Digest*, ch. xxxvii. p. 184-193, and note xvi. p. 374.

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

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

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

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

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

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

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

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

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

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

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



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

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

## CHAPTER XIX.

<sup>1</sup> RELATION OF MADNESS TO CRIME.

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

<sup>1</sup> The following are the medical works most frequently referred to in this chapter :—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>1</sup> *Responsibility in Mental Disease*, p. 102.

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

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

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

In dealing with this subject the following questions occur:—

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

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

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

1. What is the meaning of the word mind?

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

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

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

The next question is, What are sanity and insanity ?

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

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



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

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

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

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

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

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

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

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

<sup>1</sup> I quote from an English translation by Dr. C. Lockhart Robinson and Dr. James Rutherford, published by the Sydenham Society, London, 1867.

<sup>2</sup> Gr. 127, 132; B. and T. 57-116.

<sup>3</sup> B. and T. 337-339.

<sup>4</sup> B. and T. 350.

<sup>5</sup> B. and T. 346.

<sup>6</sup> B. and T. 327.

<sup>7</sup> B. and T. 377.

<sup>8</sup> B. and T. 382.

<sup>9</sup> B. and T. 386.

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

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

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

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

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

<sup>1</sup> Gr. 409.

<sup>2</sup> Gr. 432.

<sup>3</sup> Gr. 412.

<sup>4</sup> Book iii. For the passage quoted see p. 207.

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

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

<sup>1</sup> “ Observation shows that the immense majority of mental  
 “ diseases commence with a state of profound emotional per-  
 “ version of a depressing and sorrowful character,” though,  
 there are exceptions.

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

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

<sup>1</sup> Gr. 210.<sup>2</sup> Gr. 211.<sup>3</sup> Gr. 211-222.<sup>4</sup> Gr. 223-46.<sup>5</sup> Gr. 223.

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

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

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

<sup>1</sup> Gr. 224.

<sup>2</sup> Gr. 227.

beggary, and these delusions may vary at different times. CH. XIX.

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

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

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

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

<sup>5</sup> In other cases the desire to destroy may be a desire to destroy other persons or even inanimate things, a desire

<sup>1</sup> Gr. 228.

<sup>2</sup> Gr. 246.

<sup>3</sup> Gr. 247-252.

<sup>4</sup> Gr. 252-261.

<sup>5</sup> Gr. 261-271.

CH. XIX. which occasionally leads people to set fire to houses, in which case it has been called (<sup>1</sup> according to Griesinger very improperly) pyromania. The feeling of intense melancholy and general dissatisfaction with all things may suggest such desires in innumerable ways. For instance, since all is bad is it not merciful to deliver children by violence from the miseries of life? Since the patient is a wretch unworthy to live, why not kill some one else in order to get himself hung for it? The world being accursed by reason of its horrible guilt is it not necessary to offer up some one as an expiatory sacrifice? Such thoughts when dwelt upon lead the patient to look upon the proposed act with longing and with a feeling that it will bring him relief and comfort, and in point of fact <sup>2</sup> according to Dr. Griesinger he does gain ease and calm by giving way to such impulses. A lady who was much tempted to the commission of crimes under this form of disease said <sup>3</sup> "that every act of violence whether " in word or deed perpetrated on her children or those " around her afforded her considerable relief."

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

<sup>6</sup> Cases are not very uncommon in which such impulses

<sup>1</sup> Gr. 270.  
<sup>4</sup> Gr. 259.

<sup>2</sup> Gr. 263.  
<sup>5</sup> Gr. 264.

<sup>3</sup> Gr. 263.  
<sup>6</sup> Gr. 266-267.



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

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

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

<sup>1</sup> Female irregularities, for instance.

<sup>3</sup> Gr. 271.

<sup>2</sup> Gr. 271.

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

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

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

<sup>1</sup> Gr. 279.

<sup>2</sup> Gr. 280.

<sup>3</sup> Gr. 281.

<sup>4</sup> Gr. 283.

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

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

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

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

<sup>1</sup> Gr. 284.<sup>2</sup> Gr. 285.<sup>3</sup> Gr. 286.<sup>4</sup> Gr. 287.<sup>5</sup> Gr. 289.<sup>6</sup> Gr. 290.

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

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

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

<sup>1</sup> Gr. 303-304.

<sup>2</sup> Gr. 326-340.

<sup>3</sup> Gr. 307.

<sup>4</sup> Gr. 328.

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

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

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

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

<sup>1</sup> Gr. 324-340.<sup>2</sup> Gr. 340.<sup>3</sup> Gr. 344.<sup>4</sup> Gr. 392-407 ; see too Maudsley, *Responsibility, &c.*, 72-76.

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

<sup>1</sup> Gr. 408-406.

<sup>2</sup> *Responsibility, &c.*, pp. 166-70.

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

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

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

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

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

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

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

<sup>1</sup> On idiocy see Gr. 847-881; B. and T. 162-187.

<sup>2</sup> Pp. 262-275. Kleptomania.

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



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

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

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

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

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

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

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

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

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

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

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

First, then, what is the law of England as to the effect of madness upon criminality? I have stated it as follows in my <sup>1</sup>*Digest*. "No act is a crime if the person who does it is at the time when it is done prevented [either by defective mental power or] by any disease affecting his mind  
" (a) From knowing the nature and quality of his act, or  
" (b) From knowing that the act is <sup>2</sup>wrong, [or  
" (c) From controlling his own conduct, unless the absence of the power of control has been produced by his own default].  
" But an act may be a crime although the mind of the person who does it is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act.

" ILLUSTRATIONS.

" (1.) A kills B under an insane delusion that he is breaking a jar. A's act is not a crime.  
" (2.) A kills B knowing that he is killing B, and knowing that it is wrong to kill B, but his mind is so imbecile that he is unable to form such an estimate of the nature and consequences of his act as a person of ordinary intelligence would form. A's act is not a crime if the words within the first set of brackets are law. If they are not it is.  
" (3.) A kills B knowing that he is killing B, and knowing that it is illegal to kill B, but under an insane delusion that the salvation of the human race will be obtained by his execution for the murder of B, and that God has commanded him (A) to produce that result by those means. A's act is a crime if the word 'wrong' means illegal. It is not a crime if the word wrong means morally wrong.  
" (4.) A suddenly stabs B under the influence of an impulse caused by disease, and of such a nature that nothing short of the mechanical restraint of A's hand would have prevented the stab. A's act is a crime if (c) is not law. It is not a crime if (c) is law.  
" (5.) A suddenly stabs B under the influence of an impulse caused by disease, and of such a nature that a strong motive, as for instance the fear of his own immediate death, would have prevented the act. A's act is a crime whether (c) is or is not law.  
" (6.) A permits his mind to dwell upon and desire B's death; under the influence of mental disease this desire becomes uncontrollable, and A kills B. A's act is a crime whether (c) is or is not law.  
" (7.) A, a patient in a lunatic asylum, who is under a delusion that his finger is made of glass, poisons one of the attendants out of revenge for his treatment, and it is shown that the delusion had no connection whatever with the act. A's act is a crime."

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

<sup>1</sup> Art. 27. The parts inclosed in brackets [ ] are doubtful.

<sup>2</sup> Variouslly interpreted as meaning morally wrong and illegal. The word "know" is not so simple as it may appear. See below, p.

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

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

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

"Pres. fuit q un feme quant il fuit enfrensy aver naye l y m p son grez demene dd fuit de le dozyn si le malady se mist de jour en jour ou p foies, et dit fut q p foies, p q les chateux fuer forfeits."

*i. e.* It was presented that a woman, whilst in a phrenzy, had drowned herself of her own accord. The jury were asked whether the malady took her from day to day, or only at times, and it was said that it was only at times, wherefore her chattels were forfeited. FitzHerbert, *Corone*, 324 (3 Edw. 3, 1380).

<sup>2</sup> Hale *P. C.* 29-37.

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

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

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

<sup>1</sup> See 1 *Rot. Par.* 448 B. 3 Edw. 2 (1310), where the king promises that he will pardon felony only in cases where pardon was anciently granted. "Cest a saver si hom tue autre pur misadventure ou soy defendant ou en deverie" (madness). In FitzHerbert, *Corone*, 351 (3 Edw. 3, 1330), it is said, "Trone fuit par enquest que home lunatike occist un home, &c., par que le roye lui graunt charter de pardone."

<sup>2</sup> 16 *St. Tr.* 695, 1724.

<sup>3</sup> 19 *St. Tr.* 886, 1760.

<sup>4</sup> 27 *St. Tr.* 1281, 1800.

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

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

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

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

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

<sup>1</sup> A large collection of them is to be seen in 1 *Russ. Cri.* 117-135.

<sup>2</sup> e.g. McNaghten was tried for the murder of Mr. Drummond before Tindal, C.J., Williams, J., and Coleridge, J.

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

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

<sup>1</sup> 1 *Russ. Cri.* 121. The questions put to and answered by the judges are printed in 10 C. and F. 200.

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

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

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

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

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

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



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

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

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

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

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

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

The fourth question and answer may be considered here.

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

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

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

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

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

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

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

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

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

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

“ observations and corrections as the circumstances of each CH. XIX.  
 “ particular case may require.”

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

<sup>1</sup> 27 *St. Tr.* 1321. No evidence was given of this, but the case was stopped, Erskine “having,” as he said, “still twenty witnesses to call.”

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

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

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

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

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

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

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

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

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

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

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

<sup>1</sup> Banks v. Goodfellow, L.R. 5 Q.B. D. 594. Smee v. Smee, L.R. 5 Prob. Div. 84.



character. The cases referred to in the notes establish this proposition as regards contracts and wills. CH. XIX.

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

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

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

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

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

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

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

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

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

<sup>1</sup> Foster, 315.

<sup>2</sup> 1 Hale, *Pl. Cr.* 32.

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

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

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

<sup>1</sup> *Responsibility, &c.*, p. 96.

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

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

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

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

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

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

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

The proposition, then, which I have to maintain and explain is that, if it is not, it ought to be the law of England that no act is a crime if the person who does it is at the time when it is done prevented either by defective mental power or by any disease affecting his mind from controlling his own conduct, unless the absence of the power of control has been produced by his own default. The first part of this proposition may probably appear to many persons to be self-evident. How, it may be asked, can a man be responsible for what he cannot help? That a man can be made responsible in the sense of being punished for what he cannot help

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

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

<sup>1</sup> P. 77.

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

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

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



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

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

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

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

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

<sup>1</sup> Gr. 266.

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

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

<sup>1</sup> Gr. 122.

<sup>2</sup> *Responsibility, &c.*, p. 194.

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

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

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

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

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

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

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

<sup>1</sup> *Responsibility, &c.*, p. 198.

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

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

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

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

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

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

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

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

<sup>1</sup> B. and T., 673-74.

<sup>2</sup> Pp. 683-6.



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

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

<sup>1</sup> B. and T., 687-88.

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

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

In connection with this subject I may observe that the

<sup>1</sup> 23 & 24 Vic. c. 75, ss. 1 and 2.

principle that madmen<sup>1</sup> ought in some cases to be punished is proved by the practice of lunatic asylums. CH. XIX.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>1</sup> *Responsibility, &c.* p. 181.

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

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

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

<sup>1</sup> B. and T., p. 261.

<sup>2</sup> B. and T., p. 277.

CH. XIX. — person who has not given long-sustained attention to the subject to enter into the various controversies which relate to it, and the result is that juries do not understand summings up which aim at anything elaborate or novel. The impression made on my mind by hearing many—some most distinguished—judges sum up to juries in cases of insanity, and by watching the juries to whom I have myself summed up on such occasions, is that they care very little for generalities. In my experience they are usually reluctant to convict if they look upon the act itself as upon the whole a mad one, and to acquit if they think it was an ordinary crime. But their decision between madness and crime turns much more upon the particular circumstances of the case and the common meaning of words, than upon the theories, legal or medical, which are put before them. It is questionable to me whether a more elaborate inquiry would produce more substantial justice.