

## CHAPTER XX.

CONSTITUENT ELEMENTS OF THE SUBSTANTIVE CRIMINAL  
LAW; COMMON LAW AND STATUTE LAW; TREASON,  
FELONY, AND MISDEMEANOUR.

FROM the subject of criminal responsibility I pass to the other great branch of the substantive criminal law, namely, the classification and definition of crimes. Crimes may be classified in respect of their origin as being either crimes at common law or by statute; and in respect of their nature and gravity as being either treasons, felonies, or misdemeanours. I propose in the present chapter to give an account of the relation in which the common and statute law upon this subject stand to each other, and to describe and discuss the classification of crimes as treason, felony, or misdemeanour. Ch. XX.

Originally the whole of the criminal law was unwritten, and it is curious to find that at the very dawn of its history this fact had attracted attention and suggested comments not altogether unlike those of much more modern times.

The most ancient of English law books is the work of Glanville, who wrote in the reign of Henry II. In his prologue occur the following passages:—"Leges namque Anglicanas, licet non scriptas leges appellari non videtur absurdum (cum hoc ipsum lex sit 'quod principi placet 'legis habet vigorem') cur scilicet quas super dubiis in consilio definiendis, procerum quidem consilio, et principis accedente auctoritate, constat esse promulgatas." "Si enim ob scripturæ solummodo defectum leges minime censerentur majoris (procul dubio) auctoritatis robur ipsi-

CH. XX. — “legibus accommodare videretur scriptura quam vel decernentis  
 “æquitas vel ratio statuentis. Leges autem et jura regni  
 “scripto universaliter concludi, nostris temporibus omnino  
 “quidem impossibile est; cum propter scribentium ignoran-  
 “tiam, tum propter earum multitudinem confusam.” From  
 Glanville’s time to our own the “confusa multitudo” of the  
 unwritten law (which expression, however, in his day prob-  
 ably applied rather to the intricacy of local customs than  
 to any state of things resembling our law libraries) has been  
 gradually reduced to writing until in the present day it may  
 be said that the whole of the law is written, either in the  
 form of express acts of Parliament, or in the form of re-  
 ported decisions and statements of text-writers. These  
 authorities are upon the whole quite as binding as statutory  
 enactments and not much less explicit, though some are im-  
 perfect and many of them are in an exceedingly confused and  
 intricate shape.

Speaking generally the relation between statute and  
 common law in relation to the definition of crimes has been  
 as follows. The common law supplies a certain number of  
 general principles and leading definitions of crimes. The  
 statute law assuming these has provided in many cases that  
 common law offences aggravated or modified in particular  
 ways shall be subject to special punishments. In other  
 cases statutes have created offences unknown to the  
 common law, and in some few instances it has altered the  
 principles and reduced to certainty the definitions of the  
 common law. This process, speaking roughly, may be said  
 to have been in progress for about 600 years, possibly since  
 the time of Henry III., at all events since the time of  
 Edward I. At the present day the result is as follows.

The principles and rules on which all questions relating to  
 criminal responsibility depend are, without an exception, or  
 with hardly an exception, unwritten, and therefore belong  
 to the common law. No act of Parliament throws any light  
 on the questions as to the extent to which insanity is an  
 excuse for crime, and hardly any throws light on the limits of  
 the right of self-defence. These are nearly the only branches  
 of the criminal law on which it can be said with truth that

any considerable number of questions likely to be of practical importance still continue undecided. They relate mainly to the question of insanity; and to the cases in which, and the degree to which, it is lawful to apply violence to the person of another.

The law relating to Principals and Accessories, and principals of the first and second degree was originally an intricate branch of the common law. It has now been reduced by <sup>1</sup>statute to great simplicity though the common law definitions must still be resorted to in order to ascertain what makes a man an accessory before or after the fact to felony, and who are considered to be principals in treason and misdemeanour.

With regard to the degrees in the commission of crimes, the common law defines what amounts to incitement to commit a crime, and what constitutes an attempt and a conspiracy, and provides in general that such incitements, attempts and conspiracies are misdemeanours. There are, however, instances in which attempts and conspiracies are by statute made either felonies or misdemeanours liable to punishments of great severity. Thus, for instance, <sup>2</sup>attempts to commit murder are felonies punishable by penal servitude for life as a maximum, and <sup>3</sup>conspiracies to commit murder are misdemeanours punishable with ten years penal servitude.

Nearly all <sup>4</sup>political offences are defined by statute. High treason was an offence at common law, but its definition was so vague that it was defined by statute (25 Edw. 3, s. 5, c. 2) in 1352. In course of time, however, judicial constructions were put upon the statute, which have given it a technical meaning which no doubt differs from its obvious one. Unlawful assembly and riot, seditious libel, seditious conspiracies, and seditious words are defined by the common law. Most of the offences in which foreigners are principally concerned, or which are connected with navigation, are defined by statute, as for instance offences under the foreign

<sup>1</sup> 24 & 25 Vic. c. 95.

<sup>2</sup> 24 & 25 Vic. c. 100, ss. 11-15; *Digest*, art. 233.

<sup>3</sup> 24 & 25 Vic. c. 103, s. 4; *Digest*, art. 234.

<sup>4</sup> *Digest*, part ii. pp. 32-70.

CH. XX. enlistment act, and offences of the nature of slave trading and statutory piracies. Piracy by the law of nations is defined by the common law, but its punishment is provided for by statute (in a very circuitous way).

Offences which may be classified under the general head of Abuses and Obstructions of Public Authority are in part defined by statute and in part by the common law. Extortion and oppression by public officers, official frauds and breaches or neglects of duty, disobedience to the provisions of a statute or to the lawful orders of a court, judicial corruption, and the corruption of other public officers, perjury, false swearing other than perjury, and several kinds of escapes are common law offences. The sale of offices, the bribery of voters, certain escapes are offences by statute, and the punishment of perjury and of some of the other offences mentioned are also provided for by statute.

The class of offences of which nuisance may be taken as the type, and which consists of acts injurious to the public as a whole, and in particular of offences relating to religion and morals, is composed partly of common law and partly of statutory enactments. To this class must be referred the power which has in some instances been claimed for the judges of declaring anything to be an offence which is injurious to the public although it may not have been previously regarded as such. This power, if it exists at all, exists at common law. Blasphemy and blasphemous libel are offences at common law, but a denial of the truth of Christianity, depraving the book of Common Prayer, and some others are statutory offences. Some acts of gross immorality and indecency are punishable by common law, others by statute. The common law defines a common nuisance, but a large number of those common nuisances which occur most frequently (keeping disorderly houses for instance) are punishable under special statutory provisions. Libel against individuals is a common law offence, and the doctrines relating to the cases in which libels are justifiable or excusable are part of the common law. The punishment is provided by statute.

The remainder of the criminal law is contained in statutes,

and nearly the whole of it in the five consolidation acts<sup>1</sup> of 1861, of which I shall have to speak more particularly hereafter. Each of them defines and provides punishment for a large class of offences, but three out of the five also presuppose the knowledge of a greater or less number of common law doctrines. I will take them in their order. Chapter 96, the Larceny Act, is founded upon the common law definition of theft, and many intricate and subtle common law doctrines are connected with that offence. To take one instance out of a great number, the statute defines the offence of stealing horses, but it would be necessary to resort to the common law to ascertain whether a person who, under pretence of trying a horse got leave to mount him and rode away with him had committed theft or not. The whole structure of the act is unintelligible without reference to a variety of common law doctrines which have given rise to the distinctions (amongst others) between theft, embezzlement and obtaining goods by false pretences. The definitions of burglary and robbery are also common law definitions presupposed by the enactments which provide punishment for them.

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Chapter 97 relates to malicious injuries to property. I do not think that any of the offences which it defines and punishes are defined by the common law. Arson was an offence at common law, but the definition (if there was one) is superseded by the terms of the act.

Chapter 98 relates to forgery. The definition of forgery is a part of the common law, and presents several peculiarities. Every section of the act makes it an offence to forge or utter certain specified documents.

Chapter 99 relates to offences against the coinage. They are all statutory.

Chapter 100 relates to offences against the person. This act presupposes the common law definitions of murder, manslaughter, rape, assault, and a variety of common law doctrines which determine the cases in which homicide is and is not unlawful. The act, however, provides punishments for all the offences mentioned, and creates many others.

<sup>1</sup> 24 & 25 Vic. cc. 96-100.

CH. XX. To sum up, the principal parts of the criminal law which still remain unwritten are, the law as to matter of excuse and justification both in general, and in particular cases, and the definitions of murder, manslaughter, assault, theft, forgery, perjury, libel, riot, unlawful assembly, and the different doctrines connected with those offences. The rest of the substantive criminal law is defined by statute.

As regards procedure I have noticed in the earlier part of this work the provinces of the common and statute law ; but I may here shortly refer to it. The rule as to the apprehension of offenders without warrant is part of the common law, but it is supplemented by many statutory enactments. The preliminary procedure in regard to information, warrant, or summons, the procedure before justices, bail and committal for trial is regulated by statute. The rules relating to indictments are common law modified by statutory exceptions. The procedure at the trial is regulated almost entirely by common law though there are a few statutory modifications, and the same may be said as to the rules of evidence.

The classification of crimes, as felony and misdemeanour, is very ancient. The word "felonia," indeed, appears in <sup>1</sup> Glanville, and is commonly used in Bracton. <sup>2</sup> For instance, in the form of an appeal, "quæ oritur ex pace et roberia," the appellant avers that the act was done "nequiter et in 'felonia.'" And the appellee "venit et defendit pacem "et feloniam." I do not, however, remember in Bracton any express classification of offences as being either felonies or misdemeanours. In later times the sense of the word came to be definitely fixed, though it is not easy to give any exact definition of it. It is usually said that felony means a crime which involved the punishment of forfeiture, but this definition would be too large, for it would include misprision of treason which is a misdemeanour. On the other hand, if felony is defined as a crime punishable with death, it excludes petty larceny which was never capital, and includes piracy which was never felony. Felony was

<sup>1</sup> *e.g.* "Sicut in cæteris placitis de felonis," lib. xiv. ch. i.

<sup>2</sup> Brac. 475.

substantially a name for the more heinous crimes, and all felonies were punishable by death, with two exceptions, namely, petty larceny and mayhem, which came by degrees to be treated as a misdemeanour. If a crime was made felony by statute the use of the name implied the punishment of death, subject, however, to the rules already stated as to benefit of clergy. Thus, broadly speaking, felony may be defined as the name appropriated to crimes punishable by death, misdemeanours being a name for all minor offences. There were, and, indeed, still are a good many differences of considerable importance in the procedure relating to the prosecution of felonies and misdemeanours respectively. The most important are, that as a rule a person cannot be arrested for misdemeanour without a warrant; that a person committed for trial for a misdemeanour is entitled to be bailed (speaking generally), whereas a person accused of felony is not; and that on a trial for felony the prisoner is entitled to twenty peremptory challenges, whereas upon a trial for misdemeanour he is entitled to none.

So long as the punishment of death and the law relating to benefit of clergy were in force, the distinction between felony and misdemeanour was not only an important but might almost be described as an essential part of the law, but since the substitution of milder punishments for death, the distinction has become unmeaning and a source of confusion, especially as many offences have been made misdemeanours by statutes, which render the offender liable to punishments as severe as those which are now usually inflicted upon persons convicted of felony. It is impossible to suggest any reason why the offence of embezzlement should be a felony, and the offence of fraud by an agent or bailee a misdemeanour, or why bigamy should be a felony, and perjury a misdemeanour, or why certain kinds of forgery should be felonies, and obtaining goods by false pretences a misdemeanour.

It is remarkable that the classification of crimes as felonies and misdemeanours should be the only one known to the law of England. In the French *Code Pénal* the division is into *crimes*, *délits*, and *contraventions*, *crimes*

CH. XX. answering very roughly to felonies, *délits* to indictable misdemeanours, and *contraventions* to police offences punishable on summary conviction. For this class of offences which are extremely numerous in our law we have no distinct name. Many cases of felony may be dealt with in a summary way, so may innumerable cases which not being felonies must be regarded as misdemeanours. But upon the whole it may be said that no classification of crimes exists in our law except one, which has become antiquated and unmeaning. In the Draft Criminal Code the distinction between felony and misdemeanour was omitted, and whenever an offence was defined it was expressly stated whether the offender was to be entitled to be bailed and was liable to be arrested without warrant.

It may be asked whether such a classification is or is not desirable. After much consideration of the matter I think it is not, for the following reasons.

There is no practical use in any classification of crimes, unless the nature of the subject is such that it is possible to make the same provisions for all the crimes which belong to each class. For instance, if it is determined that all serious crimes are to be punished or punishable by death, it is no doubt a convenience to call all such crimes by the common name of felony, but on the other hand the facility which such a classification gives for hasty legislation is a great objection to it. I doubt whether, if the word "felony" had not been ready to their hand, the legislature in the eighteenth century would have made so lavish a use as they did of the punishment of death.

There are four points in which crimes must differ from each other. They are as follows:—

1. Different crimes must be tried in different courts.
2. Different crimes must be subjected to different maximum punishments.
3. Some crimes ought and some ought not to render the offender liable to arrest without warrant.
4. Persons charged with some crimes ought, and persons charged with other crimes ought not to have a right to be bailed till trial.



Each of these four distinctions depends upon a different principle, so that a crime may as to some of these distinctions belong to what might be called the higher, and as to the others to the lower class. Take for instance libel. Obviously the offence ought to be tried only in the superior courts, because it is likely to raise important questions of law and of fact. Obviously, also, the maximum punishment should not be high. Offenders ought not to be arrested without warrant, and ought to be entitled to be bailed. Thus with a view to the first distinction, libel must be regarded as amongst the more serious crimes. With a view to the other three, as one of the less serious. Again, take perjury. This is a most serious crime, and it ought in particular cases to be liable to a far heavier punishment than can at present be awarded to it. It is clearly not a crime for which a man ought to be liable to summary arrest. Neither is it a crime for which the offender ought in all cases to have a right to be bailed. If the maximum punishment were as severe as in some cases (*e.g.* perjury with intent to convict an innocent man of a capital crime) it ought to be, a man when committed for trial would be very likely to abscond.

Again, there are many crimes which, from the nature of the case, must differ almost infinitely in the degree of guilt and danger which they involve. Burglary may be a trifling form of theft, as for instance, if a man opens the door of a back-kitchen of a house in a street in London at 9.30 P.M., and steals a loaf of bread without alarming any one. It may be a crime of the greatest atrocity, as for instance, if armed men break into a lonely dwelling-house in the country, rob the owners of all their property, and frighten and ill-use them. So robbery with violence may mean something close upon murder, or something hardly differing from a common assault. With regard to such crimes it would be found extremely convenient to provide that the inferior courts should have concurrent jurisdiction with the superior courts, but that the inferior courts should not be able to pass a sentence exceeding a certain degree of severity—say, for instance, seven years' penal servitude, and that they should be at liberty to

CH. XX. — transmit the case to a superior court if they thought a more severe punishment would be required.

A classification which had different general names for the various combinations which might be made out of the various distinctions mentioned would be extremely intricate and technical. A classification which did not recognize them would be of little use. Hence the most convenient course in practice is to have no classification at all.

## CHAPTER XXI.

LEADING POINTS IN THE HISTORY OF THE SUBSTANTIVE  
CRIMINAL LAW.

THOUGH, for reasons which I have already given, it is impossible to say that the whole of the criminal law has any continuous history, it is nevertheless possible to mark a certain number of leading points, acquaintance with which will make it much easier than it would otherwise be to follow the development of its details.

The earliest writer who is in any way connected with the existing law of England is Glanville. His account (such as it is) of the criminal law is contained in the fourteenth and last book of his work. It is contained in a few small pages and relates almost entirely to matters of procedure. The crimes which he mentions are treason, though he does not use the word, concealment of treasure trove, homicide, arson (incendium), robbery, rape, and "generale crimen falsi," which "plura sub se continet crimina specialia, quemadmodum de falsis chartis, de falsis mensuris, de falsa monetâ." He also says that he does not mean to write "de furtis et aliis placitis quæ ad vicecomites pertinent." The whole matter is disposed of in these few words, just as in the assizes of Clarendon and Northampton, which were the most important legislative acts of that age, no further light is thrown on the subject of crime than such as is afforded by the bare use of the words<sup>1</sup> "robatores vel murtheratores vel latrones vel receptores eorum." The vagueness of these references to crimes may be compared

<sup>1</sup> Stubbs, *Charters*, p. 144, no. 13.

CH. XXI. with the famous provision in <sup>1</sup> Magna Carta: "Liber  
 " homo non amercietur pro parvo delicto, nisi secundum  
 " modum delicti, et pro magno delicto amercietur secundum  
 " magnitudinem delicti salvo contememento suo." What  
 amounted to "delictum," and what delicta were magna or  
 parva respectively, there is no definite authority to show.  
 Proof, however, still remains that this branch of the law  
 which I think subsequently developed into the law relating  
 to misdemeanours was anciently wide and indefinite to  
 the last degree, and was thus capable of being used, as  
 we know that in fact it was used, for oppressive and  
 corrupt purposes. <sup>2</sup> In Madox's *History of the Exchequer*  
 there are collected a vast mass of instances of fines  
 and amercements, extracted from the rolls of Henry II.,  
 Richard I., John, Henry III., and Edward I., from which  
 it appears that fines were paid on every imaginable  
 occasion, especially on all grants of franchises, at every  
 stage of every sort of legal proceeding, and for every descrip-  
 tion of official default, or irregularity, or impropriety. In  
 short, the practice of fining was so prevalent that if punish-  
 ment is taken as the test of a criminal offence, and fines are  
 regarded as a form of punishment, it is almost impossible to  
 say where the criminal law in early times began or ended.  
 It seems as if money had to be paid to the king for nearly  
 every step in every matter of public business, and it is im-  
 possible practically to draw the line between what was paid  
 by way of fees and what was paid by way of penal fines.  
<sup>3</sup> Madox observes, "The amercements in criminal and common  
 " pleas which were wont to be imposed during this first  
 " period" (Henry II., Richard I., John) "and afterwards, were  
 " of so many different sorts, that it is not easy to place them  
 " under distinct heads. Let them for method's sake be re-  
 " duced to the heads following: Amercements, for or by reason  
 " of murders and manslaughter, for misdemeanours, for  
 " disseisines, for recreancy, for breach of assize, for defaults,  
 " for non-appearance, for false judgments, and for not making  
 " suit or hue and cry." Then follow twenty-five 4to pages

<sup>1</sup> Art. 20, Stubbs, *Charters*, p. 299.

<sup>2</sup> Vol. i. chaps. xi.-xv. pp. 395-563.

<sup>3</sup> *Ib.* p. 542.

of illustrations of each kind of amercement. Under the head of amercements for misdemeanours occur a great variety of matters, some of which we should regard as indictable offences, as, for instance, harbouring a robber, and interfering with jurors; but others are, according to our notions, far remote from criminal offences, *e.g.*, <sup>1</sup>“Fossard was fined for a mort-gage unjustly taken.” <sup>2</sup>“The hundred of Stanberg was “amerced for denying before the justices what they had “acknowledged in the County Court,” and the town of “Charleton for confessing what they had before denied.” How long this system lasted, or by what precise steps it fell into disuse it would take more trouble to discover than the discovery is worth. It is important with a view to the present subject, because it shows the extreme vagueness of that part of the criminal law which related to misdemeanours at the beginning of the history of the system.

The earliest writer on the criminal law who gives anything like a general view of the matter is Bracton, who wrote in the earlier part of the thirteenth century. Lately, and especially since the revival in the study of Roman law which has taken place in the course of the last thirty years, Bracton's merits have been fully acknowledged. There can be no doubt that his book is by far the most comprehensive and also the least technical account of the law of England, written from the very origin of the system down to Blackstone's *Commentaries*, and it is free from various defects which have been imputed to that great work. Bracton is a remarkable mixture of Roman and English law, the Roman law supplying some of the principles and definitions, the English law supplying the procedure. Remarkable as the work is on many accounts, its arrangement is not what a modern writer would adopt. It seems to me to have been founded, partly on the Institutes and partly on the Digest. To show how Bracton introduced the Criminal Law it is necessary to say a few words on his arrangement of the whole subject of his work. The title of the first book is *Of the Division of Things*, but its contents do not correspond to the title, for it relates not only to its professed

<sup>1</sup> Madox, *History of the Exchequer*, i. p. 545.

<sup>2</sup> *Ib.* p. 546.

CH. XXI. object (which, by the way, is placed at the end of the book), but to general matters about justice and the various rights which are usually described as constituting the law of persons. The second book is headed, "De acquirendo rerum dominium," and the third, "De actionibus." The fourth and fifth relate to particular actions, namely, the fourth to assises, and the fifth to writs of right, Essoigns, defaults, warranty, and pleas. He thus conceives of the law as being divisible into three great parts—personal rights, proprietary rights, and actions relating to their enforcement. This way of treating the subject has considerable conveniences, though it has also great inconveniences, but it is certainly the mode which in the earlier stages of legal history commends itself to persons who have acquired their knowledge by experience and practice. It is much as if a modern writer, after laying down a greater or less number of preliminary general principles, were to proceed to describe the law of England under the heads of actions at law, suits in equity, conveyancing, and special pleading, subdividing each head according to the principal kinds of procedure contained under it. Such a distribution of the subject would involve all kinds of repetitions and would be difficult to follow, but it might be made complete and of great practical use.

Its inconvenience is illustrated by the place which Bracton assigns to the criminal law. Criminal law obviously is one of the great heads of the law, and in a complete account of the laws of a country it ought to occupy a prominent position of its own, and to be treated in reference to the natural divisions of the subject. In Bracton it comes in as the second treatise of the third book. The third book is "De Actionibus." The first treatise is "de actionibus" in general; the second, "De Coronâ." This treatise, which I have already quoted repeatedly and largely in reference to procedure, treats of crimes, not according to their own nature, but according to the nature of the procedure by which they are punished. The procedure appropriate to each offence, and in particular all the forms of appeal, and all the exceptions or pleas which might be made to an appeal, are described with the greatest

minuteness. The definitions of the crimes themselves are given by way of explanation. Of these eleven are specified, namely, (1) *Læsa Majestas*; (2) *falsum*; (3) concealment of treasure trove; (4) homicide; (5) wounding; (6) mayhem; (7) false imprisonment; (8) robbery; (9) arson; (10) rape; (11) theft. Besides these there is a general reference to lighter offences—<sup>1</sup> “dicendum est de minoribus et levioribus criminibus, quæ civiliter intentantur, sicut de actionibus injuriarum personalibus et pertinent ad coronam eo quod aliquando sunt contra pacem domini regis.”

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Most of these offences require hardly any definition. This applies to the concealment of treasure trove, wounding, false imprisonment, arson, and rape; The definitions given of these offences hardly go beyond the use of the words which are their appropriate names. Rape, however, seems to have included abduction. The other definitions I shall not examine minutely here, but I may say of them generally that the influence of the Roman law is manifest in the definitions of “*Læsa majestas*,” and “*falsum*,” and that <sup>2</sup> theft is defined not precisely in the words of Paulus (Dig. xlvii., Tit. ii. 1, 3), but very nearly. The definition of homicide has less resemblance to the doctrines of the Roman lawyers relating to that crime. The relation between the substantive criminal law of England as it stood in Bracton's day, and the Roman law as it stands in the forty-seventh and forty-eighth books of the Digest is unmistakably clear, but it is also less close than has been sometimes supposed of late years. In each of the definitions to which I have referred the doctrines of the Roman lawyers are modified by Bracton in the manner which in his opinion was required to adapt them to the laws and customs of England. Into this, however, I shall inquire more fully when I come to the definitions of particular offences. For my present purpose it is enough to say that when Bracton wrote the substantive criminal law consisted

<sup>1</sup> 2 Brac. 545.

<sup>2</sup> *Paulus*: “Furtum est contractatio rei fraudulosa lucri faciendi gratia vel ipsius rei vel etiam usus ejus possessionis ve.”

*Bracton*: “Furtum est secundum leges contractatio rei alienæ fraudulenta cum animo furandi invito illo domino cujus res illa fuerit.”

The differences are intentional and highly important, as will appear in the chapter on theft.

CH. XXI. of eleven capital crimes or felonies and an unspecified number of misdemeanours, the influence of the Roman law being clearly traceable in all the definitions, though it was in all cases adopted with modifications peculiar to England.

Bracton was followed by Fleta and Britton who wrote in the reign of Edward I. Fleta, so far as the criminal law is concerned, is simply a later edition of Bracton. Britton wrote on a different plan, and less elaborately than Bracton, but his work conveys the impression that hardly any change of importance in the substantive criminal law had taken place between Bracton's time and his own. He is less given to definitions than Bracton, for instance he gives no definition of either homicide or theft, though he defines treason.

Upon the whole I think that the account already given of the contents of Bracton may stand as a substantially accurate account of the substantive criminal law of England in the reigns of Henry III. and Edward I. This body of law indeed supplied the foundation on which the rest was built, and part of Bracton's definitions still lie at the root of the law and give their peculiar form to many of its most important departments.

From the days of Bracton to those of Coke, an interval of at least 350 years there was an extraordinary dearth of writers on English law. The law itself underwent changes of the utmost importance, but they have to be traced in the statutes and the year-books. No writer of any considerable eminence—if we except Fortescue, the chancellor to Henry VI. and author of the treatise, "*De laudibus legum Angliæ*"—deserves notice between the time of Edward I. and the beginning of the seventeenth century.

The interval, however, is filled up by the year-books which cover the whole period from Edward I. to Henry VII. A notion of their contents, sufficient for the present purpose, is to be got from the title "*Corone et plees del Corone*," in FitzHerbert's abridgment, which contains notes, some of them very full, others short, of 467 cases scattered over the eleven folios of which the year-books consist. I have looked through the whole of them, though I have not thought it necessary to verify all the references. The result is that the substantive



part of the criminal law appears to have varied very little during this period. A certain number of the cases decided turn upon the definition of crimes, and throw some light upon our present law, but the immense majority relate to matters of practice long since obsolete. Most of them turn upon details about appeals. The other subjects which occur most frequently are forfeitures, abjuration, fines and amercements inflicted on townships; but upon the whole this body of decisions conveys the impression that the unwritten law as to crimes varied little from the days of Bracton to those of Henry VIII. It was still composed of a few vague definitions of the grosser crimes, but I suspect that it hardly provided for the minor offences at all, except by the vague and arbitrary system of fining to which I have referred, but which seems to have been greatly restricted and to have fallen much into disuse during this period.

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The statutes creating offences during this period are not very numerous, and there is a resemblance between them. They relate principally to crimes of violence, especially crimes directed against the public peace and the administration of justice. The principal subjects dealt with are treason, riot, maintenance in its various forms, forcible entry and the extortions of officers of different kinds, and in particular those of purveyors. Crimes of dishonesty, such as cheating, embezzlement, forgery, and the like, are hardly noticed, nor have I observed any attempt to break up into specific offences the eleven general heads of the law. During all this period theft was either grand or petty larceny, and no form of personal violence was made the subject of special punishment unless it amounted to mayhem. The only exception I have noticed occurs in the Act of <sup>1</sup> 5 Hen. 4, c. 5 (1403).

Leaving out of notice what the king might do by his prerogative, the general character of the law under the

<sup>1</sup> This act is highly characteristic of the occasional and limited character of English legislature on criminal subjects. It is in these words. "Item, because that many offenders do daily beat, wound, imprison, and maim divers of the king's liege people, and after purposely cut their tongues or put out their eyes, it is ordained and established that in such case the offenders that so cut their tongues, or put out the eyes of any of the king's liege people, and that duly proved and found that such deed was done of malice prepensed, they shall incur the pain of felony."

CH. XXI. Plantagenets seems to have been somewhat as follows:—

If a man committed or was supposed to commit a gross crime, or felony, he was hung unless he got his clergy or took sanctuary and abjured the realm. If he was guilty of official misconduct or of tampering with any royal prerogative, or infringing, however slightly, any royal right, or if he committed maintenance, riot or forcible entry, he was liable to fine and imprisonment. The less serious forms of force and fraud were comparatively little noticed. They were treated to a great extent as civil injuries.

The offences which in our days would be dealt with in a summary way by police magistrates were under the jurisdiction of courts leet, and sheriffs' tourns, and the ecclesiastical courts had a jurisdiction in all matters involving immorality which has been little noticed but to which I shall direct attention in a special chapter.

The great characteristic of the criminal law up this period was its strange mixture of excessive severity and excessive laxity and inefficiency. A man who could not read, and a woman whether she could read or not, must be hung for stealing two shillings. But a murderer of the worst kind who knew how to read escaped from nearly all punishment, unless indeed he had married a widow. Moreover, the whole system was worked by juries, which might be and continually were exposed to all sorts of corrupt influences. One effect of the Reformation which has been less noticed than it deserves to be was that the law was made greatly more severe than it had been by the restriction of privilege of clergy and the abolition of privilege of sanctuary. The legislation of Henry VIII. and Edward VI. on this subject I have already noticed. A change of earlier date and of even greater importance was effected by the Court of Star Chamber. I have given its history elsewhere, and have shown how it existed from the earliest times, but was called into special vigour by the statute 3 Hen. 7, c. 1. The period of its importance thus coincides almost accurately with the Tudor period. Its power was at its height under James I. though even then it was becoming an object of suspicion. It became a partisan court and fell in the

reign of Charles I. It made, however, great additions to the law as it was under the Plantagenets. For under the fiction of declaring the law it converted into misdemeanours some acts which were not previously criminal at all, as for instance, perjury by a witness, and to say the least, it greatly extended and rendered far more definite than it had formerly been the law as to attempts and conspiracies to commit crimes, and the law as to libel, forgery, and some other offences.

The great outburst of intellectual and literary activity which signalled the period of the Reformation extended to law as well as to other subjects. Many of the books written at this period are learned, but nothing more. For instance, FitzHerbert's *Grand Abridgment* is a classified abstract of the year-books, and has in many instances been used as a substitute for them, but it might have been compiled by any one who with moderate technical knowledge combined time and inclination to go through a great deal of drudgery. Lambard's *Eirenarcha* and Dalton's *Justice* and some others are mere books of practice, Lambard being a particularly good one, but one writer aimed at all events at a higher kind of effort, and produced a work which may be regarded as having coloured English law for more than two centuries. I refer, of course, to Coke's *Institutes*. When Coke wrote the law was in such a state that any one who possessed a technical acquaintance with it, and would take the trouble to give anything which could be regarded as a popular exposition of it might exercise great influence upon it. Coke's *Institutes* have had a greater influence on the law of England than any work written between the days of Bracton and those of Blackstone. When the older learning became obsolete, Coke came to be regarded more and more as a second father of the law behind whose works it was not necessary to go. The characteristics of his style and of his mind are sufficiently well-known. He has usually been credited with great learning, and I have no doubt he had diligently read the year-books and the statutes and acquainted himself with many records, but on the occasions where I have compared his statements with his authorities I have not found him very accurate.

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CH. XXI. The amount of knowledge to be acquired was much less than it is now, but the facilities for acquiring it were far smaller, and the risk of detection in falsely pretending to have acquired it much less. <sup>1</sup> A more disorderly mind than Coke's and one less gifted with the power of analysing common words it would be impossible to find. His divisions are all technical and pedantic, running upon words instead of facts, and the speculative parts of his writings are mostly puerile and often contradictory. The Third Institute, which treats of crimes, is less ill-arranged than the first, for each offence is put in a chapter by itself, but where any arrangement is wanted it is very bad. The book, however, contains what is no doubt a fairly correct catalogue of offences both at common law and by statute. It shows that the law was composed of the elements which I have already enumerated, namely, the common law offences enumerated by Bracton, about thirty statutory felonies, and as many misdemeanours. If the law as it stood in Bracton's time had been codified, I think the penal code might have been put into an act of perhaps twenty sections. In Coke's time the same subject would perhaps have filled eighty sections.

Such of the new felonies created by statute in the interval between Bracton and Coke as are worth specific notice may be thus classified. In six cases provision was made by statute for what can now be recognised as defects in the common law definitions of common crimes or omissions to define them. These are <sup>2</sup> abduction with intent to marry, which appears at one time to have been regarded as rape; <sup>3</sup> cutting out the tongue or the eyes, which seems not to have been sufficiently provided for by the law of mayhem; <sup>4</sup> stealing records, which at common law were not the subject of larceny; <sup>5</sup> stealing falcons

<sup>1</sup> This is admirably brought out by Hobbes in his *Dialogue of the Common Laws, Works*, vi. 1-160. This nearly-forgotten work is, to my mind, the most powerful speculation on the subject to which it refers before the days of Bentham and Austin. Nothing can be better than the following remark on Coke. "Sir Edward Coke does seldom well distinguish when there are two divers names for one and the same thing; he makes them always different." He might have added that when one name applies to two things he makes them always the same.

<sup>2</sup> Coke, p. 61; 3 Hen. 7, c. 2, and 39 Eliz. c. 9.

<sup>3</sup> Coke, p. 62; 5 Hen. 4, c. 5.

<sup>4</sup> Coke, p. 70; 8 Hen. 6, c. 12.

<sup>5</sup> Coke, p. 97; 37 Edw. 3, c. 9.

to which the same remark applies; <sup>1</sup> embezzlement of armour or military stores by soldiers or others in charge of them; and <sup>2</sup> the embezzlement by servants of their master's property to the value of 40s. or upwards. These are early instances of defects in the definition of larceny which have since given great trouble and produced much legislation and many failures of justice.

In two instances common law offences were defined by statute. These were the Statute of Treason, 25 Edw. 3, st. 5, c. 2, and the Statute of Conspirators, 33 Edw. 1 (A.D. 1305).

In five cases it was made felony to do acts regarded as prejudicial to the commercial interests of the country. These cases were, <sup>3</sup> the importation into England of certain kinds of money; <sup>4</sup> the exportation of silver and the importation of bad money; <sup>5</sup> the exportation of wool and some other goods; <sup>6</sup> the exportation of certain metals, timber for shipbuilding, and some other things; <sup>7</sup> and "congregations and confederacies by masons" in their general chapters and assemblies" in prejudice of the Statute of Labourers.

There are three instances in which matters long considered as being only ecclesiastical offences were made felony by statute—a small but significant effect of the Reformation. These are <sup>8</sup> unnatural offences; <sup>9</sup> bigamy or polygamy; <sup>10</sup> conjuration, witchcraft, and sorcery or enchantment.

It is also characteristic that vagrancy in <sup>11</sup> several forms was punished as felony in Coke's days.

The misdemeanours known to Coke were partly those to which I have already referred as having been created by the statutes against maintenance, forcible entry, riot, and conspiracy in its older form, and partly offences which were specially

<sup>1</sup> Coke, p. 78; 31 Edw. 3, c. 4.

<sup>2</sup> Coke, p. 165; 21 Hen. 8, c. 7; 27 Hen. 8, c. 17; 28 Hen. 8, c. 2; 1 Edw. 6, c. 12; 5 Eliz. c. 10.

<sup>3</sup> Co. 91; 3 Hen. 5, c. 1; 9 Hen. 5, c. 6; 2 Hen. 6, c. 9.

<sup>4</sup> Co. 92; 17 Edw. 3.

<sup>5</sup> Co. 94; 27 Edw. 3, cc. 3, 11, 12, and 18.

<sup>6</sup> Co. 96; 28 Edw. 3, c. 5; 33 Hen. 8, c. 7; 2 Edw. 6, c. 37.

<sup>7</sup> Co. 99; 3 Hen. 6, c. 1.

<sup>8</sup> Co. 58; 25 Hen. 8, c. 6; 5 Eliz. c. 17.

<sup>9</sup> Co. 88; 1 Jas. 1, c. 11.

<sup>10</sup> Co. 43; 33 Hen. 8, c. 8; 5 Eliz. c. 16; 1 Jas. 1, c. 12.

<sup>11</sup> Co. 85; 39 Eliz. c. 17; Co. 102; 1 & 2 Phil. & Mary, c. 4; 5 Eliz. c. 20; 39 Eliz. c. 4; 1 Jas. 1, cc. 7 and 25.

CH. XXI. punished by the Star Chamber, and in some instances constituted as such by its decisions. The following were the most important:—<sup>1</sup>conspiracy, <sup>2</sup>bribery, <sup>3</sup>extortion, <sup>4</sup>usury, <sup>5</sup>fighting duels and sending challenges, <sup>6</sup>perjury, <sup>7</sup>forgery, <sup>8</sup>libel, <sup>9</sup>riots, <sup>10</sup>striking in church or in the King's Court, and the whole class of offences called <sup>11</sup>maintenance.

Little change in the criminal law took place during the seventeenth century, except what was effected by the abolition of the Court of Star Chamber. In regard to procedure this was of the highest importance, but its effect upon the substantive criminal law was considerably diminished by the circumstance that the Court of King's Bench after the Restoration recognised the decisions and to some extent assumed the authority of the Court of Star Chamber, treating as crimes acts which though not forbidden by any express law were nevertheless highly and plainly injurious to the public.

Under the Commonwealth the reform of the law engaged much attention, and measures more comprehensive and far-reaching than were ever suggested before, or have ever been introduced on any one occasion since, were proposed in what was known as the Barebones Parliament. <sup>12</sup>These measures were prepared by two committees, one of members of Parliament, of whom Oliver Cromwell is first-named, and the other of persons not in Parliament, of whom Matthew Hales, afterwards Lord Chief Justice, is first-named. They are of the highest interest, and have never been noticed as they deserve. Amongst other things it was proposed to introduce great changes into the whole administration of the criminal law.

The scheme was shortly as follows:—

<sup>13</sup>There were to be two courts at Westminster with six judges in each Court, namely the Court of Upper Bench and the Court of Common Pleas. <sup>14</sup>There was to be a county judicature in every county, consisting of six judges, one of

<sup>1</sup> Co. 148.

<sup>2</sup> Co. 151.

<sup>7</sup> Co. 168.

<sup>10</sup> Co. 177.

<sup>12</sup> Somers's *Tracts*, vol. vi. pp. 177-245.

<sup>13</sup> P. 211.

<sup>3</sup> Co. 145.

<sup>5</sup> Co. 157.

<sup>8</sup> Co. 174.

<sup>11</sup> Co. 175.

<sup>3</sup> Co. 149.

<sup>6</sup> Co. 163.

<sup>9</sup> Co. 176.

<sup>14</sup> P. 212.

whom was to be a judge of one of the Courts at Westminster. CH. XXI.  
 The county judicature was to sit four times a year, and the sittings of the courts of the different counties were to be so arranged that six judges from the courts at Westminster, three from each court, could attend the county judicatures on each of the six circuits. <sup>1</sup>Both the procedure to be observed in criminal trials and the law itself were to have been modified. The prisoner was not to be asked to plead guilty or not guilty, but only, <sup>2</sup>“What sayest thou to the charge now read against thee?” “And if the party accused shall not thereupon confess the fact or plead specially, such party shall say, ‘I abide my lawful trial,’ whereupon without any further form or questions of course to the prisoner, the court shall proceed to trial.”

Peine forte et dure was to be abolished, and standing mute to be taken as a confession. The extreme anxiety not to appear to question the prisoner, and the determination, nevertheless, to make him say, “I abide my lawful trial,” are equally characteristic of the scrupulosity of the Puritans and the rigidity of English lawyers.

Prisoners were to be entitled to counsel in all cases if counsel were employed against them, and their witnesses were to be sworn.

In cases of murder “it shall be part of the judgment pronounced against every such offender that their right hand shall be cut off before their life be taken away.” Deodands and all forfeitures for killing in self-defence or by misadventure were to be abolished.

Benefit of clergy was to be abolished absolutely, and in consequence the punishments of clergyable felonies were to be revised. Persons convicted of manslaughter were to be punished by death, but without corruption of blood or forfeitures. This was probably due in part to the Puritan hatred of duelling, and partly to their respect for the law of Moses, “Whoso sheddeth man’s blood by man shall his blood be shed.” Bigamy and adultery were to be punished

<sup>1</sup>The concluding words of the recommendation are, “And those which ride one circuit shall be spared the next.”

<sup>2</sup>Somers’s *Tracts*, pp. 234-245.

CH. XXI. by death; but in each of these cases the court was to have power to reprieve and Parliament or the Council of State power to pardon.

In the case of clergyable thefts the offender was to be kept at hard labour till he had paid the treble value of the goods stolen, or for three years. Things fixed to the freehold were to become the subjects of larceny. Cattle stealers and pick-pockets were "to be burnt in the left hand and to abide at hard labour in chains in the workhouse by the space of three years, and to be whipped once every month, and not to be released until restitution made to the parties injured treble the value, and whenever released to have a collar of iron riveted about the neck to be seen, and if found without the said collar of iron and convicted thereof to suffer death."

In all other cases of clergyable felony the offender was to be branded in the left hand, pilloried twice for two hours each time, committed to hard labour for not exceeding three years, and not to be released "before he have given security to be of good behaviour during his life."

Women were no longer to be burnt for treason, but hanged.

The abduction of children under fifteen was to be punished by death, and all felonies excluded from benefit of clergy except those above specially provided for were to remain capital. A limited provision was made for the payment of the costs of witnesses not worth £100.

A remarkable provision required committing magistrates if satisfied of the guilt of a person committed for robbery, burglary, or theft, to "express the same in his warrant of commitment," and require the keeper of the gaol to make the prisoner work for his maintenance if he cannot maintain himself.

An elaborate system of appeals was to be provided in all cases civil and criminal, except only capital cases.

<sup>1</sup> By a separate Act wager of battle was abolished, but I do not see that it was proposed to abolish appeals in the sense of private accusations. The same Act punished duelling with

<sup>1</sup> Somers's *Tracts*, vi. p. 188.



extraordinary severity. Every one who fought a duel was to lose his right hand, and forfeit all his property, real and personal, and be "for ever banished out of this nation," and suffer death if he returned. Penalties nearly as severe were to be imposed on those who sent or accepted challenges. CH. XXI.

Many of these proposals have since been adopted and form a part of our present law. The proposed secondary punishments, if sharper, were not so prolonged as our own. It is true that we have ceased to brand, and that we seldom flog, and then with, I think, foolish leniency, but penal servitude for life, for twenty, fourteen, seven, or even five years, is a far more severe punishment than the three years' hard labour, which was the maximum secondary punishment in this remarkable draft.

The discredit into which schemes of law reform fell upon the Restoration is a striking illustration of one of the evils of civil war. Rational measures proposed by one party become odious to the other, not on their own account, but because they are accidentally associated with political enemies. However this may have been, little change took place in the criminal law during the remainder of the seventeenth century. The most remarkable circumstance connected with it was the composition of Sir Matthew Hale's *History of the Pleas of the Crown*. He never completed it, and it was not published till after his death. It is not only of the highest authority, but shows a depth of thought and a comprehensiveness of design which puts it in quite a different category from Coke's *Institutes*. It is written on an excellent plan, and is far more of a treatise and far less of an index or mere work of practice than any book on the subject known to me.

He begins by investigating matter of excuse, infancy, madness, misadventure, ignorance, compulsion, and necessity. He then considers all the more important crimes successively, and, in particular, treason, homicide, larceny, robbery, burglary, escape; and he concludes by a reference to the statutory felonies passed in various reigns. He had intended to write on misdemeanours, but unfortunately never did so.

His second volume goes through the whole subject of criminal procedure in capital cases, following the subject out

CH. XXI. according to its natural division, from process to compel appearance to the execution of the sentence.

A great part of his book has now become obsolete, and a great deal of it is occupied with technical details and minute and hardly intelligible distinctions. It has often struck me as singular that in proportion as we go far back in legal history the law appears to become more and more intricate, technical, and minute in its details, and more and more vague in its general principles. Great principles such as those which apply to the responsibility of lunatics or persons under compulsion, or to the definitions of the greater offences are hardly noticed before we arrive at Hale. He discusses them, not indeed as they ought to be discussed in the present day, but with great force of mind and much judicial discrimination, but these great merits, which have given his book the reputation which it deserves, are marred by the endless technicalities about principal and accessory, about benefit of clergy, about the precise interpretation of obscure phrases in statutes, and many other subjects which make a great part of the work, and in particular the part which relates to procedure, almost unreadable except by a very determined student.

With the Revolution, as I have already observed, a new era of legislation on criminal law began. The excessive crudity of the early criminal law made itself apparent by the commission of numerous acts of fraud, mischief, and violence, for which the law, as it stood, provided no sufficient punishment. The modern objection to capital punishment was at that time very faintly appreciated, and accordingly for upwards of a hundred years the common result of any novel offence was the enactment of a statute making it felony without benefit of clergy. An immense accumulation of statutory felonies thus occurred throughout the eighteenth and at the beginning of the nineteenth centuries. Many statutory misdemeanours were created during the same period and for similar reasons.

Whilst this process was going on, the unwritten law was greatly developed and in many respects improved by judicial decisions. The definitions of homicide and larceny were

studied, commented upon, and carefully discussed by many judges of great eminence. Some of the cases reported during this period are of the highest merit. I may mention as a specimen the judgment of Lord Chief Justice Holt, in <sup>1</sup> *R. v. Mawgridge*, which contains the best definition of malice aforethought with which I am acquainted. "He that doeth "a cruel act voluntarily doeth it of malice prepense."

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Two writers may be noticed whose works illustrate the great development of the criminal law in the middle of the eighteenth century. The first is Sir Michael Foster, who in 1762 published his *Report of Criminal Cases* decided mostly in the reign of George II., followed by discourses on treason, homicide, and accomplices in capital cases. The second is Sir William Blackstone, the author of the *Commentaries*, the first edition of which was published between 1765 and 1769.

The scope of Foster's work is narrow, but it would be difficult to overrate its merits within the limits which the author has chosen to impose upon himself. He wrote at a time when the number of reported cases was sufficiently great to show where the difficulties of the subject lay, but when there was still room for the improvement of the law by discussions meant to show, not what had as a fact been decided in reported cases, but what it would be reasonable to decide on general grounds. Foster may thus be considered as the last, or nearly the last, author who has done much towards making the law by freely discussing its principles on their merits. Viewed in this light his discourses are admirable. They are perfectly clear, disencumbered of all unnecessary technical details, admirably comprehensive as far as they go, and full of good sense and good feeling. I do not think it would be possible to cite a better illustration of the good side of what has been called judicial legislation. Foster writes as only a perfect master of his profession can write, with a clear, firm grasp of its principles, and without encumbering himself with unimportant details. The law both as to treason and as to homicide has since he wrote been overlaid with decisions, but I think they add but little to what he has said. There are, however,

<sup>1</sup> *Kelyng*, 174. (It was decided, however, long after Kelyng's death.)

CH. XXI. points on which he seems to me to have given too much weight to very technical reasoning. For instance, he was one of the authors of the well-known opinion, that if a man shoots at a tame fowl with intent to steal it, and accidentally kills a man, the offence is murder, because of the felonious intent; but that if he shoots at a wild fowl and kills a man "it is but barely manslaughter." So no one laid down more decidedly than he artificial constructions of the statute of treason, or contended more earnestly for their substantial justice. His work, however, shows clearly that in the middle of the eighteenth century the leading doctrines of the common law relating to crime had nearly reached their full development.

Blackstone's *Commentaries* give us a complete view of the whole system as it stood at the beginning of the last quarter of the century. This celebrated work has been made the subject alternately of high praise and extreme depreciation. Of late years I think its defects have attracted more attention than its merits. These defects are sufficiently obvious. Blackstone was neither a profound nor an accurate thinker, and he carried respect for the system which he administered and described to a length which blinded him to its defects, and led him in many instances to write in a tone of courtly, overstrained praise which seems absurd to our generation. These defects brought upon him the denunciations of Bentham, who in many of his writings pointed out the essential absurdity of the commentator's courtly language, and the obscurity and confusion of his fundamental ideas, with irresistible point and vigour, and with a racy sense of humour which was in Bentham the natural consequence and companion of easy circumstances, perfect health, and pursuits which gave him that cheerful sense of intellectual superiority over many of the most distinguished men of his time which is characteristic of the critics of established institutions. After admitting all this, however, the fact still remains, that Blackstone first rescued the law of England from chaos. He did, and did exceedingly well, for the end of the eighteenth century, what Coke tried to do, and did exceedingly ill, about 150 years before; that is to say, he gave an account of the

law as a whole, capable of being studied, not only without disgust, but with interest and profit. If we except the *Commentaries* of Chancellor Kent, which were suggested by Blackstone, I should doubt whether any work intended to describe the whole of the law of any country possessed anything like the same merits. His arrangement of the subject is, I think, defective, for reasons which have often been given, but a better work of the kind has not yet been written, and, with all its defects, the literary skill with which a problem of extraordinary difficulty has been dealt with is astonishing. The dryness of the subject is continually relieved by appropriate digressions. The book is full of knowledge of many kinds, though no special attempt is made to exhibit it. It is also full of judicious if somewhat timid criticism, and, so far as I am qualified to judge, I should say, that though Blackstone did not encumber himself with useless learning, he knew nearly everything relating to the subject on which he wrote which was at all worth knowing.

As regards the Criminal Law in particular, Blackstone's exposition of it follows in the main the method of Hale, and whilst quite full enough for all the purposes for which that work was intended, it is singularly free from technical details which have no value or interest except in the actual administration of justice. One of its merits is, that it presents a distinct and trustworthy picture of the Criminal Law as it was before the notion of recasting it had made any progress worth mentioning, and whilst belief in the wisdom of its principles still remained unshaken. It differs from the law as known to Coke and Hale in the greater precision and completeness given to the various Common Law principles and definitions, but still more in the great additions which had been made in the course of the eighteenth century to the substantive Criminal Law by statutory enactments. I have already <sup>1</sup>quoted the well-known passage in which Blackstone laments "that among the variety of actions " which men are daily liable to commit, no less than an hundred and sixty are declared by Act of Parliament to be

<sup>1</sup> *Com.* iv. 18.

CH. XXI. "felonies without benefit of clergy, or, in other words, to be  
"worthy of instant death." For the wantonness with which the punishment of death was thus lavished in cases in which it was never intended to be inflicted no excuse can be made, but most of the offences thus punished were deserving of severe secondary punishment, and the extreme crudity and imperfection of the Common Law is proved to demonstration by the necessity which experience showed to exist of making statutory provisions respecting them. The legislation of the eighteenth and the early part of the nineteenth century on crime, was in fact the slow enactment of a penal code the articles of which consisted of short Acts of Parliament passed as particular offences happened to attract attention.

As time went on this state of the law was severely criticised, especially by Bentham, whose theories upon legal subjects have had a degree of practical influence upon the legislation of his own and various other countries comparable only to those of Adam Smith and his successors upon commerce. His view was that the existing law should be repealed, and that in its place there should be enacted a new code, based upon what he regarded as philosophical principles. He found less difficulty than might have been expected (though he found considerable difficulty) in convincing the public of the defects of the existing state of things, but he found it impossible to persuade them to accept a new code from his hands, or from the hands of his disciples. Highly important steps, however, were taken in his life time in the direction of the changes of which he approved, and the subject has never since been altogether dropped, though the interest taken in it by the legislature has been fitful and intermittent.

Two great efforts in the direction of a criminal code have been made in the course of the present century. The first produced Sir Robert Peel's Acts, which were passed between 1826 and 1832. Of these, 6 & 7 Geo. 4, c. 28, effected some of the reforms proposed by the Barebones Parliament 165 years before. It abolished questions of course in pleading, and benefit of clergy, in respect of which it made various changes in the punishment of so-called capital

offences to which I have already referred. Chapter 29 of the same year consolidated the law relating to larceny, and chapter 30 the law relating to malicious injuries to property. CH. XXI.

In 1828 was passed 9 Geo. 4, c. 31, which consolidated the law relating to offences against the person. The law relating to forgery was consolidated by 11 Geo. 4, and 1 Will. 4, c. 66, passed in 1830; and the law as to offences against the coin by 2 Will. 4, c. 34, passed in 1832. These acts extended only to England, and a separate set were passed for Ireland at about the same time. They left a large part of the law in its original condition, and in particular they left on one side all the common law principles and definitions.

These acts were amended by 1 Vic. cc. 85, 86, 87, 88, 89, and 90, which abolished the punishment of death in many of the cases in which it had been retained in the earlier Acts.

Though this state of things was a great improvement on that which preceded it, it left the Criminal Law in a most confused and intricate condition; for, in order to appreciate the alterations made, it was, as it still is, necessary to know how the law stood before they were made. In order to remove these admitted evils, several commissions were issued to advise as to the improvement of the Criminal Law. The first set of Commissioners issued eight reports between July 1834 and 1845. They are highly valuable and interesting. The most important are the 7th Report, which was published in 1843 containing a draft Penal Code, and the 8th Report, published in 1845, which contained a draft code of criminal procedure. These drafts, however, were not regarded as satisfactory, and did not become law.

<sup>1</sup> Some later commissions were issued and minor measures taken between 1845 and 1861, and in the last-mentioned year were passed the six Consolidation Acts which I have often had occasion to mention, and which form the nearest approach on the Statute Book to a Criminal Code. They are 24 & 25 Vic. cc. 96 (larceny), 97 (malicious mischief), 98 (forgery), 99 (coinage), and 100 (person). These acts apply both to England and Ireland. They cover rather more than

<sup>1</sup> See Mr. Greaves's preface to his edition of the Acts of 1861.

CH. XXI. half of the Criminal Law, and provide for the punishment of most of the offences which are of common occurrence; but they assume the existence of a large number of common law definitions and principles which have never been in an authoritative manner reduced to writing, and the result is that their arrangement is complicated and difficult to an extreme degree. I have had occasion to study with the utmost minuteness every section of each of these Acts, and I can bear testimony to the extreme care with which they have been prepared. This indeed is clearly proved by the fact that hardly any decisions upon their interpretation have been found necessary in the course of the twenty-one years which have passed since their enactment. They have, however, great defects, of which I shall speak in reference to the particular offences with which they deal. They are exceedingly cumbrous and ill-arranged, and they reproduce faithfully, though under somewhat different forms, the defects of the system of which they are for the present the final result.

<sup>1</sup> Of the Criminal Code Bills of 1878 and 1879 I will here say only that some reference will be made hereafter to the objects which they were intended to effect, and to the manner in which they proposed to effect them. This work may be regarded in the light of a preface to and a commentary upon them, and I still hope that Parliament may in time be induced to pass a measure into law reproducing their proposed enactments.

Since the publication of Blackstone's *Commentaries* hardly any work has been published in England upon the Criminal Law which aims at being more than a book of practice, and books of practice on Criminal Law are simply compilations of extracts from text-writers, and reports <sup>2</sup> arranged with greater

<sup>1</sup> A few words as to their origin will be found in the preface.

<sup>2</sup> The last editor of Russell *On Crimes*, which is perhaps the largest and fullest of these compilations, observes that he has made some alterations in the author's plan. For instance, "title 'Pleas of Autrefois Acquit,' which was, in the former edition, in chapter 'Burglary,' and title 'Amendment of " 'Indictments at the Trial,' formerly under title 'Evidence,' have been " transferred to 'General Provisions.' Moreover, Vol. I. being found inconveniently large, 'Bigamy' and 'Libel' were put into Vol. III." What would be thought of a copy of a picture in which, to improve the effect a man's head was transferred to the shoulders of a woman, and a group was shifted, to suit the shape of the canvas, from the foreground to the back, and when



or less skill—usually with almost none—but representing the aggregate result of a great deal of laborious drudgery, performed as a rule with more accuracy and care than could be expected in work so tiresome and usually so very poorly paid.

CH. XXI

To sum up in a few words the contents of this chapter. The following, in a highly condensed form, is the history of the Criminal Law in England.

1. In the time of Henry III. the Criminal Law consisted of eleven known offences, nearly all of which were capital, and of an indefinite number of *minora et leviora crimina*. Its definitions and doctrines were crude and unsettled.

2. Between Bracton and Coke the definitions and doctrines of Bracton's times were to a considerable extent settled and greatly developed, and about twenty statutory felonies and as many misdemeanours were added to the crimes known to Bracton. The Court of Star Chamber was one great agent in bringing about this change as to misdemeanours.

3. Between the days of Coke and those of Blackstone the common law principles and definitions of crimes were completely settled, Hale and Foster having contributed more than any other writers to their settlement, and much having been done in the same direction by judicial decisions, especially in the early part of the eighteenth century. Owing mainly to the crudity of the Common Law, an immense quantity of fragmentary occasional legislation had taken place, by which the number of capital felonies had been increased, according to Blackstone, to 160, and the number of statutory misdemeanours to a very considerable, though ill-ascertained amount.

4. From the days of Blackstone to the present time numerous attempts have been made to codify the law. They have been partially, but only partially, successful, about half of it having been reduced to a statutory form twice over, namely, once in 1826-32, and again in 1861.

5. A number of minor offences were in early times

everybody felt that such changes made no difference, and were indeed rather judicious than otherwise!

<sup>1</sup> Written in 1882.

CH. XXI. punished by the sheriffs' tourn and the courts-leet of manors, and the Ecclesiastical Courts had a wide jurisdiction over every kind of conduct which could be regarded as sinful.

The courts-leet and sheriffs' tourns fell into disuse before the sixteenth century, though to this day they continue to exercise a very trifling jurisdiction.

The Ecclesiastical Courts were totally abolished in 1640 and though they were revived in 1661, their procedure was so much altered, especially by the abolition of the *ex-officio* oath, that they have fallen into almost entire disuse for all purposes except the discipline of the clergy.

The offences which were formerly dealt with by the courts-leet and sheriffs' tourns, and a certain number of the offences formerly dealt with in the Ecclesiastical Courts, are now disposed of by the Courts of Summary Jurisdiction, which in the course of the last century and a half have acquired by many Acts of Parliament very extensive powers.

In the following chapters most of these matters will be stated in full detail.

## CHAPTER XXII.

## OF PARTIES TO THE COMMISSION OF CRIMES, AND OF INCITEMENTS, ATTEMPTS, AND CONSPIRACIES TO COMMIT CRIMES.

THE first subject to be considered in reference to the substantive criminal law is that of the parties to crimes and of degrees in the commission of crimes—matters which are obviously closely connected with each other. CH. XXII.

The facts to which the law has to be applied must always, from the nature of the case, be more or less as follows :—

A crime must first occur to the mind, it must then be considered and determined upon, preparations more or less extensive must, in most cases, be made for it, and it must be carried into execution. The execution may either be prevented or may be fully carried out, in which case it may either accomplish, or fail to accomplish, the full object which the criminal proposed to himself. Finally, after a crime has been committed, the person who committed it usually wishes to conceal or to profit by it.

In each of these stages one person, or more persons than one, may be engaged, and they may or may not receive assistance from others. It ought also to be observed that apart from every general doctrine as to attempts, many actions which under any circumstances would be regarded as crimes, are in the nature of attempts to commit some further crime. For instance, every crime against the person must of necessity involve an assault. An assault is not less an assault because it is intended to be the first step towards murder, or rape, or robbery. So forgery,

CH. XXII. coining, and the offering of bad money, are attempts to defraud, though they may not in fact produce the desired result; and the same remark applies to perjury. Treason, again, at least in its highest form, is essentially an attempt to subvert the established Government. If it succeeds fully it ceases to be treason and becomes a successful revolution or new departure in the political history of the country. These are the different facts relating to the subjects with which the Criminal Law has to deal.

The following is the history of the manner in which the law relating to attempts to commit crimes arrived at its present state.

The first general rule upon the subject with which I am acquainted was that in cases of attempts to murder the will was to be taken for the deed when it was accompanied by overt acts clearly indicating the intention of the party. Coke, in his exposition of the Statute of Treasons (25 Edw. 3, st. 5, c. 2), refers to this principle, regarding apparently the provision as to compassing and imagining the king's death as an illustration of it, and he refers to instances which occurred some time before the statute in which offenders who had clearly shown their intention to kill were punished as for murder, although their object was not carried out. <sup>1</sup>Two of the cases to which he refers are abstracted by FitzHerbert, and are given in the note.

<sup>1</sup> "*Berr.* [Sir W. Beresford, Chief-Justice of the Common Pleas], dit "que devant luy et ces cōpaigñ un garson fuit aſſ de ceo q il voill' aſſ emport les bñs son maſſr il vient al lite son maſſr lon son maſſr fuit "dormant et il trechia (trancha) duremēt en le goul' issint q̄ il entend q̄ il aſſ "trench son gorge et se treit et son maſſr cria et ses vicens oier ceo et prist "le garson et sur ceo fuit aſſ. *Berr.* apres ceo que tout soit trouve par "enquest ne voile luy pend' pur ceo que il [the master] fuit en vie q̄ il duist "aver occis, pur que il fait maunde al prison, et apres compaign don juge- "ment que il duit pendre, &c.

"Quia voluntas in isto casu reputabitur pro facto la on le volunte est cy "appartement trou." (i.e. There was a special verdict. The judge did not like to pass sentence because the person assaulted was still alive, but on argument the other judges gave judgment of death.)

"*Spig.* (probably Spigurnel) dit q̄ un femme se tient ove son advouters, et "son advoutf' et luy compass le mort son baron et luy assail' come il chivauch "vers le delivrances, &c. [as he was riding to the assizes—the gaol delivery] "et luy naufreñ' ove fetz, &c. [Coke translates 'weapons'] issint que ils less' "luy glass' pur mort et fuger et le baron leva huy et crie et vient al delivrances "et mfe ceo as justices, et les justices maundf' pur eux prendre et fuer prises "et aſſ de ceo et tout ceo fuit troue p̄ v̄dit et par ag [by the judgment of "the court] il fuit pend' et la femme ars," &c. Fitzherbert, *Corone*, 383; 15 Edw. 2 (A.D. 1322).

This rule, however, appears to have been considered too severe and to have fallen into disuse, no general principle at all taking its place. The wide discretion which was then, and is now, allowed to the courts in regard of punishment would obviate many difficulties which the want of such a principle would raise. Many attempts to commit crimes must have been punished as assaults, forgeries, or the like, and no doubt in such cases the intent on the part of the offender to commit some special crime would involve a corresponding severity in punishment. A remarkable instance of the results of this state of the law is afforded by the <sup>1</sup>trial of Giles before Jeffreys, then Recorder of London, for a desperate attempt to murder Arnold, a magistrate who had made himself conspicuous by his Protestant zeal. Giles cut Arnold's throat, and stabbed him in many places, giving him in particular one wound "of the depth of seven inches in his body between his belly and his left pap." For this offence he was fined £500, pilloried thrice, imprisoned till his fine was paid, and required to find sureties for his good behaviour for life. Jeffreys described this as "as great a corporal punishment as the law will allow," an opinion which he must have altered when he afterwards sentenced Oates. In the present day the punishment for such an offence would be penal servitude for life, or for a long term of years.

Apart, however, from the punishment of attempts under the name of assaults or the like, the doctrine that an attempt is as such an offence had been established, or at least suggested, by the decisions of the Court of Star Chamber before its abolition. This appears from <sup>2</sup>Hudson's *Treatise on the Court of Star Chamber*. In his chapter on "causes here examinable not otherwise punishable," he says that it is the "great and high jurisdiction of this court," that it "punisheth errors creeping into the Commonwealth, which otherwise might prove dangerous and infectious diseases, — yea, although no positive law or continued custom of common law giveth warrant to it." After mentioning some other cases, he says, "Attempts to coin money, to commit burglary, or poison, or murder, are an ordinary example of which the

<sup>1</sup> 7 *State Trials*, 1130, 1160.

<sup>2</sup> Pp. 107, 108.

CH. XXII. " attempt by Frizier against Baptista Basiman in 5 Elizabeth  
 " (1563) is famous ; and that attempt of the two brothers who  
 " were whipped and gazed " (I suppose pilloried) " in Fleet  
 " Street in 44 Elizabeth (1602) is yet fresh in memory." Though  
 I am not able to prove it positively I have little doubt that this  
 was with some other decisions of the Star Chamber adopted by  
 the Court of King's Bench as part of the common law. In our  
 own days it may be stated as a general proposition that all  
 attempts whatever to commit indictable offences, whether  
 felonies or misdemeanours, and whether, if misdemeanours  
 they are so by statute or at common law, are misdemeanours,  
 unless by some special statutory enactment they are sub-  
 jected to special punishment. This was established by <sup>1</sup> a  
 series of decisions between which there were a variety of  
 minute distinctions.

I do not think the law has ever been carried so far as  
 to decide that an attempt to commit a police offence sub-  
 jecting a person to a conviction upon a summary proceeding  
 before a magistrate is a misdemeanour, though an agreement to  
 do so is an indictable conspiracy. On the other hand, there  
 are attempts for which fine and imprisonment would obviously  
 be far too light a punishment, such as attempts to commit  
 murder or arson. These, and a few others, are provided for  
 specially by statute, the severest secondary punishment being  
 in some cases allotted to them.

<sup>2</sup> The law as to what amounts to an attempt is of necessity  
 vague. It has been said in various forms that the act must  
 be closely connected with the actual commission of the  
 offence, but no distinct line upon the subject has been or as I  
 should suppose can be drawn. Some decisions have gone a  
 long way towards treating preparation to commit a crime as  
 an attempt. For instance <sup>3</sup> the procuring of dies for coining  
 bad money has been treated as an attempt to coin bad  
 money.

<sup>1</sup> For the present state of the law see my *Digest*, pp. 29-30, art. 47-50. See  
 also a large collection of cases in 1 Russell *On Crimes*, 188-192, and see in  
 particular Higgins's case, 2 East, R. 21 ; R. v. Schofield, Cald. 400 ; R. v.  
 Butler, 6 C. and P. 368 ; R. v. Roderick, 7 C. and P. 795.

<sup>2</sup> *Digest*, art. 49, p. 29.

<sup>3</sup> Roberts's case, Dearsley, 539.

The most curious point on this subject is the question CH. XXII. whether, if a man attempts to commit a crime in a manner in which success is physically impossible, as for instance if he shoots at a figure which he falsely supposes to be a man with intent to murder a man, or puts into a cup pounded sugar which he believes to be arsenic, or attempts to pick an empty pocket, he has committed an attempt to murder or to steal. By <sup>1</sup> the existing law he has committed no offence at all, and this is also the law of France, and I believe of other countries, the theory being that in such cases the act done merely displays a criminal intention, but cannot be regarded as an attempt because the thing actually done was in no way connected with the purpose intended to be effected. It was proposed by the Criminal Code Commission to reverse this, I think with unnecessary severity. The moral guilt is no doubt as great in the one case as in the other, but there is no danger to the public, and it seems harsh to treat as an attempt one only of many kinds of acts by which a criminal intention is displayed; but the question is one of little practical importance. It has been held in one case that an attempt to commit a crime is not the less an offence because the offender voluntarily desists. This, however, rests upon the <sup>2</sup> decision of a single judge.

<sup>3</sup> The French *Code Pénal* and the German *Strafgesetzbuch* lay down general rules as to the punishment of attempts, the

<sup>1</sup> Collins's case, L. and C. 471. As to the French law, *Théorie du Code Pénal* (Adolphe et Hélie), i pp. 382, 383. In Collins's case the offender attempted to pick an empty pocket, and it was held that this was not an attempt to steal. No doubt the prisoner, in Collins's case, ought not to have escaped, but that was because his act was in itself an injury to the person wearing the coat. He might, and I think ought, to have been indicted for an assault with intent to commit a felony, and I think that the substantial difference between the two things will be made clear by supposing the case of a man putting his hand into the empty pocket of a coat hanging up on a peg, or looking into an empty box with intent to steal. Common sentiment would, I think, feel that in either of these cases it would be over severe to punish an act harmless except for the intention which it displayed.

<sup>2</sup> R. v. Taylor, 1 F. and F. 511.

<sup>3</sup> "2. Toute tentative du crime qui aura été manifestée par un commencement d'exécution, si elle n'a été suspendue, ou si elle n'a manqué son effet que par des circonstances indépendantes de la volonté de son auteur, est considérée comme le crime même.

"3. Les tentatives de délits ne sont considérées comme délits que dans les cas déterminés par une disposition spéciale de la loi."—*Code Pénal*, arts. 2 and 3, and see notes in Sirey's edition of the Code; see also Adolphe et

CH.XXII effect of which is to exclude from punishment all attempts in which the offender has voluntarily desisted from his crime. Nor does either Code punish, except in a few exceptional cases, attempts to commit what we should describe as misdemeanours (*délits, Vergehen*).

Article 2 of the *Code Pénal* preserves the rule of *voluntas pro facto* which was regarded as too severe by English lawyers several centuries ago. This provision is said by an<sup>1</sup> eminent French commentator on the *Code Pénal* to be peculiar to France. On the other hand, the French law, and that of most other countries, takes no notice of an attempt to commit a crime from which the offender voluntarily desists, and treats as mere acts of preparation many things which in England would be regarded as attempts. The rule of the French Code is that in order to constitute an attempt (*tentative*) there must be a *commencement d'exécution* (in the German Code, *Anfang der Ausführung*) whereas it is only in very recent times that the English courts have drawn distinctly the line between acts displaying a criminal intent, and acts amounting to a commencement to execute that intention. The distinction indeed must in the nature of things be indefinite.

It is not easy to say upon grounds of expediency whether it is or is not wise to lay down the rule that an attempt from which a man voluntarily desists is no crime. It would be dangerous to lay down such a rule universally. Suppose,

Hélie, vol. i. 376-382, and Hélie's *Procédure Criminelle* (1877), i. 2. The corresponding articles in the German Code are:—

“43. Wer den Entschluss ein Verbrechen oder Vergehen zu verüben durch Handlungen welche einen Anfang der Ausführung dieses Verbrechens oder Vergehens enthalten, bethätigt hat, ist, wenn das beabsichtigte Verbrechen oder Vergehen nicht zur Vollendung gekommen ist, wegen Versuches zu bestrafen.

“Der Versuch eines Vergehens wird jedoch nur in den Fällen bestraft in welchen das Gesetz dies ausdrücklich bestimmt.”

The punishment of attempts in the German Code is milder than in the *Code Pénal*:—

“44. Das versuchte Verbrechen oder Vergehen ist milder zu bestrafen als das vollendete.”

Then follows a scale of proportional punishments.

<sup>1</sup> Adolphe et Hélie, i. 372, &c. The German law is far less severe. After a few special provisions the Code enacts as follows:—

“S. 44. In den übrigen Fällen kann die Strafe bis auf ein Viertel des mindesten Betrages der auf das vollendete Verbrechen oder Vergehen angedrohten Freiheit und Geldstrafe ermässigt werden.”



for instance, a man voluntarily desisted from an intended and attempted murder, robbery, or rape, because he encountered more resistance than he expected, or suppose that, having lighted a match to blow up a mine under a house, or to set a stackyard on fire, he blew it out because he was or thought he was discovered? CH.XXII.

These, however, are cases which seldom occur and are of little practical importance.

I do not think that there is room for much improvement in this part of the law, except in some particular cases which will be noticed in their place. It is singular, but it is also true, that there are a large number of crimes which it is impossible to attempt to commit. For instance, high treason by imagining the king's death cannot be attempted, because the crime consists in displaying by an overt act a treasonable intention, but an attempt to do something (*e.g.* an attempt to fire a loaded pistol at the Queen) would be an overt act displaying a treasonable intention just as much as actual firing, indeed the actual murder of the Queen would (as appears from the case of the regicides) be no more than an overt act manifesting a treasonable intent to put Her Majesty to death. Similarly a man could hardly attempt to commit perjury, or riot, or libel, or to offer bad money, or to commit an assault, for an attempt to strike is an actual assault.

## CONSPIRACY.

Conspiracy has much analogy to an attempt to commit a crime. It consists in an agreement between two or more persons (as is commonly said) "to do an unlawful act or to do a lawful act by unlawful means." In other words, it is an agreement to do anything unlawful, whether the thing agreed upon is in itself an ultimate object, or only a means to an end lawful or unlawful.

The crime of conspiracy regarded as an inchoate offence, calls for little observation, but it has a remarkable history. In very early times the word had a completely different

CH. XXII. meaning from that which we attach to it. This appears from two early statutes, the first is the *Articuli super Chartas* (28 Edw. 1, A.D. 1300) which was intended to supplement and enforce Magna Charta. The tenth chapter begins: "In right of conspirators, false informers, and evil procurers of dozens, assizes, inquests, and juries, the king has provided remedy for the plaintiffs by a writ out of chancery. And notwithstanding he willeth that his justices of the one bench and of the other, and justices assigned to take assizes, when they come into the country to do their office shall upon every plaint made unto them award inquests thereupon without writ, and shall do right unto the plaintiffs without delay."

In the 33 Edw. 1 (1304) there is a definition of conspirators: "Conspirators be they who do confeder or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsely and maliciously to indict or cause to indict, or falsely to move or maintain pleas; and also such as cause children within age to appeal men of felony whereby they are imprisoned and sore grieved; and such as retain men in the country with liveries or fees to maintain their malicious enterprises; and this extendeth as well to the takers as to the givers; and stewards and bailiffs of great lords which by their seignory office or power undertake to bear and maintain quarrels, pleas, or debates that concern other parties than such as touch the estates of their lords or themselves."

The earliest meaning of conspiracy was thus a combination to carry on legal proceedings in a vexatious or improper way, and the writ of conspiracy, and the power given by the *Articuli super Chartas* to proceed without such a writ, were the forerunners of our modern actions for malicious prosecution. Originally, therefore, conspiracy was rather a particular kind of civil injury than a substantive crime, but like many other civil injuries it was also punishable on indictment, at the suit of the king, and upon a conviction the offender was liable to <sup>1</sup> an extremely severe punishment which was called

<sup>1</sup> "That they shall lose the freehold or franchise of the law, to the intent that he" [they] "shall not be put or had upon any jury or assize, or in any other testimony of truth; and if they have anything to do in the king's

“the villain judgment.” The Star Chamber <sup>1</sup> first treated conspiracies to commit crimes or indeed to do anything unlawful as substantive offences, and after the Restoration this amongst other doctrines of theirs found its way into the Court of King’s Bench. The doctrine was expressed so widely or loosely, that it became in course of time a head of law of great importance, and capable of almost indefinite extension. In various cases the definition that a conspiracy is an agreement to do an unlawful act was held to mean something more than an agreement to do an act which is in itself criminal when done by a single person, the word “unlawful” being used in a sense closely approaching to immoral simply, and amounting at least to immoral and at the same time injurious to the public. The length to which this doctrine has been carried even in our own days with respect especially to conspiracies in restraint of trade, and conspiracies to compel employers of labour to submit to terms imposed upon them by persons in their employment is well known, but upon this and some other adaptations of the law of conspiracy I defer my observations until I come to the particular conspiracies which have been treated as substantive crimes.

CH. XXII.

## PRINCIPAL AND ACCESSORIES.

From the subject of imperfect inchoate crimes I pass to that of parties to crimes, who in our law are technically known as accessories before and after the fact, and in more general language as accomplices. The possible cases as to a crime in which more persons than one are concerned are as follows:—

A person may suggest a crime to another and persuade

“ courts, they shall come, *per solem id est*, by noonday, and make their attorney, “ and forthwith return by broad day; and their houses, lands, and goods “ shall forthwith be seized into the king’s hands, and their houses and lands “ estrepped and wasted, their trees rooted up and errased, and their bodies to “ prison: all things retrograde and against order and nature in destroying all “ things that have pleased and nourished them, for that by falsehood, “ malice, and perjury they sought to attain and overthrow the innocent.”—Coke, *Third Institute*, 143 (“Conspiracy”).

<sup>1</sup> Hudson, 104-107. Mr. Wright has gone into this subject at great length and with much learning in his work on the law of criminal conspiracies. He does not happen to quote Hudson.

CH. XXII. him to commit it. The crime so suggested may or may not be committed. When it is committed, it may be done by a single person, either alone, or in the presence of one or more persons aiding or countenancing the actual perpetrator in the commission of the crime. After it has been committed, the criminal may be helped to avoid justice, or to make use of the proceeds of his crime, or to escape from justice, or to resist apprehension.

These are the possible cases to which the law has to be adapted. <sup>1</sup> So far as it need be stated here, it is as follows. A person who "counsels, procures, or commands" another to commit either a felony or a misdemeanour is guilty of the misdemeanour of incitement if the offence suggested is not committed, and if it is committed, he is an accessory before the fact if the offence is felony, and a principal if the offence is either treason or misdemeanour. <sup>2</sup> Incitement to commit a treason not committed in consequence, would in many cases be treason.

Every person who takes part in the actual execution of a crime is a principal, even if he is present only for the purpose of aiding or countenancing the person by whom the crime is actually committed. Such persons were formerly described as accessories at the fact, and are now called principals in the second degree.

Several doctrines as to the degree of participation in the actual commission of a crime which makes a person a principal in the second degree have been established by decided cases. I have made a statement of them, to which I have nothing to add, in my *Digest*, articles 35-38 inclusive. They have no historical interest, and I need not further refer to them. How far they would be recognised on the Continent I am unable to say. The provisions both of the French *Code*

<sup>1</sup> For a full statement of it, involving a variety of detailed points to which I do not here refer, see my *Digest*, pp. 22-28, articles 35-46.

<sup>2</sup> "Every instance of incitement, consent, approbation, or previous abetment in that species of treason which falleth under the branch of the statute touching the compassing of the death of the king, queen, or prince, every such treason is in its own nature, independently of all other circumstances or events, a complete overt act of compassing, though the fact originally in the contemplation of the parties should never be effected, nor so much as attempted."—Foster, 346.

*Pénal* and the German *Strafgesetzbuch* on the subject are extremely curt. The *Code Pénal* makes no distinction between what we describe as principals of the first and second degree. The *Strafgesetzbuch* distinguishes between the *Anstifter*, who answers in the main to an accessory before the fact, and the *Gehülfe*, who is thus defined (art. 49): "Wer dem Thäter zur Begehung des Verbrechen oder Vergehens durch Rath oder That wissentlich Hülfe geleistet hat," words which seem to include assistance in the actual commission of the offence as well as beforehand. <sup>1</sup> There are endless speculations by continental writers as to what, according to certain theories to which they attach more importance than we do, ought to be the law on this subject.

I now pass to the law as to accessories, which is much more complicated. Those who "counsel, procure, or command" another to commit a felony are accessories before the fact; those who in any way assist the criminal after his crime, with a view to shielding him from justice, are <sup>2</sup> accessories after the fact.

The history of the law upon this subject is intricate and characteristic. <sup>3</sup> Its gradual progress may be traced by reading the statements of it as it stood between Coke and Blackstone, referred to in the note. Stated in the broadest and most unqualified way it came to this. There was no distinction between principals and accessories in treason or misdemeanour, and the distinction in felony made little difference, because all alike, principals and accessories, were felons, and were, as such, punishable with death.

After a careful account of the matter which arrives at this result, <sup>4</sup> Blackstone not unnaturally observes:—"Why

<sup>1</sup> See e.g. Adolphe et Hélie, i. 407-430, *Théorie Générale de la Complicité*. The authors almost blame the *Code Pénal* for being too simple (p. 431). It must be owned that it is in many places crude in the extreme. See too Schütze, *Lehrbuch des Deutsche Strafrechts*, "Die Verbrechenmehrheit in Allgemeinen," 142-146; *Thäter und Mithäter*, 146-150.

<sup>2</sup> "Receive and comfort" were the words usually employed to define this offence. Coke gives a curious instance of what might safely be done. "A vicar which instructed an approver which could not read whilst he was in prison to read, whereby he escaped, was adjudged no accessory to the felony." *Third Institute*, 139. (He was a bold man, however, to raise the question.)

<sup>3</sup> *Third Institute*, 137 (very fragmentary); 1 Hale, 233-239, 612-626; Foster, *Discourses*, pp. 341-375; 4 Blackstone, 34-40.

<sup>4</sup> 4 *Com.* 39.

CH. XXII. " then, it may be asked, are such elaborate distinctions made " between accessories and principals, if both are to suffer the " same punishment?" He gives two answers. 1. To distinguish the nature and denomination of crimes, that the accused may know how to defend himself when indicted; the accusation of an actual robbery being quite a different accusation from that of harbouring the robber. 2. Because though by the ancient common law the rule is, as before laid down, that both are punished alike, yet now, by the statutes relating to the benefit of clergy, a distinction is made between them: accessories after the fact being still allowed the benefit of clergy in all cases, which is denied to the principals and accessories before the fact in many cases. He suggests that a distinction ought to be made in all cases.

The first of these reasons has, I think, little weight, as it implies, contrary to the fact, that the law upon this subject was enacted consciously at once and for definite reasons. The second, I think, supplies, or rather imperfectly hints at, the true reason which weighed more or less consciously with a long series of judges. The essential part of the doctrine of the law of principal and accessory is, that from the earliest times a doctrine prevailed that " no accessory can " be convicted or suffer any punishment where the principal " is not attainted or hath the benefit of his clergy." The result was, that if the principal died, stood mute, challenged peremptorily more than the proper number of jurors, was pardoned, or had his clergy, the accessory altogether escaped. This was founded apparently upon a notion, half scholastic, half derived from the Roman law (a fertile mother of arbitrary rules put forward as self-evident truths), that <sup>1</sup> "accessorius

<sup>1</sup> There is an elaborate exposition of this principle in Jeremy Taylor's *Ductor Dubitantium* (see his works by Heber, vol. xiii. p. 578). Its theological use was to show that the soul is the principal and the body the accessory, and that therefore the Spiritual Power is the principal, and the Temporal Power the accessory, whereby the king is subject to the pope. This Taylor indignantly denies. It is strange to observe how, even in our own times, a commonplace which is not even true may be made to look plausible by putting it in Latin. Bentham had a great disgust at the crudity and dictatorial air of the Roman law, and I wish that his remarks on its defects were borne in mind by those who in these days extol it in an unqualified manner. There can be no question as to its historical value, nor in a general way as to its merits, but they are merits of an essentially humble, commonplace kind. If

“sequitur naturam principalis sui.” It was used in practice in different ways, and no doubt with different objects, in relation to treason and felony respectively. CH. XXII.

With regard to treason, there can be little doubt that the courts wished, as a rule, to make the law as severe, and to spread as wide a net for offenders, as they could. They accordingly laid down the rule, “*Propter odium delicti*,” as Blackstone says, that all are principals in treason. This rule still exists, though it is now of little practical importance. Indeed, as treason was never clergyable, it made less difference in regard to that offence than in regard to felony.

It extends to accessories after the fact as well as to accessories before; but <sup>1</sup> Hale says that the receiver of a traitor “thus far partakes of the nature of an accessory” . . . . “that if he be indicted by a several indictment he shall not be tried till the principal be convicted.” No authority is given for this, and in his second volume he says that if A be indicted for treason and B for comforting and receiving him, “it is true they are all principals, but inasmuch as B in case of a felony would have been but accessory, and it is possible that A may be acquitted of the fact, it seems to me that B shall not be put to answer of the receipt . . . till A be outlawed, or at least jointly with A.” This appears to me to make the rule unmeaning, and to put a person said to be a principal after the fact in treason very nearly on the same footing as an accessory after the fact in felony. The plain truth is that Hale must have felt the cruelty of treating as a traitor a person who charitably helped perhaps a wounded and helpless fugitive, and he tried accordingly to evade the harsh rule thus laid down. If, however, a woman is to be burnt alive for trying to enable a wounded man to escape from those who are seeking to put him to death, it is absurd to make her burning depend on the question whether he was or was not previously attainted. The moral and

any one will read any book of the *Digest* he pleases, and then read the corresponding title in Fisher's *Digest*, he will find that the merits and defects of the two works are much of the same kind. When a number of able men are set to decide questions arising out of the common affairs of life, they will in practice set out from much the same results and reach very similar conclusions.

<sup>1</sup> 1 H. P. C. 238, and see 2 H. P. C. 223.

CH. XXII. political character of the action is precisely the same whether he died of his wounds, or was put upon his trial and hanged, drawn, and quartered. These passages of Hale are the only authorities relied upon to show that Jeffreys acted illegally in not telling the jury in Lady Lisle's case that she could not be convicted till Hicks was attainted. Hale's work was not then published, and as he gives no authority for his opinion, it is difficult to say that it was in his day well-established law. Jeffreys' abominable cruelty, the gross indecency of his behaviour on the occasion, and the shameful partiality of his summing up on the question of Lady Lisle's knowledge of Hicks's offence had the effect of causing the law upon the subject to be stated, both by Parliament in reversing Lady Lisle's attainder, and by Foster in discussing the case, to be the opposite of what Jeffreys affirmed it to be; and no doubt should the case ever arise it would be so held, but <sup>1</sup> I doubt whether, on the mere point of law, Jeffreys was not right.

I do not think that the law as to accessories in treason has been put in force in the present or the last century, and it still remains theoretically a capital crime to "receive or comfort" any person who commits that offence.

In the Draft Criminal Code it was proposed to make it an offence punishable with secondary punishment to be accessory to treason after the fact, but it is most unlikely that the question would ever be raised.

The rule as to accessories in felony was probably one of the devices by which the extraordinary severity of the old criminal law was mitigated. This is proved in several ways.

In the first place, <sup>2</sup> the rules as to the interpretation of statutes by which felonies were created were subtle and intricate to the last degree, especially in regard to the various

<sup>1</sup> Lord Campbell's remarks on this subject will be found, on careful examination, to be characteristically cautious. See *Lives of Chancellors*, iv. 376. I have my doubts as to Lady Lisle's ignorance that Hicks had been in Monmouth's army. He was afterwards hanged at Glastonbury, and made a long and striking dying speech, printed in 11 *St. Tr.* 312-321. He does not mention Lady Lisle. He must have known of her fate, and would probably have asserted her innocence if he could have done so conscientiously; besides, Dunne's evidence implies that she did know.

<sup>2</sup> 1 Hale, *P. C.* 613-614.



forms of expression which were used by the legislature as to the punishment of accessories and their being or not being deprived of clergy. This is strikingly put by <sup>1</sup> Foster. "Cases without number may be cited to show in general how extremely tender the judges have been in the construction of statutes which take away clergy, sometimes even to a degree of scrupulosity excusable only in favour of life;" and in the following pages he proceeds to give many instances.

CH. XXII.

In the second place, the statute (1 Anne, st. 2, c. 9) which first abridged this unreasonable privilege of accessories was passed whilst the last vestiges of the old rule which confined benefit of clergy to clerks, properly so called, were in course of removal, namely, nine years after women were admitted to the benefit of clergy, and four years before the necessity for reading was abolished.

The history of the rule itself is as follows:—From the earliest times till the year 1702, the rule was (as is stated in the preamble of the statute which altered it) that "no accessory can be convicted or suffer any punishment where the principal is not attainted or hath the benefit of his clergy." The statute of Anne (Anne, st. 2, c. 9, A.D. 1702) narrowed this privilege, but it did so very slightly. It provided that the accessory should be liable to punishment "if any principal offender shall be convicted of any felony, or shall stand mute, or peremptorily challenge above the number of twenty persons returned to serve on the jury. Notwithstanding that such principal felon shall be admitted to the benefit of his clergy, pardoned, or otherwise delivered before attainder." This rule, as modified by the statute of Anne, is thus stated by <sup>2</sup> Foster. "The offence of the accessory, though different from that of the principal, is yet in judgment of law connected with it, and cannot subsist without it, and in consequence of this connection the accessory shall not without his own consent be brought to trial till the guilt of the principal is legally ascertained by the conviction or outlawing of him, unless they are tried together." This continued to be the law till 1826, when it was enacted by 7 Geo. 4, c. 64, s. 9, that every accessory before the fact "shall be

<sup>1</sup> P. 355.

<sup>2</sup> P. 360.

CH. XXII. "deemed to be guilty of felony, and may be indicted and  
 "convicted either as an accessory before the fact to the  
 "principal felony, together with the principal felon, or after  
 "the conviction of the principal felon, or may be indicted  
 "and convicted of a substantive felony, whether the principal  
 "felon shall or shall not have been previously convicted, or  
 "shall or shall not be amenable to justice."

It might have been thought that this enactment put an end to the distinction between principals and accessories before the fact, but this was held not to be its effect. <sup>1</sup> It was considered that it did not make those accessories triable who were not triable before.

To meet this difficulty it was enacted by 11 & 12 Vic. c. 46, s. 1 (A.D. 1848), that "if any person shall become an accessory before the fact to any felony, whether the same be a felony at common law, or by virtue of any statute made or to be made, such person may be indicted, tried, convicted, and punished in all respects as if he were a principal felon." The 7 Geo. 4, c. 64, ss. 9 and 11, and 12 Vic. c. 46, have both been repealed, but they were re-enacted by 24 & 25 Vic. c. 94, ss. 1 and 2, which is still in force. <sup>2</sup> Under the statute of 1848 it was held that an accessory might be convicted even after the acquittal of the principal. This finally set at rest nearly every question that can be raised as to principal and accessory, and put principals and accessories before the fact on the same level. It is, however, practically impossible to say, when the precise words of so many acts have to be considered, whether the intricacies introduced by a bad principle never in terms disavowed have been effectually removed. It was accordingly proposed by the Criminal Code Commissioners to substitute for the whole of the old law the following provisions:—

Every one is a party to and guilty of an indictable offence who

(a) Actually commits the offence, or does or omits to do any act the doing or omission of which forms part of the offence; or

<sup>1</sup> R. v. Russell, R. & M. C. C. R. 356; 1 Russ. Cr. 179.

<sup>2</sup> R. v. Hughes, Bell, 242.

(b) Aids or abets any person in the actual commission of the offence, or in any such act or omission as aforesaid; or CH. XXII.

(c) Directly or indirectly counsels or procures any person to commit the offence, or to do or omit any such act as aforesaid.

Accessories after the fact to felony were and are felons as well as accessories before the fact, but their felony was always clergyable. When benefit of clergy was abolished in 1827 by the act 7 & 8 Geo. 4, c. 28, s. 6, it was enacted that no felony should for the future be punished with death except felonies excluded from benefit of clergy. All other felonies were to be punished, unless any special statutory provision was made for their punishment, by transportation for seven years as a maximum. This applied to accessories after the fact in all cases, as all such cases were clergyable. By 24 & 25 Vic. c. 95, s. 4, it is provided that the maximum punishment for an accessory after the fact shall be two years' imprisonment and hard labour. The only case in which a higher punishment is provided is that of an accessory after the fact to murder, when the maximum punishment is ten years' penal servitude, by 24 & 25 Vic. c. 100, s. 67.

Till 1847 an accessory after the fact could be tried only with, or after the conviction of, the principal felon. In that year it was enacted by 11 & 12 Vic. c. 46, s. 2, that he might be tried either as an accessory after the fact, with the principal felon, or after the principal felon; or he may be indicted and convicted of a substantive felony, whether the principal felon has been convicted or not, or is or is not amenable to justice. The act is now repealed, but this provision is reenacted by 24 & 25 Vic. c. 94, s. 3. This part of the law was not proposed to be altered, except in one very slight particular, by the Draft Criminal Code. (See ss. 73, 425, 426.)

Two offences must here be mentioned which, though now wholly independent of the law as to accessories after the fact, were at one time regarded as cases of that offence. These were, the offence of escape and rescue from custody or from prison, and the receiving of stolen goods. The law

CH. XXII. relating to escape was and is extremely intricate, but of little interest. The receiving of stolen goods was not anciently regarded as making a man accessory after the fact to theft,<sup>1</sup> “for the indictment of an accessory after the fact “is that he received and maintained the thief, not the goods.” By the statute 3 & 4 Will. & Mary, c. 9, receivers were made accessories after the fact, and by 1 Anne, st. 2, c. 9, it was provided that they might be prosecuted for misdemeanour, though the principal was not convicted. By 7 & 8 Geo. 4, c. 27, these acts were repealed, and by 7 & 8 Geo. 4, c. 29, s. 54, the offence of receiving stolen goods was made a substantive felony, though it was enacted that the receiver might also be indicted as an accessory after the fact. This was repealed, but reenacted with some additions by the present Larceny Act, 24 & 25 Vic. c. 96, s. 91, which forms the existing law on the subject.

In concluding this account of our own law, I may just mention the practically obsolete offence of misprision, which meant concealment of either treason or felony without otherwise taking part in it. On this I have only to refer to articles 156 and 157 of my *Digest*. I may add to what is there said that the commonest form of misprision of felony was forbearing to prosecute in consideration of the return of stolen goods, which was anciently called theftbote.<sup>2</sup>

The French and German law relating to accomplices is in some ways wider, in others narrower, than our own.

The French law is in these words:—

“ Art. 59. Les complices d'un crime ou d'un délit seront punis de la même peine que les auteurs même de ce crime ou de ce délit, sauf les cas où la loi en aura disposé autrement.

“ Art. 60. Seront punis comme complices d'une action qualifiée crime ou délit ceux qui, par dons, promesses, menaces, abus d'autorité ou de pouvoir, machinations ou artifices coupables, auront provoqué à cette action, ou donné des instructions pour la commettre; ceux qui auront procuré des armes, des instruments, ou tout autre moyen qui aura servi à l'action, sachant qu'ils devaient y servir; ceux qui

<sup>1</sup> 1 Hale, 620.

<sup>2</sup> 1 Hale, 619; 2 Hale, 400.

“ auront avec connaissance aidé ou assisté l'auteur ou les  
 “ auteurs de l'action dans les faits qui l'auront préparée ou  
 “ facilitée ou dans ceux qui l'auront consommée.”

CH. XXII.

None of these expressions goes so far as our “ counsel,  
 “ procure, or command.”

Accessories after the fact are punished by the *Code Pénal* only in particular cases. The most general provisions are articles 61 and 62, which are as follows :—

“ 61. Ceux qui, connaissant la conduite criminelle des mal-  
 “ faiseurs exerçant des brigandages ou des violences contre la  
 “ sureté de l'État, la paix publique, les personnes, ou les pro-  
 “ priétés, leur fournissent habituellement logement, lieu de  
 “ retraite ou de réunion, seront punis comme leurs complices.

“ 62. Ceux qui sciemment auront recélé, en tout ou en  
 “ partie, des choses enlevées, détournées, ou obtenues à l'aide  
 “ d'un crime ou d'un délit, seront aussi punis comme com-  
 “ plices de ce crime ou délit.”

The German Code (art. 48) is almost a translation of the *Code Pénal*, article 60. The only difference worth noticing is the distinction already referred to between the “ Anstifter ” or accomplice, and the “ Gehülfe ” or aider. The “ Anstifter ” is liable to the same punishment as the principal criminal. The “ Gehülfe ” is to be punished “ nach demjenigen Gesetze —welches auf die Handlung Anwendung findet zu welcher er wissentlich Hülfe geleistet hat, Jedoch nach den über die Bestrafung des Versuches aufgestellten Grundsätzen zu ermässigen.” I am not quite sure whether this means that he is to be punished as if he had attempted to commit the offence in which he assisted, or as if he had attempted to do the particular act in which he assisted, which may not have been criminal at all except in connection with other acts; e.g. A breaks into B's house and murders him, C helps A to break open the door. Is he to be punished (a) as for an attempt to break open the door, or (b) as for an attempt to commit murder? If (a) is the meaning, the “ Gehülfe ” would escape altogether if his act was not criminal in itself, e.g. if he lent the principal an arm with which to rob or murder.

Article 257 of the German Code, headed “ Begünstigung

- CH. XXII. "und Hehlerei," contains what seems an excellent definition of an accessory after the fact. "Wer nach Begehung eines Verbrechens oder Vergehens dem Thäter oder Theilnehmer wissentlich Beistand leistet um denselben der Bestrafung zu entziehen oder um ihm die Vortheil des Verbrechens oder Vergehens zu sichern ist wegen Begünstigung — zu bestrafen." The subsequent articles punish "Begünstigung," which answers very nearly to "receiving and comforting," leniently, though the trade of receiving stolen goods ("wer die Hehlerei gewerbt oder gewohnheitsmassig betreibt") is punishable with ten years' "Zuchthaus," which answers to our penal servitude.

## CHAPTER XXIII.

## OFFENCES AGAINST THE STATE.—HIGH TREASON.

OFFENCES against the State constitute the first great division of complete substantive offences. The first and most general object of all political associations whatever is to produce and to preserve a state of things in which the various pursuits of life may be carried on without interruption by violence, or, according to the well-known expression of our law, to keep the peace. Every crime is to a greater or less extent a breach of the peace, but some tend merely to break it as against some particular person or small number of persons, whereas others interfere with it on a wider scale, either by acts which strike at the State itself, the established order of Government, or by acts which affect or tend to affect the tranquillity of a considerable number of persons, or an extensive local area. <sup>1</sup>Attacks upon the State itself when they succeed cease to be within the scope of the criminal

CII. XXIII.

<sup>1</sup> There is a well-known epigram—

“ Treason can never prosper—what’s the reason ? ”  
 “ If it does prosper, none dare call it treason.”

This is a good instance of the way in which small wit is deprived of its point by the growth of knowledge. All such sarcasms derive what point they have from the tacit assumption that morals and political institutions are eternal and unchangeable. Take, for instance, the well-known passage in Pascal’s *Pensées*, which treats as a monstrous absurdity the notion that what is right on one side of a river can be wrong on the other. In these days, at least to many people, there seems nothing extraordinary in this. There are many forms of morality, and they may be bounded by local frontiers, as well as by any others. When English law prevailed within the Indian Presidency towns and not in other parts of India, it would have been true to say that suttee was or was not murder according as it was or was not carried on within the Mahratta ditch. In the same way it was morally right according to Hindoo views and morally wrong according to English views.

CH. XXIII. law. They put an end if not to all existing law, at least to all the existing sanctions of law, and constitute a new point of departure for a fresh set of political institutions. Even before the final success of a forcible revolution the common rules of criminal law may cease to be applicable to revolutionary proceedings, not because the theory of the law is altered, but because what may have been originally an apparently unimportant outbreak has changed into a civil war, in which each side is strong enough to compel the other to treat its adherents as enemies and not as criminals. This was the case in the American war long before the independence of the States was acknowledged. If, however, the Americans had been finally defeated, and British power re-established, every one who had taken part in the war or adhered to those who did so, would have been in strict law a traitor liable to be treated as such.

It often happens, however, that the public peace is disturbed by offences which without tending to the subversion of the existing political constitution practically subvert the authority of the Government over a greater or less local area for a longer or shorter time. The Bristol riots in 1832 and the Gordon riots in 1780 are instances of this kind. No definite line can be drawn between insurrections of this sort, ordinary riots, and unlawful assemblies. The difference between a meeting stormy enough to cause well-founded fear of a breach of the peace, and a civil war the result of which may determine the course of a nation's history for centuries, is a difference of degree. Unlawful assemblies, riots, insurrections, rebellions, levying of war, are offences which run into each other, and are not capable of being marked off by perfectly definite boundaries. All of them have in common one feature, namely, that the normal tranquillity of a civilised society is in each of the cases mentioned disturbed either by actual force or at least by the show and threat of it.

Another class of offences against public tranquillity are those in which no actual force is either employed or displayed, but in which steps are taken tending to cause it. These are the formation of secret societies, seditious conspiracies, libels or words spoken.



Under these two heads all offences against the internal public tranquillity of the State may be arranged. I have stated the existing law upon the subject in my *Digest*.<sup>1</sup> I propose now to relate the history of such of these offences as have a history of sufficient interest to be related.

The first and by far the most important of these is the history of the law relating to high treason, which is connected with all the most stirring periods of our history, and has gone through a remarkable series of changes from the very earliest times to our own days.

The history of the definition of treason begins at the beginning of our law. The offence is referred to in a few words by Glanville, who says—<sup>2</sup> “Cum quis itaque de morte regis, vel de seditione regni, vel exercitus infamatur aut certus accusator apparet aut non.” These few words it should be observed specify the principal heads of treason as ascertained by 25 Edw. 3, imagining the king’s death (de morte regis), levying war (seditionem regni), adhering to the king’s enemies (seditionem exercitus).

Bracton, however, may be regarded in this as in most other cases as the earliest writer of importance. His definition or description is as follows:—<sup>3</sup> “Habet enim crimen læsæ majestatis sub se multas species, quarum una est ut si quis ausu temerario machinatus sit in mortem domini regis vel aliquid egerit, vel agi procuraverit ad <sup>4</sup>seditionem domini regis vel exercitus sui, vel procurantibus auxilium et consilium præbuerit vel consensum, licet id quod in voluntate habuerit non perduxerit ad effectum.” . . . “Continet etiam sub se crimen læsæ majestatis crimen falsi, quod quidem multiplex est: ut si quis falsaverit sigillum domini regis, vel monetam reprobam fabricaverit, et hujusmodi. Si sit aliquis qui alium noverit inde esse culpabilem, vel in aliquo criminosum statim et sine intervallo aliquo accedere debet ad ipsum regem si possit, vel mittere si venire non possit ad aliquem regis familiarem et omnia ei

<sup>1</sup> Chapters vi. vii. viii. pp. 32-57.

<sup>2</sup> Glanville, lib. xiv. ch. 1.

<sup>3</sup> 2 Bracton, 258.

<sup>4</sup> Sir H. Twiss says: “It seems probable that ‘*seditionem*’ is the older reading,” though some read “*seductionem*.”

CH. XXIII. "manifestare per ordinem. Non enim debet morari in uno  
 "loco per duas noctes vel per duos dies antequam personam  
 "regis videat, nec debet ad aliqua negotia quamvis urgen-  
 "tissima, se convertere, quia vix permittitur ei quod retro  
 "aspiciat." Treason is to be punished upon conviction with  
 the greatest severity. "Ultimum supplicium sustenebit cum  
 "pœnæ aggravatione corporalis, et omnium bonorum amissi-  
 "one, et hæredum suorum perpetuâ exheredatione, ita quod  
 "nec ad hæreditatem paternam vel maternam admittuntur, est  
 "enim tam grave crimen istud quod vix permittitur hæredibus  
 "quod vivant."

This account of the crime of treason has some resemblance to the <sup>1</sup>"Majestas" of the Roman Law, though it cannot be said to be expressly taken from it. No doubt, however, the adoption of the name would in practice go far to import the definition itself, or at least to authorise and countenance its gradual introduction.

Here, as elsewhere, Fleta simply repeats Bracton. Britton mentions the crime in several places.

<sup>2</sup> The *Mirror* gives an account of "majestas" which throws some light on the way in which the law in the thirteenth century was capable of being extended. "The crime of "majestas is an horrible offence done against the king, and "that is either against the King of Heaven or an earthly "king." "Against the earthly king in these manners:--  
 "1. By those who kill the king or compass to do so. 2. By  
 "those who disinherit the king of his realm by bringing in  
 "an army or compass so to do. 3. By those adulterers who  
 "ravish the king's wife, the king's lawful eldest daughter  
 "before she be married being in the king's custody; or the  
 "nurse, or the king's aunt heir to the king." He adds,  
 "The crime of majestas or offence against the king is neigh-  
 "bour to many other offences; for all those who commit

<sup>1</sup> See *Dig.* xlviij. tit. iv. and see all the texts on the subject collected in Pothier on that title. Sir H. Twiss says that Bracton, "as regards the jurisdiction of the crime of high treason, adopts the whole doctrine of the "Roman law as to what constitutes the *crimen læsæ majestatis*," as well as the collateral penalties attached to the crime (ii. lvii.). As far as regards the definition of the crime, this is, I think, an overstatement. Many things amounted to majestas which no one ever supposed to be treason.

<sup>2</sup> *Mirror*, 16.

"perjury whereby every one lieth against the king, falleth into this offence." The author then proceeds to specify a great number of what he calls perjuries against the king. They are all cases of the breach of duties which any public officer is sworn to discharge, or of the usurpation of such duties. For instance, "Into perjury fall all those subjects of the king who appropriate to themselves jurisdictions over the king, and of themselves make judges, sheriffs, coroners, and other officers to have command of law." There is much more to the same purpose. The whole chapter recalls, though it does not quote or directly imitate, the various texts of the Roman law as to the minor form of *majestas*—*majestas* as distinguished from *perduellio*.

CH. XXIII.

How far the *Mirror* can be regarded as an authority at all is a question, but if it is an authority as to any period, it is so for the reign of Edward I., and if the chapter on perjury against the king gives any sort of indication of the manner in which the judges of those days were disposed to interpret the general offence of "*majestas*" it must undoubtedly have been to the last degree oppressive. Amongst many other cases of the offence is mentioned the following: "Those who charge the king wrongfully. And those who spend the king's quarries, timber, or other thing otherwise than in the king's service, without sufficient warrant."

A certain number of judicial decisions as to what constituted treason before the statute of Edward III. still remain. They are all referred to by Hale. The first is the case of <sup>2</sup> *Nicholaus de Segrave* in 33 Edw. 1 (1305), to which I have already referred. Segrave having quarrelled with Crumbwell during the war in Scotland left the army, and laid a charge against Crumbwell in the court of the King of France. The Lords being consulted, held this to be a crime which "*meretur pœnam amissionis vitæ*," and this, says Hale, "seems to import no less than the crime of high treason." This may be so, but the entry in the roll does not mention that offence.

The proceedings against Gaveston in 1311, against the Despensers in 1321 and again in 1326, and against Thomas

<sup>1</sup> P. 21.<sup>2</sup> Hale, 79; and see Vol. I. p. 147.

CH. XXIII. of Lancaster in 1322, and the prosecution of Mortimer in 1331, may also be referred to. In two of these, namely, the cases of the Despensers and Mortimer, the charge was that of "accroaching royal power;" but Mortimer was attainted of treason, and executed for procuring Maltravers and Gurney to murder Edward II. after his deposition. Perhaps this was regarded as treason on the ground that Edward II. was the father of the reigning king.

<sup>1</sup> Piracy by one of the king's subjects on another is said to have been held to be treason, on what ground it is difficult to conjecture, unless it was regarded as a general levying of war against the king's subjects.

<sup>2</sup> In 21 Edw. 3 (1348) it was held that an appeal of treason lay for killing of malice prepense a person sent in aid of the king in his wars with certain men at arms.

In the following year, John at Hill was attainted of high treason for the death of "Adam de Walton nuntii domini regis missi in mandatum ejus exequendum."

The case, however, which appears to have attracted most attention and to have been the immediate occasion of the passing of the statute, was <sup>3</sup> that of Sir John Gerberge, who was indicted in 1348 (21 Edw. 3.), "Quod ipse univit cum aliis in campo villæ de Royston in alta regiâ strata, rode armed, with his sword drawn in his hand, modo guerrino, and assaulted and took William de Boletisford, and detained him till he paid £90, &c., and took away his horse, usurpando sibi infra regnum regis regiam potestatem ipso domino rege in partibus exteris existente contra sui legem antiam, et regis et coronæ suæ prejudicium et seditionem manifestam." He prayed his clergy, which was not allowed, "but yet he refusing to plead was not convicted as in case of treason, but was put to penance." Two of his companions were convicted, and had judgment "quod distrahantur et suspendantur." The case cannot accordingly be described as one of a definite conviction of treason. Upon its decision, however, the <sup>4</sup> Commons presented a petition

<sup>1</sup> *Third Inst.* 7, quoting 40 Ass. 35.

<sup>2</sup> 1 Hale, 81.

<sup>3</sup> 1 Hale, 80, referring to the rolls of the King's Bench.

<sup>4</sup> 2 *Rot. Par.* 166b, but I have quoted it from Hale.

praying "qe come ascuns justices en place devant eux ore  
 " de novel ont adjudgè pur treason accrochement de royal  
 " poer prit le dit comen, que le point soit desclaré en ceo  
 " parlement en quell case ils accrochent royal poer, per quei  
 " les seigneurs perdent leur profit de la forfeiture de leur  
 " tenents et les arreynes benefice de sant eglise." The  
 answer to the petition was, "En les cases où tiel judgments  
 " sont rendus, sont les points des tieux treasons et accroch-  
 " ments declares par mêmes les judgments." The Commons,  
 in a word, pray that the offence of accroaching royal power  
 may be defined. The king answers, that as cases occur the  
 judges will decide.

There may of course have been other decisions besides these, which are now forgotten, but those which are recorded are enough to show the way in which questions arose as to the law of treason. The extensions of the law (if such they were) in most of the cases which I have mentioned, do not appear to our modern notions particularly dangerous. The offences of the Despensers and Mortimer were hardly likely to be committed except in what amounted to a revolution, and all the other offences were capital crimes whether called treason or not. Thus, if Sir John Gerberge did not commit treason, he at least committed highway robbery by taking his enemy's horse and forcing him to pay £90 for his liberty. So in the other cases, the accused persons were guilty, in some instances of murder, and in one of piracy. The difference between these offences and treason lay in the two points noticed in the petition of the Commons, namely, that treason was not clergyable, and that the king had the forfeiture of the traitor's goods and lands, so that the immediate lord lost the escheat which he would have had upon a conviction for felony. The additional severity of the punishment established a further distinction, but probably one of less practical importance. I should doubt whether in the fourteenth century the political significance of a distinction between different grades of political offences had made itself felt. Probably the great importance of the Act of Edward as a protection to what we should now call political agitation and discussion, was hardly recognised till a much later time.

However this may have been, it was passed upon a memorable occasion. <sup>1</sup>The Parliament by which it was passed was the first that sat after the interruption of all legal and public business by the great pestilence called the Black Death. It sat about twenty years after Parliament had been finally divided into two houses. It passed in the same session the Statute of Provisors, and <sup>2</sup>one of the statutes long afterwards used to show the illegality of the proceedings of the Court of Star Chamber. This period was, in Mr. Stubbs's opinion, <sup>3</sup>"the culminating point of Edward's glory: "in 1349 he completed the foundation of the Order of the Garter, and in 1350 he was requested to accept the imperial "crown."

Whatever may have been the reasons which led to the passing of the Statute of Treason, the statute has formed not only the foundation, but the principal part of the law of high treason since 1352, and its interpretation and application to particular cases has been associated with some of the most stirring periods in our history. Before noticing the leading points in this history, I will examine the statute itself so far as it relates to <sup>4</sup>political offences. It is in these words: "Pur ceo q̄ divses opinions ount este einz ces heures "qell cas qant il avient doit estre dit treson et en quel cas "noun le Roi a la requeste des Seignrs et de la Cœ ad fait "declarissement q̄ ensuit. Cest assavoir qant home fait "compasser ou ymaginer la mort nre Seigneur le Roi, "sa dame, sa compaigne, ou de lour fitz primer et heir; ou "si hōme violast la compaigne du Roi, ou leisnesce fille le "Roi nient marie, ou la compaigne leisne fitz et heir du Roi; "et si hōme leve de guerre contre nre Seignr le Roi en le "Roialme ou soit aherdant as enemys nre dit Seignr le Roi "en le Roialme donnant a eux eid ou confort en son Roialme "on p̄ aillours, et de ceo pvablement soit atteint de overt "faite p̄ gentz de lour condicion."

<sup>1</sup> See 2 Stubbs, *C. H.* 376.

<sup>2</sup> 25 Edw. 3, st. 5, c. 3.

<sup>3</sup> Stubbs, *ii.* 390.

<sup>4</sup> I pass over for the present the provisions relating to the coin, and to forging the Great Seal, and to some murders, some of which are called petty treason.

This memorable enactment, it will be observed, differs but little from the definition of the crime given in Bracton. Indeed it follows it so closely in some particulars that it seems to have been adapted from it. Thus, "quant home fait compasser ou *ymaginer* la mort nre Seigneur le Roi," is almost a translation of "Siquis ausu temerario *machinatus* est in mortem domini regis." The fact that the statute extends to every intention displayed by an act, corresponds with the "licet id quod in voluntate habuerit non perduxit erit ad effectum." CH. XXIII.

It is obvious that to kill the king must be the readiest and most natural means of effecting a political revolution in any kingdom, and that an attempt to do so would be the first step towards such a revolution. Probably the killing of the queen and of the eldest son and heir apparent might be treated as treason by way of a sort of compliment to the king.

The violation (even with her own consent, for the word does not necessarily imply violence) of the queen or of the wife of the heir apparent might obviously interfere with the succession to the crown, but why the violation of the king's eldest daughter unmarried should be treason I am at a loss to understand. These points, however, are of no practical or historical interest, and may be passed over, together with a variety of strange refinements upon them, which are elaborately stated and discussed by Hale.

Viewing the statute broadly, it declares three things to be treason—(1) Forming and displaying by any overt act an intention to kill the king. (2) Levying war against the king. (3) Adhering to the king's enemies. It also contains a proviso, afterwards appealed to in the case of Lord Strafford. It is in these words: "Et pur ceo q plusurs auts cases de semblable treson purront escheer en temps a venir queux home ne purra penser ne declarer en present assentu est q si autre cas supposee treson q nest especeffe p amount aviegne de novel devant ascunes justices, demoerge la justice saunz

<sup>1</sup> *a.g.* Do the words "nient marry," as applied to the king's eldest daughter, include a widow, or are they confined to an eldest daughter who never has been married? The case may well be left undetermined till it arises.

CH. XXIII. "aler au jugement de treson, tan q devant nre Seignr le  
 " Roi en son plement soit le cas monstree et desclarre le  
 " quel ceo doit estre ajugge treson ou autre felonie."

The fact that the Statute of Treasons was passed at the moment when Edward III. was at the very height of his power, more securely seated on the throne and in the enjoyment of greater popularity and more undisputed authority than was the lot of any other English sovereign for a great length of time, must be borne in mind in considering the provisions of the Statute of Treasons. It enumerates the only crimes likely to be committed against a popular king who has an undisputed title, and as to the limits of whose legal power there is no serious dispute. Of course Edward might have personal or political enemies who might wish to murder him. Theoretically war might be made upon him in his realm, and it was always possible to adhere to his enemies in France, Scotland, or elsewhere; but his personal qualities prevented such proceedings as were common in his grandson's reign, and the time for religious, political, and social revolutions had not yet arrived, though it was not far distant. This may account for the extreme leniency of the Statute of Treasons, and also for its incompleteness. It protects nothing but the personal security of the king. He is not to be killed, nor is any step to be taken towards his death. War is not to be levied against him, but no provision at all is made for any acts of violence towards the king's person which do not display an intention to take his life. Nothing is said about attempts to imprison or depose the king, or to interfere with the exercise of his most undoubted prerogatives; or about disturbances, however violent, which do not reach the point of an actual levying of war; nor even of a conspiracy, or attempt to levy war. All these matters are totally unprovided for except by the proviso, which I read as enacting that Parliament, in its judicial capacity, may, upon the conviction of any person for any political offence, hold that it amounts to high treason, though not specified in the act.

These considerations perhaps explain the popularity of the statute. In quiet times it is seldom put in force, and if by any accident it is necessary to apply it, the necessity for



doing so is obvious. For revolutionary periods it is obviously and always insufficient, and at such times it is usually supplemented by enactments which ought to be regarded in the light of war measures, but which are usually represented by those against whom they are directed as monstrous invasions of liberty. The struggle being over, the statute of 25 Edw. 3 is reinstated as the sole definition of treason, and in this way it has become the subject of a sort of superstitious reverence. CH. XXIII.

During the remaining twenty-five years of Edward III. no change worth mentioning took place in the law of treason, but the reign of Richard II. was, as Lord Hale <sup>1</sup> says, "a fruitful time for declaring and enhancing of treason in Parliament." One remarkable case, which had no special political bearing, occurred in 3 Rich. 2 (1380). <sup>2</sup>John Imperial was sent as agent to the king by the duke and commonalty of Genoa, and coming under the king's safe-conduct, was murdered. The Coroner's inquisition was brought into Parliament, and under the proviso quoted the case was declared by the King, Lords, and Commons, to be treason.

Cases of much greater importance, to which I have already referred in connection with the subject of impeachments, followed. These were the series of appeals of treason which were brought before Parliament in 1387-8 and 1399. The first set of appeals or accusations charged the Archbishop of York, Robert de Vere (Duke of Ireland), Tressilian the Chief Justice, and Brember the Lord Mayor, with leading Richard II. to misgovern the country. This was elaborated into thirty-nine heads, of which fourteen were held to amount to treason.

It would be difficult, without a somewhat minute reference to the history of those times, to explain accurately the nature of the treasons with which the appellees were charged, but speaking very generally it may be said that their <sup>3</sup>alleged offences consisted first in taking advantage of the king's

<sup>1</sup> 1 Hale, 263.

<sup>2</sup> 4 Hale, 263; Co. 8.

<sup>3</sup> Of the thirty-nine heads of accusation the following were held to amount to treason—1, 2, 11, 15, 17, 28, 29, 30, 31, 32, 37, 38, 39.—3 *Rot. Par.* 230-237.

CH. XXIII. youth, to persuade him fraudulently to place unlimited confidence in them, and even to swear to maintain and sustain them; and afterwards in persuading him to do, and to authorise them to do, many acts in opposition to the powers of a commission of regency appointed by statute just before he attained his majority. These acts seem to be considered in the light of so many overt acts of the treason of "accroaching royal power." In 1399 the accusers of 1389 were themselves accused of accroaching royal power, as I have already observed in giving an account of impeachments.

In commenting upon these proceedings, <sup>1</sup>Hale observes that the case of John Imperial was a good declaration of treason within the 25 Edw. 3, as it was made by the King, Lords, and Commons; that the judgment of 1387-8 was bad, because "the King and Commons did not consent *per modum legis declarative*, for the judgment was only "the Lords'."

I find considerable difficulty in accepting the view of the proviso suggested by this remark. There was no necessity for Parliament in 1352 to reserve the right of future parliaments to pass declaratory acts as to treasons not mentioned in the statute, and the whole language of the proviso seems to refer rather to a judicial than to a legislative declaration of the law, especially because the declarations were to refer to and to be made upon the occurrence of particular cases, as was actually done in the case of John Imperial.

As to the observation that the judgments in Richard II.'s time were by the Lords alone, Lord Hale does not observe that <sup>2</sup>the Lords, in reference to the first set of appeals, claimed the right to act as judges in such cases, and that the Commons afterwards declared that judgments in Parliament "belong only to the King and the Lords, and not to the "Commons."

Whatever may have been the true view of the proviso, it must be taken to have ceased in some way to operate. It was argued in Lord Strafford's case by <sup>3</sup>Sir R. Lane that the

<sup>1</sup> 1 Hale, *P.C.* 263.

<sup>2</sup> See the passage quoted in full, *ante*, vol. i. p. 154.

<sup>3</sup> See Lord Campbell's *Lives of the Chancellors*, iii. 303. "He came to the "main point which had been urged by the Commons, 'whether the saivo

statute of 1 Hen. 4, c. 10 (A.D. 1399) repealed it. This statute enacts that in no time to come any treason be judged otherwise than it was ordained by the statute of Edward III., making no mention of the proviso. The act 1 Mary, sess. 1, c. 1, s. 3, is to much the same effect, and only one declaration of treason seems to have been made by Parliament in its judicial capacity after the reign of Richard II. The fact that the Commons abandoned Strafford's impeachment, and proceeded against him by act of attainder, must, I think, be taken as an admission as strong as the nature of the case admitted, that either by the statutes referred to by Lane or otherwise the proviso had ceased to have the force of law.

An act of parliament (21 Rich. 2, c. 3, A.D. 1397) was passed at the end of Richard II.'s reign relating to treason. It enacted that every one should be guilty of treason "which compasseth or purposeth the death of the king, or to depose him, or to render up his homage or liege, or he that riseth against the king to make war within his realm." Nothing is said of any overt act. The trial was to be in Parliament. It is difficult to understand the object of this statute, unless it was to convert into treason mere words, or indeed anything whatever which could be considered to indicate in any way hostility to the king. The act was passed in 1397, when Richard was no doubt fully aware of the dangers which were gathering round him, and which in 1399 led to his deposition. It was repealed two years afterwards by 1 Hen. 4, c. 10, the preamble of which recites that "divers pains of treason" were ordained by it "inasmuch that there was no man which did know how he

"in that statute as to Parliament declaring a law of treason could apply to "a parliamentary impeachment, and he argued to demonstration that this "could only be exercised by Parliament in its legislative capacity." I think this is not correct. What Lane argued was that the "salvo" was repealed by the statutes of Henry IV. and Queen Mary, but his whole argument, as reported in the *State Trials*, admits that under that salvo, while it was in force, Parliament acting judicially (i.e. the House of Lords being judges and the House of Commons a grand jury) could declare new treasons.

<sup>1</sup> Mortimer's case in 2 Hen. 6 (1426); see 1 Hale, 268. In this case the Lords, at the request of the Commons, declared it to be treason in a man imprisoned on suspicion of treason to break prison.

CH XXIII. "ought to behave himself, to do, speak, or say, for doubt of  
 "such pains."

This language is obviously exaggerated. A man could hardly help knowing whether or not he intended, and whether or not his conduct indicated, an intention to kill or depose the king, but strict accuracy of statement is not to be expected of political opponents.

In the reign of Henry V. (2 Hen. 5, c. 6, A.D. 1414) it was made treason to kill, rob, or spoil persons having the king's safe-conduct—a measure probably connected with the French war; but this act was repealed by 20 Hen. 6, c. 11 (1442). Except in this unimportant particular, the law relating to treason was unaltered during the fifteenth century, though throughout the Wars of the Roses, in Hale's words,<sup>1</sup> "every new revolution occasioned the attainder "by Parliament of the most considerable of the adverse "party."

This period has, however, left one singular mark upon the Statute Book, in the shape of the statute 11 Hen. 7, c. 1 (1494), which provides in substance that obedience to a king *de facto*, but not *de jure*, shall not expose his adherents to the punishment of treason when the rightful king re-establishes himself. <sup>2</sup>The words of the act are very

<sup>1</sup> P. 271.

<sup>2</sup> The words (slightly abridged) are as follows :—"The king, calling to his remembrance the duty of allegiance of his subjects, and that they are bound to serve their prince for the time being in his wars for the defence of him and the land against every rebellion, and to do him service in battle, and that for the same service what fortune ever falls by chance in the same battle against the mind and will of the prince (as in this land some time passed hath been seen), that it is not reasonable, but against all reason, that the said subjects going with their sovereign lord in wars, anything should lose or forfeit for doing their true duty and service of allegiance; be it enacted, that from henceforth no persons that attend upon the king and sovereign lord of this land for the time being in his person, and do him true and faithful service of allegiance in the same, for the said deed and true duty of allegiance be in nowise convict or attaind of high treason or of other offenses for that cause." This statute may perhaps be regarded as the earliest recognition to be found in English law of a possible difference between the person and the office of the king, though nothing can be more vague and indirect than the way in which the distinction is hinted at by the words "king and sovereign lord of this land for the time being." The recital as to the chances of battle are also noticeable in an act passed by the sovereign who owed his crown to the victory of Bosworth, and who, within two years of the passing of this act, had to fight for his crown at the battle of Stoke Field.

remarkable, and if the history of the Wars of the Roses were unknown would be wholly unintelligible. CH. XXIII.

The statute of Edward was found, or was at all events considered as altogether insufficient to protect the royal power and the person of the king during the whole of the critical period which intervened between the beginning of the Reformation and the end of the reign of Elizabeth—that is to say, during the seventy eventful years from 1533 to 1603. During this interval a great number of acts were passed by which different offences were made treason. They are enumerated and their substance is given by <sup>1</sup> Hale, and omitting several which do not relate to political offences, their substance was as follows:—

There were in all nine acts in the time of Henry VIII. which created new treasons. Four were directed to the object of asserting and maintaining the position taken up by the king in opposition to the pope, and five to maintaining the succession of the crown as it stood after the king's various marriages. <sup>2</sup>The four which I refer to as constituting the first class were 26 Hen. 8, c. 13 (A.D. 1534), 28 Hen. 8, c. 10 (1536), 31 Hen. 8, c. 8 (1539), and 35 Hen. 8, c. 3 (1543).

The treasons created by these acts were as follows. By the 26 Hen. 8, c. 13, which was passed in the same year as the Act of Supremacy, and in the year following the divorce of Catherine of Aragon and the marriage with Anne Boleyn, the following acts were made treason:—

(1) "Maliciously to wish, will, or desire by words or writing, or by any craft to imagine, invent, practise, or

<sup>1</sup> Pp. 274-282.

<sup>2</sup> In order to appreciate the significance of these dates some other dates should be borne in mind. In 1533 Catherine was divorced, and the marriage with Anne Boleyn took place. The Act of Supremacy was passed in 1534. In 1536 was passed the first of the three Acts of Succession, and the act by which all ecclesiastical and lay officers were required to abjure the pope. In the same year the lesser monasteries were dissolved. In 1537 occurred the pilgrimage of grace. In 1539 was passed the Act of the Six Articles. In 1543 Cromwell, who had been at the head of affairs for nearly ten years, was attainted and executed. Between 1543 and 1547 (when Henry VIII. died), occurred first a motion towards Catholicism, marked by the execution of Anu Askew, and then a motion in the opposite direction, marked by the execution of Lord Surrey. Henry's later marriages were dated as follows:—Anne Boleyn, 1533; Jane Seymour, 1536; Anne of Cleves, 1540; Catherine Howard, 1540; Catherine Parr, 1543.

CH. XXIII. "attempt any bodily harm to the king, queen, or their  
"heirs apparent; or"

(2) "To deprive them, or any of them, of their dignity,  
"title, name, or of their royal estates; or"

(3) "Slanderosly or maliciously to publish and pronounce,  
"by express writing or words, that the king our sovereign  
"lord is an heretic, schismatic, tyrant, infidel, or usurper; or"

(4) "Rebelloisly detain or keep any of his ships, am-  
"munition, or artillery," and not to deliver them up when  
demanded.

The 28 Hen. 8, c. 10 (1536), described by Hale as "the  
"great concluding act against the papal authority," subjected  
to the penalties of *præmunire* the asserting and maintaining  
of the papal authority; and obstinate refusal to take the oath  
of abjuration therein provided was made high treason.

By 31 Hen. 8, c. 8 (1539), which was passed in the same  
year as the Act of the Six Articles, proclamations con-  
cerning religion were put on the same footing as acts of  
parliament, and those who went beyond sea in order to  
avoid the penalties enacted by the proclamations were to  
be guilty of high treason.

By 35 Hen. 8, c. 3 (1543), passed after the fall of Crom-  
well, the king's <sup>2</sup>style was united and annexed to the imperial  
crown of England, and it was made treason to "imagine to  
"deprive the king, queen, prince, or the heirs of the king's  
"body, or any to whom the crown is or shall be limited, of any  
"of their titles, styles, names, degrees, royal estate or regal  
"power annex to the crown of England."

These were the new treasons created by Henry VIII.'s  
legislation, in order to secure and establish the great reli-  
gious and political revolution which he had effected. I think  
that the impression which they have created of tyranny is  
somewhat exaggerated though it is not unnatural. Hale  
observes that part of the act of 1534, viz., "the practising  
"of any bodily harm, if there be an overt act, and also the re-  
"bellious detaining of the king's castles after summons by  
"proclamation," are treasons within 25 Edw. 3. I suppose

<sup>1</sup> Henricus Octavus Dei gratiâ Angliæ, Franciæ, et Hiberniæ rex, Fidei  
Defensor, et in terra ecclesiæ Anglicanæ et Hiberniæ supremum caput.

that in the word "practising" Hale would include "wish, " will, or desire, by writing, or by craft to imagine, invent, or " practise." To wish the infliction of bodily harm on the king by voluntary agencies, and to display the wish by writing, would, I think, at least according to the older authorities, be an overt act of imagining the king's death. In the expression "or word" and what follows, the statute no doubt goes much beyond the old law, but, as we shall see, several of Henry VIII.'s successors made the speaking of treasonable words treason.

The part of the act which makes it treason to desire by words or writings to deprive the king of his title, which no doubt was levelled principally at denials of the king's ecclesiastical supremacy, may be compared to 4 Anne, c. 8, which made it treason to affirm maliciously by writing that "the pretended Prince of Wales or any other person hath any right to the crown of these realms," and *præmunire* to affirm the same by advised speaking. I do not see that the 35 Hen 8, c. 3, as to the king's style, carried this any further. The 31 Hen. 8, c. 8 (1539), which made it treason to go abroad in order to avoid the penalties of proclamations, may also be compared to acts passed by William III. and Queen Anne. By 9 Will. 3, c. 1, it was made treason for any subject who since a certain day had gone into France without license, to return into England without license, and 3 & 4 Anne, c. 14, contained a similar provision. All these acts may be compared to the penalties imposed upon the *émigrés* by the French revolutionary legislation. The 28 Hen. 8, c. 10, which made it high treason to refuse obstinately the oath of abjuration against the pope, I think carried the practice of test oaths to a greater length than it was ever carried to before or since, but the refusal of test oaths has frequently been made the subject of penalties of extreme severity.

In short, if it is admitted and fully realised that the controversy between the king and the pope in Henry VIII.'s time was simply a war carried on between rival powers claiming jurisdiction of an analogous though distinct kind over the same population, it can hardly be said that the legal weapons used were other than those which on such an occasion must be used if the war was to be effective and

CH. XXIII. thoroughgoing. Whether Henry or the pope was in the right is a matter which I do not discuss, but I do not understand how any one can heartily take either side and yet blame the leader of that side for using to the utmost the weapons which he possessed—the pope for his excommunications and depositions, or the king for his racks, scaffolds, and gibbets. Questions of sovereignty can be determined only by force, and I cannot see how Henry was to make himself the sole ruler of the English people as he wished to do, and to a great extent actually did, without striking terrible blows against his antagonist and his adherents. After all, it was all that he, his son, and his daughter could do to carry their point.

As for the class of statutes which were intended to secure his succession, three successive acts were passed which thrice resettled the order of succession, and one which invalidated his marriage with Anne of Cleves. These were 25 Hen. 8, c. 22 (1534), which affirmed the divorce of Catherine of Aragon and the marriage with Anne Boleyn. The 28 Hen. 8, c. 7 (1536), which annulled the marriage with Anne Boleyn and settled the crown on the issue of Jane Seymour by the king, and in default of issue gave him power to appoint a successor by will. The 32 Hen. 8, c. 25 (1540), annulled Anne of Cleves' marriage, and made it treason to assert its validity.

The 35 Hen. 8, c. 1 (1543), made after the marriage with Catherine Parr, limited the crown after the death of the king and Edward VI., without heirs of their bodies, to Mary and the heirs of her body, with remainder to Elizabeth and the heirs of her body, with a final remainder to the persons appointed by the king's will.

Each of these statutes, in somewhat different forms of words, made it high treason to attempt to alter the settlement or to cast doubt on the validity of the marriages confirmed, or on the nullity of the marriages declared void.

The second and third provided stringent test oaths and made it treason obstinately to refuse to take the oath. The act of 1536 made it treason to refuse to answer interrogatories on the oath. Such laws were beyond all question of



terrible severity. The provisions relating to the succession of the crown were consequences of Henry's repeated marriages, of which it would be out of place to speak here. No doubt the recollection of the Wars of the Roses and the result of a disputed succession must have been present to all minds and have exercised a powerful influence both on the king and on his counsellors. Much also must be ascribed to haughty self-will, and something to mere passion, though Henry's character was not that of a sensualist. However this may have been, I may observe that one of the treasons which he created cannot be excused or palliated upon any view of his conduct or position. It is an unqualified disgrace to his memory. I refer to 33 Hen. 8, c. 21 (1542), which after the execution of Catherine Howard made it treason in any woman "whom the king or his successors shall intend to take to wife thinking her a pure and clean maid, if she be not so" to marry the king without discovering it to him before marriage, and in any one knowing the fact not to reveal it to the king or one of his council.

As soon as Henry VIII. was dead his legislation on the subject of treason was repealed. The statute 1 Edw. 6, c. 12 (1547), enacted that nothing should be held to be treason except offences against 25 Edw. 3; and offences created by the new act. It made considerable changes in the criminal law, some of which connected with the law of benefit of clergy I have already referred to. It provided that it should be treason to deny the king's supremacy or to affirm that of the pope, or the right of any person other than Edward VI. to be king, but this was only on a third conviction, where the offence was by words, and in such cases (s. 18) the prosecution was to be within thirty days of the words spoken. Where the offence was by "writing, printing, overt act or deed," it was to be treason on the first offence. In 1549 it was made treason for twelve persons or more to make a riot with intent "to kill, take, or imprison, any of the Privy Council, or unlawfully to change or alter any laws established by Parliament for religion, or other laws, and to remain together for an hour after a summons to disperse." <sup>1</sup> Riots for many

<sup>1</sup> Ss. 2 and 4.

CH. XXIII. other specified purposes (breaking down enclosures, &c.) and raising or collecting unlawful assemblies with intent so to riot to the number of forty, such assemblies continuing together for two hours, were also made treason. Under Queen Mary these acts were <sup>1</sup> repealed (1 Mary, c. 1) but re-enacted in substance (1 Mary, sess. 2, c. 12), the offences being reduced from treason to clergyable felonies. Mary's act was temporary, but was re-enacted by 1 Eliz. c. 16, to continue during her life, and to the end of the next session after her death.

In 1551, by 5 & 6 Edw. 6, c. 11, it was made treason to allege that the king was a heretic, schismatic, tyrant, infidel, or usurper of the crown, either by words or "by writing, "printing, painting, carving, or graving." In the case of words on a third, and in the other cases on the first conviction.

In a few words, under King Edward VI. the only treasons except those contained in the act of Edward III. were (1) denying the king's supremacy; (2) alleging him by writing, &c., to be a heretic or usurper; (3) riots of a certain degree of importance.

On the accession of Mary the doctrine of the queen's ecclesiastical supremacy being repudiated and her title being undisputed, these acts ceased to be required, and the first act of her reign (1 Mary, c. 1) was to bring back the law of treason to the 25 Edw. 3. This was done by re-enacting the repealing section of the act of Edward VI., with the addition of words extending it to misprision of treason. Other felonies and *præmunire* made since the beginning of the reign of Henry VIII. were also abolished.

The Spanish marriage, however, introduced a necessity for the enactment of new treasons, and an act (1 & 2 Phil. & Mary, 10) was passed much resembling some of the acts of Henry VIII. and Edward VI. It made it treason on the first offence to display by writing any intent treasonable as against the king consort, or to affirm by writing that he ought not to have the title and style of king jointly with the queen. To commit the same offence by words spoken was made treason on a second conviction. A singular enactment was passed in the same session (1 & 2 Phil. & Mary, c. 9) making it treason "if

<sup>1</sup> 1 H. 293.

“ any by express words or sayings have prayed or shall pray CH. XXIII.  
 “ that God would shorten the queen’s life, or take her out of  
 “ the way, or any such like malicious prayer, amounting to  
 “ the same effect.”

Under Queen Elizabeth the act 1 & 2 Phil. & Mary, c. 10, was re-enacted (1 Eliz. c. 5) and applied to Elizabeth. It made attacks on the queen’s title by writing treason on a first conviction, attacks by words treason on a second conviction. In 1571, after the pope had issued his Bull of Deposition, and when Queen Mary Stuart’s presence in England, and the plots of which she was the object, had exposed the queen to grievous dangers, an act (13 Eliz. c. 1) was passed which made it treason to compass the death or bodily harm of the queen, or to deprive her of the imperial crown, or to levy war against her, and to declare such compassing by writing or by words. This act also made it treason to affirm the title of any other person, or to deny the power of Parliament to bind the succession.

By 23 Eliz. c. 1, passed in 1581, it was made treason for any person having or pretending to have power to absolve any subject from obedience to her Majesty, to do so, or practise to do so, or with that intent to withdraw them from the established religion to the Romish religion, or to move them to promise obedience to the See of Rome. This act was re-enacted in stricter terms in 1606 by 3 Jas. 1, c. 4.

In 1585 was passed 27 Eliz. c. 2, by which it was made high treason for any Jesuit or seminary priest born in the queen’s dominions, to come into, be, or remain in any part of the realm, and for any subject brought up in any college or seminary beyond sea, not to return to England and take the oath of supremacy within six months after proclamation made in London.

James I. added nothing to the law of treason except the re-enactment of the law of 1581, already referred to. In the reign of Charles I. the only attempt to extend the law of treason proceeded from the Long Parliament, which treated Strafford and Laud as traitors on grounds closely resembling those on which their predecessors had proceeded under Richard II. In 1661 it was made treason by 13 Chas. 2,

CH. XXIII. c. 1, <sup>1</sup> to display any treasonable intention by writing or by preaching, or malicious and advised speaking, during his Majesty's life. In 1698, by 9 Will. 3, c. 1, it was in substance made treason for the adherents of James II. who had followed him into France to return to England without licence. In 1701 (12 & 13 Will. 3, c. 3) it was made treason to correspond with "the pretended Prince of Wales," and <sup>2</sup> several similar acts were passed under Queen Anne.

All these acts were either temporary, or have in one way or another long since expired, and they exercised little or no permanent influence on our law. I have referred to them so fully partly on account of their historical interest, partly because they illustrate in a striking manner the nature of one class of political offences. Convulsions and revolutions have occurred in the history of every nation. Each party in turn, and in particular every successful party, is from the nature of the case obliged to treat the prosecution by their antagonists of the political views and objects which they have at heart, and even in some cases the open avowal of those views, as crimes of the highest nature. It seems to me that such legislation can be fairly criticised only by considering two things, namely, first, the substantial merits of the quarrel, and secondly, the efficiency and approach to necessity of the means employed for the attainment of the end proposed. The Reformation and the great political revolutions which have followed it were the stormy periods in human history, and the legislation by which different parties have done their best to maintain their respective views in their own dominions, are like orders given by a military commander in time of war. To criticise them upon the false supposition that they were

<sup>1</sup> "Compass, imagine, invent, devise, or intend death or destruction, or any bodily harm tending to death or destruction; maim, wounding, imprisonment, or restraint of the person of the king; or to deprive or depose him from the style, &c.; or to levy war against his Majesty, within the realm or without; or to move or stir up any foreigner, &c."

<sup>2</sup> 1 Anne, c. 17 (1702), treason to attempt to prevent the succession as established by Act of Settlement; 3 & 4 Anne, c. 14 (1705), returning without licence into England after going without licence into France, treason; 4 Anne, c. 8 (1705), treason to maintain by writing, title of Prince of Wales or others, re-enacted after the Union, 6 Anne, c. 7; 7 Anne, c. 4 (1709), treason for officers to hold correspondence with rebels or enemies.

intended to last for an indefinite time, and to apply to the normal state of society, is to misunderstand them pedantically. CH. XXIII.

Coming to consider more closely and in a more technical way the long series of enactments which I have been describing, it will be found to have consisted of three different sets of enactments collateral and supplementary to the act 25 Edw. 3. First, there are the provisions which made it high treason to display by words or by writings such intentions as would if displayed by overt acts have been high treason by 25 Edw. 3, and some intentions which would not have been high treason within that act however displayed. Secondly, there are the provisions which made it high treason to interfere with the order of succession to the crown established by law. Thirdly, there are the provisions which made it high treason to recognize the authority claimed by the pope. Treasons of the second and third class are no longer likely to be committed, and it will therefore be unnecessary to notice further the enactments which refer to them. The enactments of the first class form the origin of our present law, and they must accordingly be somewhat more closely examined.

If we assume that the object of the statute of Edward III. was to confine high treason, regarded as a political offence, to three main branches, namely, actual attacks on the king's person, war actually levied against his authority, and adherence to his enemies, it must be admitted that it was worded too narrowly if it is to be construed literally. The expression, "compass and imagine the king's death," does not, as I have already observed, include by the mere force of the words the formation of an intent to depose the king, to imprison him, to do him bodily harm which would incapacitate him from exercising his royal power, as, for instance, by blinding or mutilating him. It is obvious that in many cases such measures would be better suited to carry out treasonable designs than the actual killing of the king. In fact few instances have occurred in the history of England in which treason took the form of an assassination plot. The plots against the life of Elizabeth, the Gunpowder treason, the Rye House plot, and the assassination plot in the reign of

CH. XXIII. William III. form the only prominent exceptions. The attacks on the lives of George III., William IV., and her present Majesty, were nearly all the acts of madmen. The deaths of Edward II., Richard II., and Henry VI. followed their deposition; and the story of Edward V. is altogether doubtful and exceptional. On the other hand, in nearly every reign political conspiracies have occurred having for their object the deposition of the ruling sovereign. Such conspiracies, if he resisted, would of necessity involve, to say the least, his imprisonment, or his exposure to the chances of war. It is difficult to believe that this can have been entirely overlooked by the authors of the act of Edward III. especially when we remember the fate of Edward II. I am unable to suggest any explanation of this circumstance, unless it is to be found in the power reserved, by the proviso already referred to, for Parliament acting judicially to declare new treasons. Long afterwards the view was put forward, and repeatedly enforced by judicial decision, that the words were intended to have a wider signification than their literal one, and that they were meant to include all forcible attempts upon the person of the sovereign with a view to his deposition, imprisonment, or coercion.

The acts to which I have referred are neither inconsistent with, nor altogether favourable to, this view. On the one hand, several of the acts passed under Henry VIII. make it treason to <sup>1</sup>“attempt any bodily harm to the “king,” <sup>2</sup>“by writing, printing, or *exterior act*, maliciously “do or procure anything to the peril of the king’s person,” or to the disturbance of the king’s enjoyment of his crown; and it may be said that if the wider interpretation of the act of Edward III. had been the true one these provisions would have been unnecessary. On the other hand, it may be said that the statutes passed by <sup>3</sup>Elizabeth do not expressly provide that an attempt, or the display of an intention, to do bodily harm to the queen, or to imprison or depose her, shall be high treason, and the same may be said

<sup>1</sup> 6 Hen. 8, c. 13.

<sup>2</sup> 25 Hen. 8, c. 27. See 28 Hen. 8, c. 7, the words of which are similar.

<sup>3</sup> 1 Eliz. c. 5; 13 Eliz. c. 1.

of the last statute of the kind, 13 Chas. 2, c. 1. This act makes it high treason to display by writing or words an intention to kill or destroy the king, or to do him "any bodily harm, tending to death or destruction, maim, wounding, imprisonment or restraint of his person, or to deprive and "depose him," &c., but it is silent as to displaying any such intention by overt acts other than writing or speaking. As far as the wording of the statute goes it would have been treason to say, "I mean to try to imprison the king," but it would not have been treason to display such an intention by collecting a number of men and supplying them with arms for that purpose. It is, it may be said, very unlikely that an act should have been passed leading to this result, unless the conduct which it failed to notice had been regarded as treason under 25 Edw. 3. I think there is weight in this argument.

The probability is, that the wider interpretation of the statute of Edward III. had always been suggested as possible, but was in the reign of Elizabeth first considered sufficiently well established by legal decisions to warrant those who drafted her statutes in relying upon it. <sup>1</sup> In the great case of Lord Essex the judges advised the House of Lords, <sup>2</sup> "that in case where a subject attempteth to put himself into such strength as the king shall not be able to resist him, and to force and compel the king to govern otherwise than according to his own royal authority and direction, it is manifest rebellion." Also, "that in every rebellion the law intendeth as a consequent the compassing the death and deprivation of the king as foreseeing that the rebel will never suffer that king to live or reign who might punish or take revenge of his treason or rebellion." It is true that Lord Essex's case was decided in 1600, whereas the statutes referred to were passed thirty years before, but the fact that the decision of the judges fills up the gap left by the wording of the statutes shows that they probably were declaring what had been the common opinion of the profession when the statutes were passed. If it is asked why this opinion did not prevail in the

<sup>1</sup> This is obscurely hinted in the *Third Institute*, 6, marginal note, and see Broke's *Abridgment Treason*.

<sup>2</sup> 24 *State Trials*, 1353.

CH. XXIII. days of Henry VIII. the answer may probably be that it had not then been thought of; and that after his death the lavish severity of his legislation on this subject made his successors unwilling to multiply statutory treasons, whilst the attention drawn to the defects of the statute of Edward III. by the provisions of the repealed acts disposed lawyers to supply them by strained artificial constructions.

However this may have been, the fact is undoubted, that the wider construction of the words "imagine the king's death," have prevailed, and are at this moment part of the law of England, though in a curious and intricate way. The following is the history of the definition and of the later enactments connected with it.

The earliest express decision which I have been able to find in which an unnatural sense is attached to the words "imagine the king's death" is that of the Earl of Essex in 1600, already referred to. Referring to this case, and to the later one of Lord Cobham in the reign of James I., <sup>1</sup>Coke says, "He that declareth by overt act to depose the king is a sufficient overt act to prove that he compasseth and imagineth the death of the king. And so it is to imprison the king or to take the king into his power, and to manifest the same by some overt act." <sup>2</sup>He also says, "if a subject conspire with a foreign prince beyond the seas to invade the realm by open hostility, and prepare for the same by some overt act, this is a sufficient overt act for the death of the king."

<sup>3</sup>Hale repeats Coke, but makes some additions to what Coke says, for <sup>4</sup>he says that to levy war against the king directly is an overt act of compassing the king's death, that a conspiracy to levy such a war is an overt act to prove it, so that upon the whole he appears to think that conspiring to levy such war, though not in itself a substantive treason, is nevertheless an overt act of treason by compassing the king's death. He distinguishes, as I shall notice more fully hereafter, between different ways of levying war.

<sup>1</sup> *Third Institute*, 6, 12.  
<sup>2</sup> 1 Hale, *P.C.* 110.

<sup>3</sup> *Ib.* 14.  
<sup>4</sup> *Ib.* 151.



This view of the law was acted upon, as I have already observed, in the case of Lord William Russell. CH. XXIII.

After the revolution of 1688 the fictitious interpretation of the offence of compassing the king's death was carried much further than it had been under the Stuarts. In <sup>1</sup> Lord Preston's case it was held that taking a boat at Surrey Stairs in Middlesex in order to go on board a ship in Kent for the purpose of conveying to Louis XIV. a number of papers informing him of the naval and military condition of England, and in order to help him to invade England and depose William and Mary, was an overt act of treason by compassing and imagining the death of William and Mary. But not to go through all the cases on the subject, I may observe that in Sir Michael Foster's discourse on high treason, published in the middle of the last century, the following glosses are put upon the words "imagine the king's death."

<sup>2</sup> "The care the law hath taken for the personal safety of the king is not confined to actions or attempts of the more flagitious kind, to assassination or poison, or other attempts directly and immediately aiming at his life. It is extended to everything not fully and deliberately done or attempted whereby his life may be endangered; and therefore the entering into measures for deposing or imprisoning him, or to get his person into the power of the conspirators, these offences are overt acts of treason within this branch of the statute, for experience hath shown that between the prisons and the graves of princes the distance is very small.

"Offences which are not so personal as those already mentioned have been with great propriety brought within the same rule, as having a tendency, though not so immediate, to the same fatal end; and therefore the entering into measures in concert with foreigners and others in order to an invasion of the kingdom, or going into a foreign country, or even purposing to go thither to that end, and taking any steps in order thereto, these offences are overt acts of compassing the king's death."

He then states Lord Preston's case, and proceeds to carry the law laid down in it a step further: "The offence of

<sup>1</sup> 12 *State Trials*, 646, A. D. 1691.

<sup>2</sup> Foster, p. 195.

CH. XXIII. "inciting foreigners to invade the kingdom is a treason of  
 "signal enormity. In the lowest estimation of things, and  
 "in all possible events, it is an attempt on the part of the  
 "offender to render his country the seat of blood and desola-  
 "tion, and yet unless the powers so incited happen to be  
 "actually at war with us at the time of such incitement, the  
 "offence will not fall within any branch of the statute of  
 "treasons except that of compassing the king's death: *and*  
 "*therefore since it hath a manifest tendency to endanger the*  
 "*person of the king, it hath, in strict conformity to the statute,*  
 "*and to every principle of substantial justice, been brought*  
 "*within that species of treason of compassing the king's death—*  
 "*ne quid detrimenti respublica capiat.*"

<sup>1</sup> Foster follows Coke and Hale in holding that "levying war" is an overt act of compassing, and that conspiring to levy war in one sense of the expression is so too. Indeed, he goes so far as to say that "a treasonable correspondence "with the enemy" is an act of compassing the king's death, and he refers in support of this to Lord Preston's case, and also to the case of one <sup>2</sup> Harding, in which it was held on a special verdict that enlisting men in England and sending them abroad to join the French forces in an attempt to dethrone King William III. was an imagining of his death.

In short, various writers have held that to imagine the king's death means to intend anything whatever which under any circumstances may possibly have a tendency, however remote, to expose the king to personal danger or to the forcible deprivation of any part of the authority incidental to his office.

The words "levy war," in the statute of Edward III. have been made the occasion of nearly as strange interpretations as the words "imagine the king's death." As I have already observed, the difference between the commonest unlawful assembly and a civil war is one of degree, and no definite line can be drawn at which riot ends and war begins. There has been a double current of authority on this point from the date of the 25 Edw. 3, to our own days. On the one hand, the statute declares, and the commentators have

<sup>1</sup> Foster, p. 197.

<sup>2</sup> 12 *State Trials*, 645, note.

been careful to insist on the declaration, that in order to be treason the war levied must be levied against the king. No amount of violence, however great, and with whatever circumstances of a warlike kind it may be attended, will make an attack by one subject on another high treason. On the other hand, any amount of violence, however insignificant, directed against the king will be high treason, and as soon as violence has any political object, it is impossible to say that it is not directed against the king, in the sense of being armed opposition to the lawful exercise of his power.

The words of the statute on the first of these propositions are express, and leave no room for doubt as to their object. "Et si per cas ascun homme de cest roialme chivach arme"<sup>1</sup> "descouvert ou secretement od gentz armees contre ascun autre pur lui tuer ou derober ou pur lui prendre et retenir tanqil face fyn ou raunceon pur son deliverance avoir, nest pas lentent du roi et de son conseil qe en tiel cas soit ajugge treson einz soit ajugge felonie ou trespass solone la lei de la terre aunciennement usee et solonc ceo qe le cas demand."

The object no doubt was to distinguish between private wars and attacks on the royal authority. <sup>2</sup> Hale collects from the Parliament Rolls many instances of insurrections amounting almost to private wars which took place in some cases before and in some after 25 Edw. 3. For instance, in 20 Edw. 1 (1292) there was a war between the Earls of Gloucester and Hereford, two great lords marchers.

As the royal power became more firmly and generally established, and especially as the habit of keeping up great military households fell into desuetude, such enterprises as these sank to the proportion of private frays and riots. But, on the other hand, risings of a distinctly political nature became more common and important. The great test employed to distinguish between the two classes of disturbances was the generality of their object. Thus, <sup>3</sup> Coke gives as an instance of an agreement to levy war an agreement to assemble at Enslowe Hill, in Oxfordshire, and to procure arms and to

<sup>1</sup> Translated "covertly or secretly," which is obviously wrong. It should be overtly.

<sup>2</sup> 1 Hale, *P.C.* 135, 140.

<sup>3</sup> *Third Institute*, 9, 10.

CH. XXIII. rise, "and from thence to go from gentleman's house to "gentleman's house, and to cast down enclosures as well for "enlargement of highways as of errable lands." He also refers to riots for the purpose of reform in matters of law or religion. <sup>1</sup> Hale attempts, but fails as it seems to me, to draw a distinct line upon the subject. <sup>2</sup> He holds, however, upon the whole, that there are two ways of levying war, first, levying a war against the king or his army with a view to "do the king any bodily harm, or to imprison him, or to "restrain him of his liberty, or to get him into their power, "or to enforce him to put away his ministers or the like," in short, to employ violence against the government for the purpose of compelling or preventing legislation; and secondly, levying war for a public object, like throwing down enclosures generally, or raising wages. The only difference which he makes between these two forms of the offence of levying war is that every overt act of the former is also an overt act of imagining the king's death, which cannot be affirmed of the latter.

The law upon this subject was carried to a great length in <sup>3</sup> Messenger's case in 1668. In this case eight apprentices were found to have made a riot for the purpose of pulling down brothels. Some of them broke open Clerkenwell Prison and released the prisoners. Some refused to disperse when required to do so by the guards, and "very contemptuously slighted the king's guards." Ten judges to one (Sir M. Hale) held that this was treason. Seven years afterwards the judges were <sup>4</sup> equally divided (five against five) upon the question whether a riot by weavers for the destruction of engine-looms was high treason or not, and the offenders were accordingly prosecuted for a riot only.

The case of <sup>5</sup> Dammaree and others in 1710, was, however, I am inclined to think, the most severe ever decided upon this point. The prisoners, during the trial of Dr. Sacheverell, became riotous in support of his cause and pulled down four dissenting meeting-houses, crying, "Down with the Presby-

<sup>1</sup> 1 Hale, *P. C.* 143-146.

<sup>2</sup> *Ib.* 152.

<sup>3</sup> 6 *State Trials*, 379. I have only indicated the points discussed in this case, which were numerous, and differed as to the different prisoners.

<sup>4</sup> 1 Hale, *P. C.* 143.

<sup>5</sup> 15 *State Trials*, 521.

terians." They were indicted for, and convicted of, treason, but Dammaree was afterwards pardoned and made (he was a waterman by trade) the steerer of the Queen's barge. If <sup>1</sup>Dammaree's case is good law it seems difficult to say that any riot excited by any unpopular measure, whether executive or legislative, is not high treason. It is, however, rather matter of curiosity than of practical importance in the present day to consider these cases. They have been practically superseded long since by legislation as to riots.

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The Riot Act of 1 Geo. I, st. 2, c. 5 (A.D. 1714), after reciting the frequency of rebellious riots and tumults (in connection with the question of Jacobite and Hanoverian) which had recently taken place, makes it felony, without benefit of clergy, for twelve persons to continue riotously assembled together for an hour after proclamation is made to them to disperse, and indemnifies those who may kill or wound them in order to their being dispersed. This act, for which there were earlier precedents in our history, especially in the reigns of Edward VI., Mary, and Elizabeth, as mentioned above, is still in force, though the punishment is no longer capital, and since it was passed such prosecutions as the one against Dammaree have been practically unknown.

The modern cases of treason by levying war are cases of such insurrections as those of Frost, in the year 1840, Smith O'Brien, in 1848, or the Fenians in 1867. On each of these occasions war was levied against the queen in the most direct and natural sense of the words, though in Frost's case there was little show of military discipline or equipment, and though in the case of the Irish risings the amount of force actually employed was small.

To return, however, to the history of the development of the law. By the middle of the eighteenth century both the clause of the statute of Edward III. which relates to imagining the king's death and that which relates to levying war against him had received a strained and technical interpreta-

<sup>1</sup> All these cases are elaborately considered by Mr. Luders in his *Considerations on the Law of Treason in the Article of Levying War*. Long extracts from it are published in the notes to Dammaree's case in the *State Trials*. There can, I think, be no doubt that the cases upon this as well as upon the other clause of the statute have stretched it far beyond its natural meaning.

CH. XXIII. tion, but for a great length of time no occasion arose which made it necessary to put either branch of the statute in force except in its obvious sense. The rebellions of 1715 and 1745 were beyond all question levyings of war against George I. and George II., and it was not till George III. had been for many years on the throne that an occasion arose for testing the constructions which had been put upon the two leading branches of the statute of Edward III.

There is a common impression that the memorable cases of Lord George Gordon in 1780, and Hardy and others in 1794, tested and, for practical purposes, exploded the doctrines which by way of odium have been described as the law of constructive treason. In one sense this impression is ill-founded and proceeds upon a superficial view of the whole subject, but there is a sense in which it may be described as true.

In a strictly legal point of view the memorable cases in question are so far from being opposed to the constructions put by the earlier writers on the statute of Edward III. that they are strong and decisive authorities in their favour, but the legal view is not the only one which ought to be taken of a great State prosecution. On each of these occasions the prosecution for treason failed, and though to a lawyer the failure in each case shows merely that the evidence was not satisfactory, the two decisions undoubtedly did impress the popular imagination with the notion that an<sup>1</sup> arbitrary and oppressive doctrine, called the doctrine of constructive treason, had been discredited by the failure of two great prosecutions for that offence. However incorrect and hasty such impressions may be, it would be idle to deny their importance. Still it will be well to point out that legally they are altogether unfounded.

<sup>2</sup> The facts of Lord George Gordon's case are well known. The riots took place between June 2 and June 6, 1780. Many houses were burnt in different parts of London. The gaols were broken open, and attempts were made upon the

<sup>1</sup> Dr. Johnson, for instance, said "he was glad Lord George Gordon had escaped rather than a precedent should be established of hanging a man for constructive treason."—Boswell, iv. 98.

<sup>2</sup> 21 *State Trials*, 485-652.

Bank of England, and to cut off the New River Water by which the fires might be put out, and there could be no doubt that the object of the mob was to procure by force the repeal of 18 Geo. 3, c. 60, which mitigated the penalties to which Roman Catholics were then by law liable. It is not too much to say that in order to obtain this object the mob tried to burn down London. CH. XXIII.

It would have been impossible to imagine a case falling more distinctly within the definition of treason by levying of war given in the passages I have cited from Hale and Foster. If, therefore, the decisions had (as is sometimes supposed) been adverse to the views expressed by Hale and Foster, it would have decided that such acts did not amount to treason. In fact no such decision was given, nor did any one suggest that it possibly could be given. Erskine's celebrated speech on the occasion does not attempt to shake the doctrine laid down by the authorities I have referred to. <sup>1</sup> He hints, in passing, that he might in case of need attack Foster's view, but he accepts it as the basis of his argument. <sup>2</sup> He admits that "war may be levied against the king in his realm not only by an insurrection to change or to destroy the fundamental constitution of the government itself by rebellious war, but by the same war to endeavour to suppress the execution of the laws it has enacted, or to violate and overbear the protection they afford, not to individuals (which is a private wrong), but to any general class or description of the community by premeditated open acts of violence, hostility, and force." Further on he says, <sup>3</sup> "If it had been proved that the same multitude under the direction of Lord George Gordon had afterwards" (*i.e.* after going down to Parliament with their petition, which Erskine admits, or practically admits, was a misdemeanour) "attacked the Bank, broke open the prisons, and set London in a conflagration, I should not now be addressing you. Do me the justice to believe I am neither so foolish as to imagine I could have defended him, nor so profligate as to wish it if I could." In other words such acts would have been treason by levying of war, and actually were so in the case of those

<sup>1</sup> 21 *Sz. Tr.* 589.<sup>2</sup> *Ib.* 590.<sup>3</sup> *Ib.* 591.

CR. XXIII. who did them. The point of the defence is that Lord George Gordon had nothing to do with the riots and with setting London on fire, that these events, which were treason by levy-of war, were, as far as he was concerned, the unintended and unexpected consequence of highly imprudent and even criminal conduct on his part in putting himself at the head of a mob for the purpose of tumultuous petitioning.

<sup>1</sup> Lord Mansfield, in summing up, after referring shortly and in a summary way to the authorities already noticed, <sup>2</sup> said, "I tell you the joint opinion of us all, that if this "multitude assembled with intent, by acts of force and "violence, to compel the legislature to repeal a law, it is "high treason." In leaving the question to the jury he repeated this in substance, and said, "If there was no such "intention either in the mob or the prisoner, he ought to be "acquitted; but if you think there was such an intent in "the multitude, incited, prompted, or encouraged by the "prisoner, then you ought to find him guilty."

My impression upon the facts is that the acquittal was right, and that, though high treason was committed on the occasion, Lord George Gordon was guilty of nothing more than hare-brained and criminal folly in heading an unlawful assembly. However this may be, the case considered only in its legal aspect is a strong and direct authority in favour of the views of Hale and Foster.

The <sup>3</sup> trials of 1794 were more remarkable than even the trial of Lord George Gordon. They turn upon the meaning attached to the words, "imagine the king's death."

The main features and the general results of these trials are well known, but their effect on the popular mind, constituting as they did failures in prosecutions promoted by all the power of the State, was of far greater importance than their legal value as precedents. Shortly, the case (for the facts in each prosecution were substantially the same) was this :

<sup>1</sup> 21 *St. Tr.* 644.

<sup>2</sup> The trial was at the King's Bench bar, before Lord Mansfield, C.-J., and Willes, Ashurst, and Buller, J.J., so that the direction is of the highest authority.

<sup>3</sup> Vol. xxiv. of the *State Trials*, from p. 189 to the end, contains the trial of Hardy; vol. xxv. pp. 1-748, contains the trial of Horne Tooke.



The indictment charged a conspiracy to depose the king and put him to death, and alleged as overt acts consultations to procure a convention to be assembled with intent that the persons so assembled should subvert the government and depose the king; the circulation of books and pamphlets recommending the choice of delegates; consultations concerning the calling of the Convention; and the provision of arms for treasonable purposes. These acts were so varied as to amount in all to nine.

The facts proved in evidence were that two societies, the Constitutional Society, and the London Corresponding Society, which had branches all over the country, carried on an agitation for the establishment of universal suffrage and annual parliaments, in the course of which they called a Convention, consisting of representatives from a number of branch societies. Members of the societies wrote letters, and made speeches, and circulated books and pamphlets, and the Convention held meetings and passed resolutions, ostensibly and avowedly in order to further their political objects by constitutional means; really, according to the case for the Crown, in order to put themselves in a position to assume the powers of government, depose the king, and establish a Republic. That there was a failure on the part of the prosecution to prove any such intent on the part of the prisoners is well known. Whether, under all the circumstances of the case, it may not be reasonably supposed that the English reformers of that period would have been glad to establish a republic if they had seen their way to doing so, and had found the people at large disposed to assist them, and whether the result of these trials was not greatly to alarm the democratic party in Great Britain, and to retard for a considerable time the progress of democratic views, are questions which belong rather to the general than to the legal history of the country. The conflicting views of the law of treason put forward by Lord Eldon (then Sir John Scott) for the prosecution, and Lord Erskine (then Mr. Erskine) for the defence, were of necessity stated at great length, and with an amount of reiteration which was probably necessary to give the jury some sort of notion of the views which they were to

CH. XXIII. be made to understand, and they are accordingly exceedingly tiresome reading. When, however, they are stripped of all that is superfluous, they may be reduced to two counter propositions which differ much less widely than, from the passionately emphatic character of the discussion and the importance which was attached to it, might be supposed.

<sup>1</sup> Lord Eldon's contention was, that in order that any act might be an overt act of treason by compassing the king's death, it must be an act satisfying the jury that the person who did it intended by deposing, or otherwise, "to put the king in circumstances in which, according to the ordinary experience of mankind, his life would be in danger."

<sup>2</sup> Lord Erskine contended that the treason consisted in forming the intention to kill the king in the literal sense of words. He admitted that an intent to depose the king was a fact from which a jury was at liberty to draw the inference that the prisoner intended to kill the king, but he said that unless they did draw such an inference they could not properly convict the prisoner, even if they thought he had, by an overt act, manifested an intention to depose the king.

<sup>3</sup> The judge in Hardy's case contented himself with giving the jury an analysis of the indictment and reading over the evidence to them, giving no general account of the law. 'Nearly at the end, however, he says, "If they" (the Convention) "meant to put themselves into a condition to sustain their convention by force against any attack which might be made upon it, or upon them in defence of it—defence becomes offence and treason." This observation, however, relates only to one of the overt acts—that which consisted in providing arms. The Chief Justice further observed that "it was a question what was in the minds of the people at the time they proposed this Convention, and whether their purpose was that which this prosecution charged; a purpose

<sup>1</sup> See 24 *State Trials*, 256; but Lord Eldon repeats himself in all sorts of forms of words, and with endless precautions and qualifications, and in sentences which neither begin nor end for many pages.

<sup>2</sup> Pp. 883-911. One of the most pointed passages is at the end of p. 894, "Whatever, therefore," &c. Erskine, like his antagonist, felt bound to drive his law into the heads of the jury as if it were a spike.

<sup>3</sup> In the summing-up. 24 *State Trials*, 1293-1384.

<sup>4</sup> Pp. 1379, 1380.

“ of subverting the government of the country, consequently | CH. XXIII.  
 “ deposing the king, which is an overt act of compassing the  
 “ king’s death.”

It should be observed, however, that in his <sup>1</sup> charge to the Grand Jury the Lord Chief Justice had explained his views of the law very elaborately, but what he there says all comes to the same thing. The members of a convention intended to usurp the powers of parliament, to depose the king and institute a republic, commit high treason by imagining the king’s death.

In summing up on Horne Tooke’s trial, on substantially the same facts, the same judge laid down the law a little more boldly. <sup>2</sup> He said: “ A jury ought to find that he who means “ to depose the king compasses and imagines the death of “ the king. It is in truth a presumption of fact arising from “ the circumstance of intending to depose, so undeniable and “ so conclusive that the law has adopted it and made it a “ presumption of law ; and it is in that manner that the law “ has pronounced that he who means to depose the king has “ compassed and imagined the death of the king.”

This was the legal result of these memorable trials. How far the verdict of the jury proceeded upon a dislike to the doctrine of constructive treason, and how far it proceeded upon the failure of the prosecution to establish anything more than a political agitation unconnected with any intention to produce a forcible revolution, cannot be determined. I should think that if it could have been shown that there really was a plot to dethrone George III. and to establish a republic—if, for instance, a correspondence could have been produced containing a distinct plan for the king’s capture and imprisonment, the scheme of a provisional government and draft proclamations to be issued on its establishment—Erskine’s eloquence and argument would have been in vain, though legally it would have been quite as applicable to such a case as it was to the case actually set up.

<sup>1</sup> 24 *State Trials*, 199-210. A severe criticism on the charge to the Grand Jury had been written and published before the trial. It is reprinted at p. 210 of the *State Trials*. Its author was Mr. Felix Vaughan, a young and exceedingly promising barrister, who was assistant counsel in Hardy’s case, and who greatly distinguished himself in other political cases about the same time. He died young.

<sup>2</sup> 25 *State Trials*, 725.

The doctrine against which Erskine is supposed to have prevailed in the trials of 1794 was applied to many later cases without hesitation. This occurred in the trials for the Irish rebellion in 1798, and in particular in the case of the <sup>1</sup>two brothers, Henry and John Sheares. It was clearly proved (if the evidence was believed, and no doubt it was true) that the prisoners had entered into a conspiracy with others to raise an open rebellion in Ireland, which rebellion was actually raging at the time of the trial. The indictment charged an imagining of the king's death, some of the overt acts being a conspiracy to levy war, treasonable consultations, and the provision of arms. It was argued on behalf of the prisoners that, admitting that a conspiracy to levy war in England with a view to the king's deposition was an overt act of compassing his death, because a war in England might expose the king's person to danger, this could not be so in respect of levying war in Ireland, where the king never resided. The jury, however, were directed that such a conspiracy as was proved was an overt act of imagining the king's death, and that the fact that the king was not resident in Ireland made no difference. The prisoners were convicted and executed.

The same doctrine was applied in an instance even more remarkable. <sup>2</sup>David Maclane, an American, was, in 1797, indicted, convicted, and executed for treason by imagining the king's death, the overt acts charged being that he conspired with others to raise a rebellion in Lower Canada and to procure the invasion of the country by the French. In this case it was contended that even if Canada were separated from the king's dominions this could have no effect on his personal security, but the Court told the jury that the statute referred not to the natural life, but to the political existence of the king. Upon the whole, it must, I think, be said that the wide construction put upon the act of Edward III. by Coke, Hale, and Foster, has never been doubted by any court called upon to administer the law, though it no

<sup>1</sup> 27 *State Trials*, 255-898.

<sup>2</sup> 26 *Ib.* 721. The indictment also charged treason by adhering to the king's enemies.

doubt has in a popular sense been more or less discredited by the trials of 1794. I do not believe, however, that even popular feeling would regard as too severe a view of the law which makes it high treason to enter into a real conspiracy, to excite a rebellion, or carry out a forcible revolution, even though the legal result may involve the use of a legal fiction. CH. XXIII.

However this may be, the law of treason has, since the year 1794, been put on a different footing from that on which it rested till that year. In the year 1795 an act was passed (36 Geo. 3, c. 7) which enacted that it should be treason to "compass, imagine, invent, devise, or intend death, or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint, to the person of his Majesty, or to depose him, or to levy war against him, in order, by force or constraint, to change his measures or counsels, or in order to put any force or constraint upon, or to intimidate or overawe both houses or either house of parliament, or to move or stir any foreigner with force to invade this realm or any other of his Majesty's dominions," such imagination being manifested either by printing, or writing, or by any overt act.

This act re-enacted that part of the act of Edward III. which relates to imagining the king's death in the sense in which it had been interpreted by Hale and Foster, and thus gave statutory authority to all their constructions. It did not however repeal the act of Edward III., which still continued to be the only source of the law of treason by levying war and adhering to the queen's enemies. The act of 1795 was at first limited to the life of George III. and the end of the first session after his death, but was, in 1817, made perpetual as to treason by 57 Geo. 3, c. 6.

The law thus settled remained unaltered till the year 1848, when the disturbances consequent on the Continental revolutions of that year were considered to require new legislation. Accordingly the act 11 & 12 Vic. c. 12, was passed, which repealed the provisions of the acts of George III., "save such of the same respectively as relate to the compassing, &c., death, or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or

CH. XXIII. "restraint of the person" of the sovereign, and the expression of them by overt acts. It then proceeded to enact that the other compassings, &c., specified in the acts of George III. should be felony, subjecting the offender to a maximum punishment of penal servitude for life. It is provided by section 6 that the act is in no way to lessen the effect of the statute 25 Edw. 3. The act of 1848 has not been altered by subsequent legislation. It has been put in force not unfrequently both in England and in Ireland, and it has not been interpreted otherwise than according to the obvious meaning of its words. The last case tried under it was that of Walsh, tried and convicted before me at the Old Bailey, in July, 1882.

The result of this complicated legislation is as follows:—

1. The act 25 Edw. 3, st. 5, c. 1, is still the standard act on which the whole law of treason is based, and the constructions put upon its different members by Coke, Hale, Foster, and others, have been in many instances adopted by the Court, and must still be taken to be part of the law of the land.

2. Such of those constructions as extend "imagining the king's *death*" to imagining his death, destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint, have been turned into statute law by the joint operation of the acts of George III. and the act of 1848 (11 & 12 Vic. c. 12).

3. Such of the constructions as make the imagining of the deposition of the king, conspiring to levy war against him directly, and instigating foreigners to invade the realm, have not been abolished, but are left to rest on the authority of those who have stated them, and of the cases in which they have been recognised.

4. It is provided by statute, 11 & 12 Vic. c. 12, that all the imaginations and conspiracies lastly mentioned shall be felony punishable with secondary punishment as well as treason (if they are treason) punishable with death.

5. Treason, by the actual levying of war, and by adhering to the king's enemies, is left under the statute 25 Edw. 3, but by judicial construction levying war has been defined to

mean in its natural sense, war meant either to depose the king or to compel legislation, and in its wider sense, a great riot for any public object. The result may be displayed in the form of a diagram, thus :—

25 Edw. 3, as construed by Coke, Hale, Foster, and judicial decisions.

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38 Geo. 3, c. 7, perpetuated by 57 Geo. 3, c. 6,  
and recognised by 11 & 12 Vic. c. 12.

25 Edw. 3.	Felonies by 11 Vic. c. 12.	
A. Treason by imagining the king's death.	A'. Extended to imagining bodily harm or restraint of the king.	A". Extended to (a) conspiracy to levy war in natural sense (see B.); (b) conspiracy to depose; and (c) instigating foreigners to invade the realm.
B. Treason by levying war. Natural sense defined to be levying war with intent to depose the king, or to compel legislation by force and terror.	B'. Extended to great riots for political objects.	
C. Treason by adhering to the king's enemies.		

A is high treason by 25 Edw. 3. A' represents that part of the constructions put upon A by Coke, Hale, and Foster, to which statutory authority is given by 57 Geo. 3, c. 6, and by 11 & 12 Vic. c. 12. A" represents that part of those constructions to which such authority was not given, but offences in A" which according to judicial decisions amount to high treason are, under 11 & 12 Vic. c. 12, s. 2, at least felony, punishable with penal servitude for life.

B represents treason by levying of war in what has been defined to be the natural sense of the expression.

B' represents the construction put upon B by various cases,

CH. XXIII. of which Dammaree's is the best illustration, and which Lord George Gordon's case is popularly, but erroneously, supposed to have discredited.

I must, in conclusion, say a few words on C: Treason by adhering to the king's enemies. Instances of this offence have been very rare in our history. England, owing to its insular position, has not for centuries been the scene of war carried on with a foreign enemy. Indeed, since the march of Charles Edward to Derby in 1745, no military operations of any kind have been carried on here. Hence the offence of "adhering to the king's enemies"—an exceedingly vague expression—has been committed only by a few spies who have in the time of war been detected in giving information to foreign enemies. The case of <sup>1</sup>Stone in 1796 is an instance. He was tried for sending information to the French as to the prospects of an invasion, and acquitted. The case of <sup>2</sup>De la Motte may also be referred to. He sent many particulars as to the condition of the navy to France, in the latter part of the American war. No questions of legal or constitutional interest have arisen on this branch of the act of Edward III. to my knowledge.

A review of this long and intricate history shows, first, that the act of Edward III. was clearly defective, in not providing expressly for the case of personal injury to, or restraint of, the sovereign, but this defect was so obvious that the public acquiesced without difficulty in its being supplied, first by a construction of the statute which was undoubtedly strained and unnatural, and afterwards by express legislation.

A greater defect in the statute is that it altogether omits to deal with the case of conspiring to levy war. In treason it is obvious that the conspiracy is a more proper object of punishment than the actual offence, for when war is actually levied it must be met by armed force, not by legal punishment, and when a rebellion has suffered defeat in the field subsequent punishment may seem cruel. This defect was supplied in part by special legislation, making such a conspiracy treason, which was in force all through the reigns of Henry VIII., Edward VI., the greater part of the

<sup>1</sup> 25 *State Trials*, 1155.

<sup>2</sup> 21 *Id.* 687.



reign of Elizabeth, the reign of Charles II., and the period between 1796 and 1848. Most of the acts which were in force during these periods made it treason to display an intention to levy war by writing. Some of them extended to speaking. The defect was also supplied in part by the judicial constructions, which made the conspiracy to levy war an overt act of imagining the king's death. As the law now stands, such a conspiracy can be treated either as felony or as treason.

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The general effect of the whole is that the statute which has been so much praised, is really a crude, clumsy performance, which has raised as many questions as it can have settled, and which has been successful only when it was not required to be put in force. It has been praised by one party because it does not, in terms, relate to treasonable conspiracies, and by another because they approved of the artificial constructions of which they said it was capable. The fact that it has been in force for 530 years seems to me to show only the extreme indifference of the public to the manner in which their laws are worded, and the attachment of the legal profession to phrases which have been long in use and to which an artificial meaning has been attached. If, however, we turn from the mode by which the present result has been arrived at, to the result itself, I do not think it can be said to be a bad one, except in so far as the levying of war has been interpreted to extend to great riots for a political object. <sup>1</sup>The Criminal Code Commission proposed to re-enact the existing law with a few unimportant exceptions—the clauses, namely, of the statute of Edward III. which relate to the violation of the king's eldest daughter, and the murder of the lord chancellor and the judges of the superior courts. The section in the draft code which defines high treason may thus be taken to represent the substance of the existing law free from all technicalities and from provisions obviously obsolete. The definition was as follows:—

SECTION 75.—HIGH TREASON DEFINED.—High treason is  
(a) The act of killing Her Majesty, or doing her any

<sup>1</sup> Report, p. 19.

- CH. XXIII.            bodily harm tending to death or destruction, maim or wounding, and the act of imprisoning or restraining her; or
- (b) The forming and manifesting by an overt act an intention to kill Her Majesty, or to do her any bodily harm tending to death or destruction, maim or wounding, or to imprison or to restrain her; or
- (c) The act of killing the eldest son and heir apparent of Her Majesty, or the Queen consort of any King of the United Kingdom of Great Britain and Ireland; or
- (d) The forming and manifesting by an overt act an intention to kill the eldest son and heir apparent of Her Majesty, or the Queen consort of any King of the United Kingdom of Great Britain and Ireland; or
- (e) Conspiring with any person to kill Her Majesty, or to do her any bodily harm tending to death or destruction, maim or wounding, or conspiring with any person to imprison or restrain her; or
- (f) Levying war against Her Majesty either  
     with intent to depose Her Majesty from the style,  
     honour, and royal name of the Imperial Crown of  
     the United Kingdom of Great Britain and Ireland  
     or of any other of Her Majesty's dominions or  
     countries; or  
     in order by force or constraint to compel Her  
     Majesty to change her measures or counsels, or  
     in order to intimidate or overawe both Houses  
     or either House of Parliament; or
- (g) Conspiring to levy war against Her Majesty with any such intent or for any such purpose as aforesaid; or
- (h) Instigating any foreigner with force to invade this realm or any other of the dominions of Her Majesty; or
- (i) Assisting any public enemy at war with Her Majesty in such war by any means whatsoever; or
- (j) Violating, whether with her consent or not, a Queen consort, or the wife of the eldest son and heir apparent for the time being of the King or Queen regnant.

Some remarks arise on this definition:—(a) was intended to remove a strange defect in the law, already noticed, by which the actual murder of the sovereign is treason only because it

is evidence of an intent to murder; (*f*) excludes Damaree's case, and other cases referred to in the diagram under B'. Another section (79) re-enacts the provisions of 11 Vic. c. 12, so that if the Draft Code became law there would still be cases in which the definitions of treason and felony would overlap.

The provisions of the French and German Codes on the subject of high treason have some features of close resemblance to, and some of striking difference from, the law of England.

Each code recognises a distinction unknown to our law between the sovereign and the state. The first title of the third book of the *Code Pénal*, deals with "Crimes-et délits contre la chose publique," the first chapter with "Crimes et délits contre la sûreté de l'état," and this is subdivided into two sections, relating respectively to the "sûreté extérieure" and the "sûreté intérieure" of the state. The provisions as to the external safety of the state (Article 75—85) cover the ground which is covered in English law by the single phrase "adhering to the king's enemies, giving them aid and comfort;" they are elaborate, and bear the traces of a history in which war has been far more frequent than in England, and of a period when the minds of the authors of the Code were much occupied by it, and were forced to be familiar with the questions arising out of warlike operations.

The following offences are punished with death. <sup>1</sup> A Frenchman bearing arms against France; every one subject to French law <sup>2</sup> intriguing with a foreign power or its agents to commit hostilities against or go to war with France, whether war actually follows or not; <sup>3</sup> intriguing with the enemies of the state with intent to facilitate their entrance on to the territory of the republic; or to give up (*livrer*) to them French strong places, &c. or ships; or to furnish them help in soldiers, men, money, provisions, arms, or ammunition, or to aid the progress of their arms in the French possessions, or against the French

<sup>1</sup> Art. 75.

<sup>2</sup> "Quiconque aura pratiqué des machinations ou entretenu des intelligences avec," &c.—Art. 76.

Art. 77. The words are the same as in art. 76.

CH. XXIII. forces, military or naval, either by tampering with the fidelity of the troops, or in any other manner. <sup>1</sup> Correspondence with the enemy, not having in view any of these objects, "which nevertheless has resulted in furnishing the enemy with instructions injurious to the military or political situation of France, or its allies," is punishable with detention (*i.e.* confinement in a fortress for twenty years at most and five years at least) unless the instructions are given in consequence of an understanding with spies, in which case the punishment is death.

A person, who having official knowledge of <sup>2</sup> the secret of a negotiation or expedition betrays (*l'aura livré*) it to the agent of a foreign power, or an enemy, is liable to be punished by death.

This series of provisions is singularly contrasted with English law. Articles 75—82 are much more precise, detailed, and minute than the enactment as to adhering to the king's enemies.

The German Strafgesetzbuch distinguishes between Hoch Verrath—high treason, and Landes-verrath—treason against the state. Landes-verrath closely corresponds to the offences constituted by the Articles in the French Code just referred to. Indeed Articles 87—92 of the German Code are taken in many instances almost verbatim from the corresponding Articles of the French Code. It is worthy of remark that the general provision, "Tout Français qui aura porté les armes contre la France sera puni de mort," which forms Article 75 of the French Code is elaborated into a provision of considerable length in Article 88 of the German Code. This article distinguishes between the case of a German, who, during a war against the German empire, takes service in the enemy's army, or bears arms against the empire; and the case of a German, who being in foreign service when the war breaks out, remains in the enemy's service or bears arms against the empire. In neither case is the crime capital, but in the first the punishment is imprisonment for life. Even if there are extenuating circumstances the punishment must be im-

<sup>1</sup> Art. 78.

<sup>2</sup> Art. 80.

prisonment for at least five years. In the second case the punishment must be two to ten years' imprisonment, but in the case of extenuating circumstances may be less. CH. XXIII.

Each of these sets of provisions differs from English law in the recognition of the state as being the object of the crime, as distinguished from the king.

The offences in these Codes which correspond to treason by imagining the queen's death, and by levying of war, differ from the law of England chiefly in the circumstance that being modern they are expressed in plain words instead of being arrived at by legal fictions, but the general correspondence between the three systems is remarkable.

Since the establishment in France of a republican form of government in 1870, no particular provision has been in force for attacks upon the life or the person of the president, but under the empire the law was contained in Article 86, "L'attentat contre la vie ou contre la personne de l'empereur est puni de la peine du parricide. L'attentat contre la vie des membres de la famille impériale est puni de la peine de mort. L'attentat contre la personne de la famille impériale est puni de la peine de déportation, dans une enceinte fortifiée."

The meaning of the word "attentat" in this provision was not, it seems, clear even to French lawyers. It was the subject of a<sup>1</sup> discussion by M. Hélie, who thought it meant

<sup>1</sup> "L'expression d'*attentat contre la vie* présente une idée nette et précise c'est l'assassinat, l'empoisonnement, le meurtre même; ce sont tous les crimes qui menacent l'existence même de la personne. Mais qu'est ce qu'un *attentat contre la personne*? Il nous semble que les mots, mis en opposition avec ceux d'*attentat contre la vie*, ne peuvent s'entendre que des blessures ou de violences graves commises sans intention de tuer. Il faut d'ailleurs rapprocher l'Article 86 de l'Article 305 du Code qui comprend sous la dénomination d'*attentats* contre les personnes non-seulement l'assassinat et l'empoisonnement, mais les autres violences graves. Or quelle sera la gravité des violences pour qu'elles soient qualifiées d'*attentats*? C'est là seulement la difficulté, et la loi ne l'a point résolue." After pointing out the difficulty of supposing that a common assault upon the emperor or his family could be a capital crime, M. Hélie gives his own opinion: "Il nous semble qu'une distinction doit être adoptée, ce serait de ne comprendre sous la qualification d'*attentat* que les seules violences que la loi pénale range dans la classe des crimes."

The word "*attentat*" must not be confounded with the "*tentative*" described in Article 2 of the *Code Pénal*, and regarded in French law as equivalent to the crime.

Article 88 of the Code, which relates to the "*attentats*" now under consideration, runs thus:—"L'exécution ou la tentative constitueront seules

CH. XXIII. personal violence, which in other cases would amount to a *crime* as distinguished from a *délit*.

The German Code treats the <sup>1</sup>following offences of this class as high treason:—The murder of, or an attempt made to murder, the emperor, the offender's own sovereign, or the sovereign of any confederate state in which the offender resides. (These offences are capital.) Also the undertaking (*wer unternimmt*) to kill a sovereign of the confederation or to take him prisoner, or to give him up to the enemy, or to make him incapable of reigning. This offence is punishable with imprisonment for life. Article 82 defines “*unternemen*.” <sup>2</sup>Every act by which the scheme is brought close to execution, must be regarded as an undertaking constituting the crime of high treason. Each of these enactments has a striking resemblance to treason, by imagining the queen's death. The French “*attentat*,” the German “*unternemen*,” and the English overt act, manifesting a treasonable intention, all resemble each other.

The crimes which in England would be called treason by levying of war are elaborately provided for and severely punished by the French *Code Pénal*, though the severity of the punishment has been considerably mitigated by the provision

l'*attentat*.” This is interpreted as follows by M. Hélie:—“*La tentative dont il s'agit ici est celle qui est caractérisée par l'Article 2. De là il suit—* 1. Qu'il n'y a pas crime d'*attentat* lorsqu'il y a eu désistement volontaire même après commencement d'exécution, puisque aux termes de l'Article 2 il n'y a pas de tentative légale. 2. Que l'*attentat* n'existe qu'autant que les actes de son exécution ont été commencés. 3. Qu'enfin l'exécution d'après l'Art. 88 c'est la consommation même de l'*attentat*. Cette exécution suppose donc une agression violente, un acte de la force brutale, et cette attaque constitue l'*attentat*, lors même qu'elle n'a pas réussi, lors même qu'elle a été comprimée et que ses auteurs ont été dispersés.”—Hélie, *Pratique Criminelle*, ii. 404, and see *Théorie du Code Pénal*, ii. 97-100.

The word *attentat* means, according to Littré: 1. *Entreprise criminelle, entreprise contre la loi.* 2. *En termes de droit attentat à la pudeur, tentative violente contre la personne d'une femme ou d'un enfant.*

*Tentative* is defined as “*Action par laquelle on tente ou essaye de faire réussir quelque chose.*” I have already referred to the definition of it given in the *Code Pénal*, art. 2.

<sup>1</sup> “80. Der Mord und der Versuch des Mordes, welche an dem Kaiser, an dem Eigenen Landesherrn oder während des Aufenthalts in einem Bundesstaate an dem Landesherrn dieses Staats verübt worden sind.

“81. Wer ausser den Fällen des a. 80 es unternimmt (1) einen Bundesfürsten zu tödten, gefangen zu nehmen, in Feindseligkeit zu liefern oder zur Regierung unfähig zu machen.”

<sup>2</sup> “82. Als ein unternemen durch welches das Verbrechen des Hochverraths vollendet wird, ist Jede Handlung Anzusehen, durch welche das Vorhaben unmittelbar zur Ausführung gebracht werden soll.”

of the constitution of 1848, which abolished the punishment of death, "en matière politique." <sup>1</sup> It seems that no precise definition of this general phrase has ever been given, though there are several crimes which are well recognised as falling within it. Amongst others all the crimes now to be referred to are regarded as political, though many of them are still described in the <sup>2</sup> Code as capital offences. In reference to them the meaning of the word "attentat," already referred to, must always be borne in mind. The offences then which correspond to treason by levying war, are <sup>3</sup> "L'attentat dont le but est soit de détruire ou de changer le gouvernement (ou l'ordre de successibilité au trône), soit d'exciter les citoyens ou habitants à s'armer contre l'autorité <sup>4</sup> impériale." <sup>5</sup> "L'attentat dont le but sera soit d'exciter la guerre civile en armant ou en portant les citoyens ou habitants à s'armer les uns contre les autres, soit de porter la dévastation, le massacre, et le pillage dans une ou plusieurs communes." <sup>6</sup> "Quiconque soit pour envahir des domaines, propriétés ou deniers publics, places, villes, forteresses, postes, magasins, arsenaux, ports, vaisseaux, ou bâtiments appartenant à l'état, soit pour piller ou partager les propriétés publiques ou nationales, ou celle d'une généralité de citoyens, soit enfin pour faire attaque ou résistance envers la force publique agissant contre les auteurs de ces crimes se sera mis à la tête de bandes armées, ou y aura exercé une fonction ou commandement quelconque." The last two offences are still on the face of the Code punishable by death.

As with us an intention or conspiracy to levy war is felony by the Act of 1848, so in France <sup>7</sup> "le complot ayant pour but," a forcible attempt to change the government is punished by transportation, if followed by an overt act, and by detention, if not. A proposal to enter into a conspiracy is punishable by imprisonment for from one to five years; <sup>8</sup> and this provision also applies to conspiracies and proposals to conspire to excite civil war.

There are various other offences short of high treason which

<sup>1</sup> Hélie, *Pratique Criminelle*, ii. pp. 20 and 23.

<sup>2</sup> *Codes et Lois Usuelles*, Roger and Sirey, 1879.

<sup>3</sup> Art. 3, s. 87.

<sup>4</sup> Obsolete.

<sup>5</sup> Art. 91.

<sup>6</sup> Art. 96.

<sup>7</sup> Art. 89.

<sup>8</sup> Art. 91.

CH. XXIII. partake more or less of the same nature as constituting offences against the sovereign personally, or tending to disturb the internal tranquillity of the state. No one of them can be said to have a distinct legal history of any special interest or importance. I will accordingly content myself with a short enumeration of them, referring to my *Digest* for the details of the offences. It will be better, on the present occasion, to notice them in the order of their dates than in the order of their importance or precise nature.

The only offence against the king personally, other than high treason, known to the common law, was that of <sup>1</sup>contempt, either of his person or of his authority. I have no doubt that if any such offence had taken place in early times, in a form gross enough to attract special attention, it would have been punished with cruel severity. Probably a blow given to the king's person would have been interpreted to be high treason. It would, at the very least, have been punished by mutilation, for a blow given to any one in the king's court or palace, or even in the court at Westminster in which he was supposed to be in some mystical way present in the person of the judges, was punished <sup>2</sup>by amputation of the right hand, and the discretionary power of the courts as to whipping and pillory would, no doubt, have been used to the utmost if an occasion had occurred to call for it.

It is remarkable that it did not become necessary to make specific statutory provision for personal insults to the sovereign till the reign of the most popular monarch who ever sat on the throne of this country had lasted for several years. In the early part of her Majesty's reign, two foolish boys, Oxford and Francis, fired pistols at the Queen, loaded or not.

One was, with cruel mercy, acquitted of high treason on

<sup>1</sup> *Digest*, p. 38, article 65.

<sup>2</sup> All the particulars of the execution are set forth with extreme minuteness in 33 Hen. 8, c. 12, ss. 10-18 inclusive, *s.g.* "S. 9. And the serjeant of the pantry . . . shall be also then and there ready to give bread to the party that shall have his hand so stricken off. . . . S. 18. And the master cook for the time being . . . shall also be then and there ready, and bring with him a dressing-knife, and shall deliver the same knife at the place of execution to the serjeant of the larder . . . who shall be also then and there ready, and hold upright the dressing-knife till execution be done."



the ground of insanity, and though unquestionably sane <sup>1</sup> was confined in criminal lunatic asylums for upwards of thirty years. The other was convicted and sentenced to death, but his sentence was commuted to transportation for life. Soon afterwards (in July 1842) <sup>2</sup> the Act 5 & 6 Vic. c. 51, was passed, which provides for such offences a maximum punishment of seven years' penal servitude and whipping. There have been several prosecutions under it.

<sup>3</sup> The Royal Marriage Act, passed in 1772, creates the only other offence relating to the royal family. <sup>4</sup> It was passed, as is well-known, on the occasion of the marriage of the Duke of Cumberland to Mrs. Horton, and the marriage of the Duke of Gloucester to Lady Waldegrave.

It was regarded at the time as a great stretch of power and as highly oppressive, and was the subject of <sup>5</sup> two protests by twenty-one peers.

Passing to isolated offences against the public peace in their historical order, the following offences may be noticed.

1. <sup>6</sup> Tumultuous petitioning. This offence was created by an act passed immediately after the Restoration, namely in 1661. The preamble recites that "it hath been found by sad experience that tumultuous and other disorderly soliciting and procuring of hands" for petitions on political matters "have been a great means of the late unhappy wars," and proceeds to define and punish the offence. <sup>7</sup> The act was not repealed by the Bill of Rights (as was once suggested), nor can it be regarded as altogether obsolete, though part of it, which in certain cases requires the assent of justices to a petition, is now never enforced.

2. The Riot Act (1 Geo. 1, st. 2. c. 5, A.D. 1714) and its

<sup>1</sup> This was, I think, the most severe punishment, with one exception, ever inflicted in England. The exception to which I refer is not a case of death by torture, or even Oates's case, which virtually was flogging to death, but the case of Bernardi, who was imprisoned in Newgate for a supposed share in the Assassination Plot for forty years, 1696-1736. See his case, 13 *State Trials*, 759-788.

<sup>2</sup> *Digest*, p. 88, art. 65.

<sup>3</sup> 12 Geo. 3, c. 11. See *Digest*, p. 39, art. 66.

<sup>4</sup> *Annual Register for 1772*, pp. 83-84.

<sup>5</sup> *Ib.* p. 232.

<sup>6</sup> *Digest*, p. 47, art. 81; 13 Chas. 2, c. 5.

<sup>7</sup> R. v. Lord George Gordon. 23 *State Trials*, 650.

CH. XXIII. relation to treason by levying war, I have already referred to. The part of it which related to beginning to demolish buildings was repealed by 7 & 8 Geo. 4, c. 27, and re-enacted by the 7 & 8 Geo. 4, c. 30, s. 8, which was itself repealed and re-enacted by 24 & 25 Vic. c. 97, s. 11, with some additions. Its wording is a good instance of the way in which statutes gain by re-enactment. The subjects of the offence under the enactment last mentioned are as follows :<sup>1</sup>

“ CHURCH, CHAPEL, MEETING-HOUSE, OR OTHER PLACE OF  
 “ DIVINE WORSHIP, dwelling-HOUSE, STABLE, coach-house, OUT-  
 “ HOUSE, warehouse, office, shop, mill, malt-house, hop-oast,  
 “ BARN, granary, *shed, hovel, or fold*, or any building or erec-  
 “ tion used *in farming land or in carrying on any trade or*  
 “ manufacture, or any manner thereof, *or any building other*  
 “ *than such as are in this section before mentioned, belonging to*  
 “ *the Queen, or to any county, riding, division, city, borough,*  
 “ *poor-law union, parish, or place, or belonging to any uni-*  
 “ *versity, or college, or hall of any university, or to any inn of*  
 “ *court, or devoted or dedicated to public use or ornament, or*  
 “ *erected or maintained by public subscription or contribution.*  
 “ or any machinery whether fixed or movable, prepared for  
 “ or employed in any manufacture or in any branch thereof,  
 “ or any steam-engine or other engine for sinking, working,  
 “ *ventilating*, or draining any mine, or any staith, building,  
 “ or erection used in conducting the business of any mine, or  
 “ any bridge, waggon-way, or tank for conveying minerals from  
 “ any mine.”

The act would not be materially altered by substituting for all this verbiage “ any building whatever, or any machinery “ whatever, or any erection, structure, or work used in or in “ connection with any mine ;” but there are differences of style in Acts of Parliament as in all other kinds of literary composition. The Riot Act constituted a number of new capital felonies, and the authors thought principally of the destruction of dissenting chapels, which was the particular evil which occasioned the Act. In 1827 the offences were

<sup>1</sup> The words in small capitals are those of the original Riot Act. The words in ordinary type are those of 7 & 8 Geo. 4, c. 30, s. 8. The words in italics are those which were introduced in 24 & 25 Vic. c. 97, s. 11.

still capital, and a definite enumeration of a number of particular things was therefore considered necessary. The <sup>1</sup> authors of the Act of 1861 were all educated under and accustomed to the style of drafting which prevailed from say 1810 to 1830, and though the punishment was diminished in severity, and the greatest discretion as to mitigating it left to the judges, it did not occur to them to extend the terms of the act by abridging and generalising its language. Finding it defective they altered it by adding an immense mass of new particulars, and so produced the unwieldy enactment now in force.

CH. XXIII.

3. A considerable number of offences against public tranquillity were created during the reign of George III. The first in point of time is setting fire to dockyards, public stores, &c., which was made felony without benefit of clergy, <sup>2</sup> by 12 Geo. 3, c. 24, in 1772. I am unable to say on what occasion the act was passed, but it was put in force some years afterwards, in the case of a person known as <sup>3</sup> Jack the Painter, who at the instigation, as he said, of some distinguished Americans, set fire to part of the dockyard at Portsmouth.

The rest of the offences which still remain reflect the experience of two periods, separated from each other by a considerable interval, at each of which great fears were entertained as to the peace of the country. The first was about the year 1797, the second about the year 1817.

In 1797, on the occasion of the mutiny at the Nore, was passed the <sup>4</sup> Act, punishing as a felony without benefit of clergy, the incitement of soldiers or sailors to mutiny. It was at first a temporary measure, intended to expire at the end of the first month of the then next session, but it was several times re-enacted, and <sup>5</sup> was in force till August 1, 1807, when it was suffered to expire, but it was revived and made perpetual in 1817 by 57 Geo. 3, c. 7. The offence is

<sup>1</sup> Amongst others, Lord Campbell, Sir Fitzroy Kelly, and especially Mr. Greaves. A curious essay might be written on the styles of drafting employed at different times.

<sup>2</sup> *Digest*, p. 298, art. 376.

<sup>3</sup> See his trial, 20 *St. Tr.* 1817.

<sup>4</sup> 37 Geo. 3, c. 70; *Digest*, p. 37, art. 63.

<sup>5</sup> See 41 Geo. 3, c. 29.

CR. XXIII. obviously one which requires the severest punishment, and the facts that it was so long unknown to the law, and that when it was thought of it was provided for by a temporary act, which after being in force for ten years was allowed to expire for ten more, are remarkable. <sup>1</sup> The act against administering unlawful oaths belongs to the same year, and appears from the <sup>2</sup> preamble to have been directed against offences of the same class. Indeed the first set of unlawful oaths, which it mentions are "oaths to engage in any mutinous or seditious purpose." It was not a temporary act, and the maximum punishment was seven years' transportation. It is singular that what appears to be the more general crime, and the one most likely to be committed, should have been treated as special and exceptional, and the more special and occasional offence as the one which required a permanent provision. In 1812, after an interval of fifteen years, the Unlawful Oaths Act of 1797 was followed by an <sup>3</sup> act of greater severity, punishing oaths to commit treason, murder, and other capital crimes.

In 1799 and 1817 <sup>4</sup> two acts were passed for the suppression of secret societies. The character of these acts, and the occasions of passing them, appear from the preamble. The preamble of the Act of 1799 is as follows: "Whereas a traitorous conspiracy has long been carried on in conjunction with the persons from time to time exercising the powers of government in France to overturn the laws, constitution, and government, and every existing establishment, civil and ecclesiastical, in Great Britain and Ireland, and to dissolve the connection between the two kingdoms so necessary to the security and prosperity of both; and whereas, in pursuance of the said design, and in order to carry the same into effect, divers societies have been of late years instituted in this kingdom and in the kingdom of Ireland, of a new and dangerous nature, inconsistent with public tranquillity and with the existence of regular government, particularly

<sup>1</sup> 37 Geo. 3, c. 128; *Digest*, p. 49, art. 84.

<sup>2</sup> "Whereas divers wicked and ill-disposed persons have of late attempted to seduce persons serving in his Majesty's forces by sea and land," &c.

<sup>3</sup> 52 Geo. 3, c. 104; *Digest*, p. 49, art. 83.

<sup>4</sup> 39 Geo. 3, c. 79; 57 Geo. 3, c. 19; *Digest*, pp. 51-54, articles 86-89, inclusive.

“ certain societies calling themselves societies of United  
 “ Englishmen, United Scotsmen, United Britons, United  
 “ Irishmen, and the London Corresponding Society, and  
 “ whereas the members of many such societies have taken  
 “ unlawful oaths and engagements of fidelity and secrecy,  
 “ and used secret signs, and appointed committees, secretaries,  
 “ and other officers in a secret manner, and many of such  
 “ societies are composed of different divisions, bands, or parts,  
 “ which communicate with each other by secretaries, dele-  
 “ gates, or otherwise, and by means thereof maintain an  
 “ influence over large bodies of men, and delude many igno-  
 “ rant and unwary persons into the commission of acts highly  
 “ criminal; and whereas it is expedient and necessary that all  
 “ such societies as aforesaid, and all societies of the like  
 “ nature, should be utterly suppressed and prohibited,” &c.  
 It then proceeds to make many provisions against societies,  
 the proceedings or officers of which are secret.

The Act of 1817 (57 Geo. 3, c. 19) was passed at a time  
 of great political excitement, partly in consequence of reports  
 issued by secret committees of each House of Parliament,  
 appointed in consequence of a message from the Prince Re-  
 gent. <sup>1</sup> Shortly before the Act was passed a meeting took  
 place in Spa Fields which led to the trial of Watson and  
 others for high treason. Shortly after it was passed occurred  
 the outbreak of the Luddites in Derbyshire and Notting-  
 hamshire which led to the trial of Brandreth and others  
 for high treason. The act contains a number of extremely  
 severe provisions for the suppression of seditious meetings,  
 and for other objects. Most of them have been repealed, some  
 however still continue to form a part of the criminal law.  
 S. 25 relates to unlawful societies. It is introduced by s. 24,  
 which is as follows: “ And whereas divers societies or clubs  
 “ have been instituted in the metropolis and in various parts  
 “ of this kingdom of a dangerous nature and tendency, incon-  
 “ sistent with the public tranquillity and the existence of the  
 “ established government, laws, and constitution of the king-  
 “ dom, and the members of many of such societies or clubs

<sup>1</sup> Martineau's *Thirty Years' Peace*, i. 129-141; for Watson's trial see 32 *State Trials*, 1; for Brandreth's, *ibid.* p. 755.

CH. XXIII. "have taken unlawful oaths and engagements of fidelity and  
 "secrecy, and have taken, or subscribed, or assented to illegal  
 "tests, and declarations, and many of the said societies or  
 "clubs elect, appoint, or employ committees, delegates,  
 "representatives, or missionaries of such societies and clubs  
 "to meet, confer, communicate, or correspond with other  
 "societies or clubs, or with delegates, representatives, or mis-  
 "sionaries of such other societies or clubs, and to induce and  
 "persuade other persons to become members thereof, and by  
 "such means maintain an influence over large bodies of men,  
 "and delude many ignorant and unwary persons into the com-  
 "mission of acts highly criminal; and whereas certain  
 "societies or clubs calling themselves Spenceans or Spencean  
 "Philanthropists, hold and profess for their object the con-  
 "fiscation and division of the land, and the extinction of the  
 "funded property of the kingdom; and whereas it is expedi-  
 "ent and necessary that all such clubs should be utterly  
 "suppressed and prohibited as unlawful combinations and  
 "confederacies," &c.

<sup>1</sup>The same act forbids political meetings within a mile of Westminster Hall when Parliament or the Courts of Law are sitting.

The last act of this period to be referred to, and the last which I need mention in relation to this subject is the <sup>2</sup>act which forbids unlawful drilling. It was passed under the impression which then prevailed, that unlawful drilling with a view to an insurrection was carried on at night in different parts of England, especially in the northern counties. In Bamford's *Memoirs of a Radical*, there is an account of the drilling which took place, and which, if he is to be believed, was a matter of little importance. Probably it was not in itself formidable; but as a way of keeping up excitement and disaffection, and of preparing the minds of large classes of people for insurrection, and accustoming them to the idea, it may have had more importance than he admits.

I have now concluded my account of the first class of political offences known to the law of England. The second

<sup>1</sup> S. 23, *Digest*, p. 47, art. 80.

<sup>2</sup> 60 Geo. 3, and 1 Geo. 4, c. 1, s. 1.

class, including the offence of seditious libels, words and conspiracies, will form the subject of the next chapter. CH. XXIII

The history of those to which I have already referred may be very shortly summed up.

High treason was an offence known to the law from the earliest times. The latitude which its indefinite character left to the judges being regarded as a grievance it was defined by the 25 Edw. 3. This definition was considered insufficient, and was supplemented at first by declarations of treason made in Parliament, and afterwards, especially during the reigns of Henry VIII. and his three children, by additional Acts of Parliament. Under the Stuarts the supplementary legislation on the subject was, to a great extent, suffered to expire, and till late in the reign of George III. no statutory addition was made to the list of treasons, except in a few instances soon after the Revolution of 1688. But the place of new legislation was taken by artificial extension of the old law. Early in the reign of Elizabeth the judges appear to have begun to extend the literal meaning of the statute of Edward III. by artificial constructions put upon its most important clauses. This process reached its height in the middle of the eighteenth century. In 1780 and 1794 trials took place which were popularly supposed to have shaken the authority of these constructions. They were confirmed in part, first by an act of 1795, and afterwards less fully by the Act of 1848. Such of the constructions as were not made treason by the Act of 1848 were made felony by that act, but without prejudice to the authority of the constructions.

Of the other political offences described, the oldest is the Riot Act, the earliest form of which goes back to 1714, and the rest are memorials of the violent political agitation which resulted in England, first from the first French Revolution, and afterwards from the discontent and suffering which, in consequence of the cessation of war expenditure, and the revival of questions connected with internal political and social changes followed the peace of 1815.

## CHAPTER XXIV.

SEDITIONOUS OFFENCES—SEDITIONOUS WORDS—LIBELS—  
CONSPIRACIES.

CH. XXIV. THE second class of offences against internal public tranquillity consists of offences not accompanied by or leading to open violence. They may be classified under the general head of seditious offences, and more particularly as seditious words, seditious libels, and seditious conspiracies. All these offences presuppose dissatisfaction with the existing government, and censure more or less express upon those by whom its authority is exercised, and the offences themselves consist in the display of this dissatisfaction in the various manners enumerated. As for sedition itself I do not think that any such offence is known to English law. It is, indeed, difficult to understand how a seditious purpose could be carried out otherwise than by one or more of the three methods enumerated.

The word "seditio" seems to have been more appropriately used in Latin to signify an actual riot than an act displaying a seditious intention.

<sup>1</sup>The articles from my *Digest* reprinted in the note state

"ART. 91. SEDITIONOUS WORDS AND LIBELS. Every one commits a misdemeanour who publishes verbally or otherwise any words or any document with a seditious intention. If the matter so published consists of words spoken, the offence is called the speaking of seditious words. If the matter so published is contained in anything capable of being a libel, the offence is called the publication of a seditious libel.

"ART. 92. SEDITIONOUS CONSPIRACY. Every one commits a misdemeanour who agrees with any other person or persons to do any act for the furtherance of any seditious intention common to both or all of them. Such an offence is called a seditious conspiracy.

"ART. 93. SEDITIONOUS INTENTION DEFINED. A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against



the present law on this subject as I understand it, and I may observe that these articles were adopted by the Criminal Code Commission almost *verbatim* in their Draft Code, in which they form section 102. In the report the Commissioners say that this section appears to them "to state accurately the existing law."

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Hardly any branch of the law has a longer or more interesting history than this. Two different views may be taken of the relation between rulers and their subjects. If the ruler is regarded as the superior of the subject, as being by the nature of his position presumably wise and good, the rightful ruler and guide of the whole population, it must necessarily follow that it is wrong to censure him openly, that even if he is mistaken his mistakes should be pointed out with the utmost respect, and that whether mistaken or not no censure should be cast upon him likely or designed to diminish his authority.

If on the other hand the ruler is regarded as the agent and servant, and the subject as the wise and good master who is obliged to delegate his power to the so-called ruler because being a multitude he cannot use it himself, it is obvious that this sentiment must be reversed. Every member of the public who censures the ruler for the time being exercises in his own person the right which belongs to the whole of which he forms a part. He is finding fault with

" the person of Her Majesty, her heirs and successors, or the Government and  
 " Constitution of the United Kingdom, as by law established, or either House  
 " of Parliament, or the administration of justice, or to excite Her Majesty's  
 " subjects to attempt otherwise than by lawful means the alteration of any  
 " matter in Church or State by law established, or to raise discontent or dis-  
 " affection amongst Her Majesty's subjects, or to promote feelings of ill-will and  
 " hostility between different classes of Her Majesty's subjects.

" An intention to show that Her Majesty has been misled or mistaken in her  
 " measures, or to point out errors or defects in the Government or Constitution  
 " as by law established, with a view to their reformation, or to excite Her  
 " Majesty's subjects to attempt by lawful means the alteration of any matter  
 " in Church or State by law established, or to point out, in order to their re-  
 " moval, matters which are producing or have a tendency to produce feelings  
 " of hatred and ill-will between different classes of Her Majesty's subjects  
 " is not a seditious intention.

" ART. 94. PRESUMPTION AS TO INTENTION. In determining whether the  
 " intention with which any words were spoken, any document was published,  
 " or any agreement was made, was or was not seditious, every person must be  
 " deemed to intend the consequences which would naturally follow from his  
 " conduct at the time and under the circumstances in which he so conducted  
 " himself."

CH. XXIV. his servant. If others think differently they can take the other side of the dispute, and the utmost that can happen is that the servant will be dismissed and another put in his place, or perhaps that the arrangements of the household will be modified. To those who hold this view fully and carry it out to all its consequences there can be no such offence as sedition. There may indeed be breaches of the peace which may destroy or endanger life, limb, or property, and there may be incitements to such offences, but no imaginable censure of the government, short of a censure which has an immediate tendency to produce such a breach of the peace, ought to be regarded as criminal.

These are the extreme views, each of which has had a considerable share in moulding the law of England with the practical result of producing the compromise which I have tried to express in the articles of my *Digest*. It has no claim to that quasi-mathematical precision which even in the most careful legal writings is rarely, if ever, attainable, but I think it is sufficiently distinct to afford a practical guide to judges and juries in the discharge of duties which are now seldom imposed upon them.

I will now attempt to sketch the history of the various legal controversies which have for the present ended in this compromise. The interest of the history lies in the gradual character of the process by which with hardly any legislative interference the law was modified in the course of a long series of years by the changes which took place in public sentiment on the matter [to which it relates.

The main stages in the history are as follows. Under the Plantagenets the law of libel was comparatively unimportant, though the offence of libel defined in the most general terms as a defamatory writing was known to the law. Under the Tudors and Charles I. the law of libel became highly important and prominent. The definition of the offence was stringent though vague, and the law was administered by the Star Chamber, which decided both the law and the fact. During the latter part of the seventeenth century and into the eighteenth the Court of King's Bench adopted

the doctrines of the Court of Star Chamber, but as the mode of trial was by jury efforts were made by very distinguished advocates—and especially towards the end of the century by Erskine—to get juries to adopt for practical purposes a definition of the offence of libel different from the one acted upon in earlier times. This caused the famous controversy finally ended by Fox's Libel Act, passed in 1792. The successors of Lord Mansfield and Mr. Justice Buller never gave up the view of the law which their predecessors had adopted, though they modified the practice in obedience to the directions of the Libel Act, but the change of public sentiment as to the free discussion of political affairs has practically rendered the law as to political libels unimportant, inasmuch as it has practically restricted prosecutions for libel to cases in which a libel amounts either to a direct incitement to crime, or to false imputations upon an individual, of disgraceful conduct in relation to either public or private affairs. This history I now propose to relate in detail.

The offence of libel is mentioned by Bracton in the most cursory manner. In a <sup>1</sup>general enumeration of crimes and punishments near the beginning of the book *De Corona*, he observes, <sup>2</sup>“facta puniuntur, ut furta, homicidia, scripta “ut falsa et libelli famosi.” In his chapter on misdemeanours “minora et leviora crimina” he <sup>3</sup>observes “fit autem injuria “non solum cum quis pugno percussus fuerit verberatus “vel fustibus cæsus, verum cum ei convitium dictum fuerit, “vel de eo carmen famosum vel hujusmodi.” The next definite instance I have found of any law relating to a quasi-seditious offence is a provision of the Statute of Westminster the First, 3 Edw. I, c. 34 (1275). It is as follows: “Forasmuch as “there have been oftentimes found in the country [devisers] “of tales whereby discord or occasion of discord has many “times arisen between the king and his people or great men “of this realm, for the damage that hath and may therefore

<sup>1</sup> Lib. iii. chaps. v. and vi. vol. ii. pp. 150-160.

<sup>2</sup> P. 154. Sir H. Twiss, by a slip of the pen, translates “writings such “as false and infamous libels.” It means “forgeries and defamatory “libels.”

<sup>3</sup> P. 544.

CH. XXIV. "ensue, it is commanded that from henceforth none be so  
 "hardy to cite or publish any false news or tales whereby  
 "discord or occasion of discord or slander may grow between  
 "the king and his people or the great men of the realm;  
 "and he that doth so shall be taken and kept in prison until  
 "he hath brought him into the court which was the first  
 "author of the tale." I can say nothing as to the way in  
 which this enactment may have been used.

<sup>1</sup> Coke mentions "two notable records," one of 10 Edw. 3, (1337), in which Adam de Ravensworth was convicted on an indictment for calling Richard of Snowshall "Roy de Ravens;" the other of 18 Edw. 3 (1345), in which John de Northampton, an attorney, wrote a letter to Ferrers, one of the King's Council, saying that neither the judges of the Court of King's Bench nor their clerks "any great thing would do by the commandment of our lord the king, nor of Queen Philip (Philippa) in that place more than of any other of the realm." The mention as notable of these two cases which seem in no other way notable, looks as if they were the only cases of libel which Coke had met with in his study of the records.

Be this as it may, there is no reason to doubt that practically libels attracted comparatively little attention till the Court of Star Chamber was at the height of its power, by which time the invention of printing, and the great intellectual movement of which it was one symptom, had given an importance to political writings which they did not possess before. It must, however, be remembered that for a long time the offences which were afterwards treated as seditious libels were dealt with in a different manner and with much greater severity, for though words were not regarded as an overt act of treason by themselves, <sup>2</sup> writings were, if they were considered to display a treasonable intention, so that what would now be regarded at most as libels may in earlier times have been punished as treason.

But apart from this the great subjects of discussion in all ages are religion and politics. From the latter part of the reign of Edward III., when the Lollards came into notice, to

<sup>1</sup> *Third Institute*, 174.

<sup>2</sup> *Ib.* 14; 1 Hale, *P. C.* 112.

the Reformation—a period of about 150 years,—and especially after the statutes of Henry IV. and Henry V., writings upon religious subjects which were regarded as objectionable could be dealt with as heresy or as some minor ecclesiastical offence. Under Henry VIII., Edward VI., Mary, and Elizabeth, any discussion in a sense hostile to the government for the time being of political questions of real importance would be likely to bring the disputant within one of the <sup>1</sup>many statutes by which new treasons and felonies were from time to time created.

I may refer by way of illustration to a single instance of the sort, the details of which have been preserved by an account written by the offender <sup>2</sup>Udall. Udall was a Puritan who was reputed to be, and probably was, the author of the work called *Martin Marprelate*. He was examined as to his authorship before the Privy Council in 1589, and was afterwards tried at Croydon under 23 Eliz. c. 2 (1581) for felony in writing the book. This statute enacted, amongst other things, that it should be felony to “devise, write, print, or set forth any book, &c., “to the defamation of the queen or the stirring or moving of “any rebellion.” The evidence given against Udall was, according to his own account, entirely that of depositions, and much of the matter deposed to was hearsay. There is, however, little doubt that he wrote the book, for he was pressed to say whether he did or not, and was offered an acquittal if he would deny it. He refused to answer, on the ground that his denial of it would be a step towards the discovery of the true author—an obvious evasion. He justified the contents of the book, however, with some exceptions as to its style, and declared that it did not come within the act, as it was written without any malicious intent, and attacked, not the queen, but the bishops. The judge, according to Udall, said first: <sup>3</sup>“You of the jury have not to inquire whether he be guilty “of the felony, but whether he be the author of the book, “for it is already set down by the judgment of all the judges

<sup>1</sup> See the account given above of the statutes creating treasons. There were others which created analogous felonies.

<sup>2</sup> *1 State Trials*, 1271.

<sup>3</sup> *Ib.* 1283.

CH. XXIV. " in the land that whosoever was author of that book was " guilty by the statute of felony." He <sup>1</sup> afterwards said: " I " will prove this book to be against her Majesty's person; for " her Majesty, being the supreme governor of all persons and " causes in these her dominions, hath established this kind of " government in the hands of bishops which thou and thy " fellows so strive against; and they being set in authority " for the exercising of this government by her Majesty, thou " dost not strive against them, but her Majesty's person, " seeing they cannot alter the government which the queen " hath laid upon them." The jury found him guilty of felony, but not (if his account is correct) without repeated admonitions from the judge that they had nothing to do with any question except the publication of the book, the judges having decided on its guilt. <sup>2</sup> A Mr. Fuller (who he was does not appear; probably an officer of the court) said: " You are to find " him author of the book, and also guilty of a malicious " intent in making it." Mr. Fuller was reprov'd for speaking by <sup>3</sup> Dalton, counsel for the Crown.

We see in this case the germs of controversies which afterwards became highly important.

Side by side with prosecutions of this kind under special statutes, there were in progress the prosecutions before the Star Chamber of which I have already given specimens. It was upon these that Sir E. Coke founded his report of the case *de famosis libellis*. The cases relating to libel in Coke's *Reports* are: the case <sup>4</sup> *de famosis libellis*, and <sup>5</sup> Lamb's case. These are the earliest authorities upon the law of libel of any importance, and even in Coke it would be difficult to find anything less satisfactory. Neither attempts to define a libel. The case *de libellis famosis* lays down the following points. It distinguishes libels made against a private person, and libels made against magistrates or public persons. In reference to libels against public persons it says: " If it be against a magis- " trate or other public person it is a greater offence " (than if

<sup>1</sup> 1 *State Trials*, 1286.

<sup>2</sup> *Ib.* 1289.

<sup>3</sup> Probably the author of Dalton's *Justice*.

<sup>4</sup> Part v. fol. 125, or vol. iii. p. 254.

<sup>5</sup> Part ix. fol. 69, or vol. iv. p. 108.

against a private person) "for it concerns not only the breach  
 " of the peace, but also the scandal of government: for what  
 " greater scandal of government can there be than to have cor-  
 " rupt or wicked magistrates to be appointed and constituted  
 " by the king to govern his subjects under him? and greater  
 " imputation to the State cannot be than to suffer such corrupt  
 " men to sit in the sacred seat of justice, or to have any  
 " meddling in or concerning the administration of justice."  
 It is said that libels against the dead are punishable (which  
 has never been acted upon), that a libeller may be punished  
 by indictment at common law or "*ore tenus* on his confession  
 " in the Star Chamber" by fine and imprisonment, and "if  
 " the case be exorbitant by pillory and loss of ears." It adds,  
 that "it is not material whether the libel be true or whether  
 " the party against whom it is made be of good or ill fame,  
 " for in a settled state of government the party grieved ought  
 " to complain for every injury done him in an ordinary course  
 " of law, and not by any means to revenge himself either by  
 " the odious course of libelling or otherwise." It mentions  
 various forms of libel, as writings, emblems, and pictures, and  
 it says that when a man finds a private libel he should either  
 burn it or give it to a magistrate, and when he finds a public  
 libel give it to a magistrate that the author may be discovered.  
 Lamb's case decides that "every one who shall be convicted  
 " ought to be a contriver, procurer, or publisher of it knowing  
 " it to be a libel."

The inference from all this seems to be that Coke's idea of  
 a libel was, speaking generally, written blame, true or false,  
 of any man public or private, the blame of public men being  
 a more serious matter than the blame of a private man.

A passage in Hudson's treatise on the Star Chamber con-  
 tains a remarkable commentary upon these cases. After  
 noticing some other offences of which the Court took  
 cognizance, he comes to libel. <sup>1</sup> "In all ages libels have been  
 " severely punished in this court, but most especially they  
 " began to be frequent about 42 & 43 Elizabeth" (1600) "when  
 " Sir Edward Coke was her attorney-general. But it must  
 " not be understood of libels which touch the alteration of

<sup>1</sup> Hudson, pp. 100-104.

CH. XXIV. "government" (I suppose he means that they were dealt with under special acts as treason or felony) "as—

"The Cat, the Rat, and Lovell the Dog,  
"Rule all England under a hog ;"

"or the work of <sup>1</sup> Mr. Williams of the Temple not long since executed at Charing Cross; but libels against the king's person and nobles have been here examined. So was that in 7 Hen. 8" (1515), "at which time for the discovery of the hand the books of all the tradesmen in London were to be viewed with two aldermen and a knight appointed by the council to confer the hands and manner of writing at the Guildhall, whither they were brought sealed for that purpose only, and this done for the discovery of the author."

Hudson then proceeds to refer to a number of cases which show that the law of libel administered by the Court of Star Chamber was by no means confined "to libels against the king's person and nobles." "For scandalous letters the precedents are infinite. One of the first sent to the person himself was Lloide, register of the Bishop of St. Asaph, against Peter Breveston, clerk, sentenced M. 2 Jac." (1604), "and yet the defendant would have undertaken to have proved the contents of the letter to have been true, he thereby charging him with bribery and extortion in his place. There was Sir William Hale's case against Ellis, a scoffing letter, and severely punished. A scurrilous letter from one mean man to another was M. 12 Jac." (1615) "sentenced at the suit of Barrows v. Snelling, and the cause only sent to the party himself. Nay, Naton Roper 1 Jac.

<sup>1</sup> He was executed in 1619 for writing two books called "*Balaam's Ass*, and *Speculum Regale*, "in which he took upon himself the office of a prophet, and affirms that the king which now is will die in the year 1621, which opinion was founded on the prophecy of Daniel, where that prophet speaks of a time, and times, and half a time. . . . And he also says this land is the abomination of desolation mentioned in Daniel, and that it is full fraught with desolation, and that it is an habitation of devils, and the anti-mark of Christ's church." "All the court clearly agreed he was guilty of high treason at common law, for these words import the end and destruction of the king and his realm," although "he inclosed his book in a box sealed up, and so secretly conveyed it to the king, and never published it."—2 *State Trials*, 1685-6, quoting from 2 Rolle, 88. Poor Williams!



“ was sentenced for writing a scoffing letter by one rival to another.” CH. XXIV.

He adds, “ There are two gross errors crept into the world concerning libels. 1. That it is no libel if the party put his hand unto it, and the other that it is not a libel if it be true ; both which have been long since expelled out of this court.” The reason given why both of these opinions are erroneous is that libels are punished “ for that they intend to raise a breach of the peace.” Hudson adds this curious remark. “ I could spend much time in the discourse of the libels of these days, but Sir Edward Coke hath shortly and pithily set down the diversities, who (I think) in his time was as well exercised in that case, as all the attorneys that ever were before him.”

In the early part of the seventeenth century prosecutions for seditious words were as common as prosecutions for libels, and sometimes even more important. I will refer only to two, one of which was memorable in the general history of the country.

In 1629, on the dissolution of Charles I.'s third parliament, <sup>1</sup> Sir John Elliot, Denzil Holles, and Benjamin Valentine were prosecuted on a criminal information for seditious speeches in Parliament. <sup>2</sup>The information charged not only words spoken with a seditious intention but also a seditious conspiracy to disturb Parliament. The defendants were convicted and Elliot was fined and imprisoned, but the conviction was quashed on

<sup>1</sup> See proceedings against them in 3 *State Trials*, 293-336.

<sup>2</sup> The language of the information is a strange composition. Parts of it are as follows:—“ Quod prefatus J. E. machinans et intendens omnibus viis et modis quibus poterit discord. malevolenc. murmuraciones et seditiones tam int. pred. dom. regem et magnat. prelatos proceres et justic. suos hujus regni quam. int. pred. magnat. prelat. proceres et justiciar. dicti dom. regis et reliquos subdit. suos seminare et excitare et regimen et gubernation. hujus regni Angl. tam in pred. dom. rege quam in consiliar. et majest. suis cujuscumque generis totalit. deprivare et enervare et tumult. et confusion. in omnibus statibus et partibus hujus regni Angl. introducere . . . hæc falsa ficta malitiosa et scandalosa verba Anglicana alta voce dixit et populavit. videlicet ‘The king’s Privy Council, all his judges, and his counsel learned, have conspired together to trample under their feet the liberty of the subjects of this realm and the privileges of this house.’”

In another count the information charges that “ J. E., B. V., et D. H. eodem secundo die Martii anno quarto supradict. apud West. pred. maliciose agreever. et inter eos conspiraver. ad disturband. milites cives et burgens. de pred. domo commun. parliament. in eadem domo apud Westm. pred. ad tunc et ibidem assemblat.”

a writ of error brought by Lord Hollis in 1668. The case is a leading authority for the proposition that the courts of common law have no jurisdiction over offences committed in Parliament by members of Parliament in their character as members.<sup>1</sup>

The other case to be mentioned is deserving of notice as it established a rule which has never since been doubted, and which was in those days creditable to the judges who established it. This was <sup>2</sup>Pine's case. Pine had spoken disrespectfully of Charles I., saying that he was "as unwise a king as ever was, and so governed as never king was, for he is carried as a man would carry a child with an apple. Also, before God he is no more fit to be king than Hickwright" (Pine's shepherd). The judges being according to the fashion of the time consulted beforehand had before them twenty-one cases, from the time of Henry VI. downwards, of prosecutions for words and unpublished writings, "upon consideration of all which precedents and of the statutes of treason it was resolved by <sup>3</sup>fourteen judges, and so certified to His Majesty, that the speaking of the words before mentioned, though they were as wicked as might be, was not treason. For they resolved that unless it were by some particular statute no words will be treason." . . . "The words spoken here can be but evidence to discover the corrupt heart of him that spake them; but of themselves they are not treason, neither can any indictment be passed upon them." Probably the last expression means no indictment for treason. They would have been punishable at that time not only in the Star Chamber, but as a contempt against the king at common law.

I have already, for another purpose, given instances of the extreme severity of the Star Chamber proceedings in respect

<sup>1</sup> Upon this point see the case of Sir W. Williams (13 *State Trials*, 1369). He as Speaker published by order of the House of Commons Dangerfield's narrative, which contained many reflections on the Duke of York of a gross nature. He was convicted and fined £10,000. Several attempts were made to get the judgment reversed in the reign of William III., but they all failed. The whole subject is discussed in *Stockdale v. Hansard*, 9 A. & E. 1.

<sup>2</sup> 3 *State Trials*, 359.

<sup>3</sup> At that time there were four puisne judges of the Court of Common Pleas, and four barons of the exchequer, besides the chief baron.

of libels and words regarded as seditious, and in particular I have noticed the two prosecutions of Prynne, one of which was also directed against Bastwick and Burton. There were many others, to which it is needless to refer more particularly. It ought, however, to be observed, as a point of considerable importance in the history of the law of libel, that in the Star Chamber it was impossible for any question to arise as to the respective provinces of the court and the jury, as the court decided the whole matter without the assistance of a jury. The importance of this will appear when I come to describe the cases decided in the eighteenth century.

In connection with this subject it is necessary to notice shortly the law relating to the licensing of books. Printing did not become at all general in England before the middle of the sixteenth century. <sup>1</sup>The Stationers' Company was established by a charter of Philip and Mary, the declared object of the Crown being to prevent the propagation of the Reformed religion. "About this time there are several " decrees and ordinances of the Star Chamber regulating the " manner of printing, the number of presses throughout " the kingdom, and prohibiting all printing against the force " and meaning of any of the statutes or laws of the realm. " Until the year 1640 the Crown, through the instrumentality " of the Star Chamber, exercised this restrictive jurisdiction " without limit, enforcing by the summary powers of search, " confiscation, and imprisonment, its decrees, without the " least obstruction from Westminster Hall or the Parliament " in any instance." The powers of the Star Chamber and its ordinances came to an end on its abolition in 1640, and the system of licensing books was introduced by an ordinance of the Long Parliament, against which Milton wrote the *Areopagitica* in 1644. In 1662 the system was continued by the Licensing Act, 13 & 14 Chas. 2, c. 33, which forbade all printing without license, and gave power to the king and secretaries of state to search all houses and shops where they suspected unlicensed books to be printed, and to seize them. This act was enacted at first for two years, but it was continued by 16 Chas. 2, c. 8, by 1 Jas. 2, c. 17, s. 15 (1685), and again, in 1692,

<sup>1</sup> Copinger on *Copyright*, pp. 11-13.

CH. XXIV. by 4 & 5 Will. & Mary, c. 24, s. 14, which continued it for a year, and thence to the end of the next session. It expired finally in 1694. Apart from the provisions relating to licensing, the first section enacts that "no person shall presume to print, &c., any heretical, seditious, schismatical, or offensive books or pamphlets wherein any doctrine or opinion shall be asserted or maintained which is contrary to the Christian faith, or the doctrine or discipline of the Church of England, or which shall or may tend or be to the scandal of religion, or the Church, or the government or governors of the Church, State, or Commonwealth, or of any corporation or particular person or persons whatsoever," or import any such work, or publish, sell, or disperse it, or cause it to be bound or stitched. The effect of this was to make all such acts misdemeanours, and this gave to the law of libel an extent which it never had at any other period except perhaps under the Star Chamber.

However, both under the Commonwealth and under Charles II. the details of the law of libel were less likely to be made the subject of discussion or judicial decision than they afterwards came to be. In the first place, special laws were in force which exposed political libellers to the chance of a prosecution for treason, as appeared in the cases of John Lilburne under the Commonwealth, and Twyn the printer, FitzHarris, and others under Charles II. Moreover, the system of licensing books must have made it difficult for any one to publish a pamphlet which was objectionable to the Government unless he was prepared to take the risk of doing it secretly, the effect of which was to bring him at once into conflict with the law. Until the right to publish without a license is conceded, the question of the limits of the right cannot be discussed. Moreover, all difficulty is likely to be removed by the bitterness which is natural to unlicensed publications and the tameness enforced upon licensed ones. Abundant proof, however, remains that in the reigns of Charles II. and James II. the prosecutions for libel were at once common and highly important, and the punishments cruelly severe.

Though the trials for libel during this period reported in

the *State Trials* are <sup>1</sup> not numerous, they are characteristic as showing how the law was administered. The most important of them in a legal point of view are the trial of <sup>2</sup> Carr for publishing a paper called *The Weekly Packet of Advice from Rome*. The passage for which he was indicted said: "There is lately found out by an experienced physician an incomparable medicine" (gold—described with some little wit as a medicine). It is said, amongst other things, that "it will make justice deaf as well as blind," and "stifles a plot as certainly as the itch is destroyed by butter and brimstone." These passages no doubt imputed corruption to Scroggs. After evidence had been given of Carr's being the author, on which his counsel (Sir F. Winnington) addressed the jury, Winnington added—to the court: <sup>3</sup> "The information says 'false, illicite, et maliciose.' I know there are things that do imply malice in themselves. Truly, my lord, I am upon a tender point, and know not how to express myself. I say, supposing it should fall out that this man wrote this book, and he might have some little extravagances in his head in writing, whether this man did it maliciously to scandalise the Government, as this information says, is a question. Truly, my lord, there is many an indiscreet act a man may be guilty of that cannot be called a malicious act." This I suppose means to suggest, as delicately as might be, that Carr was only chuckling over rumours he had heard of Scroggs's corruption, without seriously imputing to him that offence—an act which Winnington hints might be indiscreet without being malicious.

In summing up, Chief Justice Scroggs said upon this: "As for those words *illicite, maliciose*, I must recite what Mr. Recorder" (Jeffreys) "told you of at first, what all the judges of England have declared under their hands. The words, I remember, are these. When by the king's command we were to give in our opinion what was to be done in point of the regulation of the press, we did all

<sup>1</sup> Several of them are curious, historically and otherwise. See e.g. Mrs. Cellier's case in 1680, 7 *State Trials*, 1183.

<sup>2</sup> *Ib.* 1114.

<sup>3</sup> *Ib.* 1122.

CH. XXIV. "subscribe that to print or publish any newspapers or  
 "pamphlets of news whatsoever is illegal; that it is a  
 "manifest intent to the breach of the peace, and they may  
 "be proceeded against by law for an illegal thing. Suppose  
 "now that this thing is not scandalous, what then? If there  
 "had been no reflection in this book at all, yet it is *illicite*  
 "and the author ought to be convicted for it. And that is  
 "for a public notice to all people, and especially printers and  
 "booksellers, that they ought to print no book or pamphlet  
 "of news whatsoever without authority. So as he is to be  
 "convicted for it as a thing *illicite* done, not having autho-  
 "rity." . . . "Therefore this book, if it be made by him to  
 "be published, it is unlawful whether it be malicious or not."  
 ". . . "If you find him guilty and say what he is guilty of,  
 "we will judge whether the thing imports malice or no. Sir  
 "Francis Winnington hath told you there are some things  
 "that do not necessarily imply malice in them. If this  
 "thing doth not imply it then the judges will go according  
 "to sentence; <sup>1</sup> if it doth—so that it concerns you not one  
 "farthing whether malicious or not malicious, that is plain."  
 In the <sup>2</sup> case of Benjamin Harris, tried in the same year, the  
 same judge made the same statement as to the opinion given  
 by the judges. I have no doubt that the opinion was actu-  
 ally given, and it is remarkable, considering what we should  
 regard as its overwhelming importance, that it should have  
 passed with so little notice or disapprobation. <sup>3</sup> In the year  
 in which these trials took place proceedings were instituted  
 in Parliament against Scroggs, and a committee was appointed  
 "to examine the proceedings of the judges in Westminster  
 "Hall." Their <sup>4</sup> report gives many instances of judicial  
 misconduct, and in particular censures Scroggs and the other  
 judges of the King's Bench for having made an <sup>5</sup> order in the  
 case of Carr, and before his conviction, for the suppression of

<sup>1</sup> These words are unmeaning, or at least incomplete.

<sup>2</sup> 7 *State Trials*, 927.

<sup>3</sup> See these proceedings in the report of the committee and the articles of  
 impeachment in 8 *State Trials*, 174-224.

<sup>4</sup> P. 184, &c.

<sup>5</sup> "Ordinatum est quod liber intitulat, *The Weekly Packet of Advice from  
 Rome*, non ulterius imprimatur vel publicetur per aliquam personam  
 "quamcunque."—P. 187.

the *Weekly Packet*. The House of Commons voted this "most illegal and arbitrary," and made his conduct in respect of it the subject of the third article of his impeachment. The committee enumerate many arbitrary proceedings on the part of Scroggs and his brethren, and in particular<sup>1</sup> report that "a very great latitude had been taken of late by the "judges" in the matter of punishments, showing great severity in some instances and undue lenity in others. Nothing, however, is said of the opinion expressed by the judges above referred to. This is most remarkable, for if Scroggs had falsely made the statement that such an opinion was given, he would have been guilty of an offence which could neither be denied nor palliated, and if the opinion itself had been at that time regarded as an act of subserviency to the king and of tyranny as against the people at large, it would have formed a natural subject for impeachment, or at all events for<sup>2</sup> proceedings like those taken in 1640 against the judges who had given extra-judicial opinions in favour of ship-money.

These reasons seem to me to go far to show that monstrous as the opinion of the judges appears to us, it may not have appeared so when it was delivered.

The great frequency of prosecutions for political libels and seditious words at this time, appears not only from passages in the report of the Parliamentary Committee referred to above, but from a<sup>3</sup> passage in Luttrell's *Diary* for the year 1684, which enumerates sixteen trials for those offences between April 30 and November 28 in that year.

Their extravagant cruelty is illustrated by several cases reported in the *State Trials*, in each of which the doctrine that the court and not the jury are to determine the character of the matter published is asserted and acted upon in the most uncompromising way. The first of these is the case of<sup>4</sup> Sir Samuel Barnardiston, who was tried for seditious libel in writing his friend, Sir Philip Skippon, four private letters containing the rumours of the day. He expressed opinions

<sup>1</sup> Pp. 187-190.

<sup>2</sup> 3 *State Trials*, 1300, &c.

<sup>3</sup> Printed at 10 *Ib.* 125-129.

<sup>4</sup> 9 *Ib.* 1334.

CH. XXIV

favourable to Russell and Sydney, and said (*inter alia*) that "the Papists and high Tories are quite down in the mouth," and that "Sir George" (Jeffreys) "is grown very humble." He also repeated various rumours then current to the effect that a turn in affairs favourable to the Whigs had taken place. Jeffreys (in whom it was gross indecency to try the case, as he was himself supposed to be libelled) scouted the notion that there was any necessity to show that the letters were written with a seditious intent, and that there was or could be any doubt that the act in itself was seditious, and he <sup>1</sup>directed the jury to that effect. The question whether there was any evidence of malice was afterwards argued on a motion in arrest of judgment, and the court <sup>2</sup>affirmed in the most unqualified way the law which Jeffreys laid down at the trial. Finally the defendant was sentenced to pay the monstrous fine of £10,000 for the mere expression of political opinions to a private friend in a private letter. Another case was that of Richard <sup>3</sup>Baxter, who was fined £500 for certain passages in his paraphrase of the New Testament which were said to refer to the bishops of the Church of England and their persecutions of the Nonconformists. The behaviour of Jeffreys on this trial was, if it is correctly reported, as to which there may be a doubt, as infamous as his behaviour to Lady Lisle. It is impossible to exaggerate its brutality and ferocity. It must however, I think, be admitted that Baxter's reflections were intended for the then bishops of the Church of England, and not, as his counsel contended, for the persecutors of other ages and countries; and it must also be said that they were neither unnatural nor altogether unjust at the time. Baxter's own conduct and that of his counsel in trying to give them a meaning which they did not bear, seems to me disingenuous and timid, and this to some extent shakes my confidence in the correctness of the report of Jeffreys' behaviour. A brutal, cruel, grossly unjust judge is hardly likely to be treated with scrupulous justice by bitter partisans of a theological

<sup>1</sup> 9 *State Trials*, 1551-1552.

<sup>2</sup> *Ib.* 1366.

<sup>3</sup> 11 *Ib.* 493.



writer who himself was not acting quite up to his own standard. CH. XXIV.

The last of these cases is that of <sup>1</sup>Samuel Johnson. He was sentenced to be fined 500 marks, to be thrice pilloried, and to be whipped from Newgate to Tyburn for two libels: one "An humble and hearty address to all the English Protestants in the present army," calling upon them not to assist Papists illegally enlisted and commissioned, in tyrannising over Protestants. The other asserted "that resistance may be used in case our religion and rights should be invaded." The sentence was cruel in any view of the case, but the address was practically a direct incitement to mutiny, though, on the other hand, there was much force in what Johnson urged as to the illegality of assembling an army partly composed of Roman Catholics, and he was certainly right in saying that the commissions of Roman Catholic officers were illegal and void. His libel, in short, was in the nature of an act of hostility against acts of power on the king's part, some of which were clearly illegal. In this, as in the other cases, <sup>2</sup>the rule was laid down that the jury ought not to consider whether the libel was seditious, but to determine only whether or not it was written or published by the prisoner.

Of the <sup>3</sup>trial of the seven bishops for libel, in 1688, I have already spoken. It seems to me, for the reasons already given, impossible to appeal to it as a precedent for any legal proposition whatever. The judges contradicted each other, and the whole proceeding was coloured by passionate political excitement. It ought, however, to be remarked, whatever may be the legal inference, if any, that as a fact the whole matter, including the character of the matter published, was left to the jury. The alleged libel consisted in the suggestion made by the bishops that the king's declaration was illegal, because it was founded upon a dispensing power which did not exist. The defence in great part was, that in fact the dispensing power did not exist, and in proof

<sup>1</sup> 11 *State Trials*, 1389.

<sup>2</sup> *Ib.* 1349-1350.

<sup>3</sup> 12 *Ib.* 183-521.

CH. XXIV. of this many records were put in evidence. <sup>1</sup> Some of these being in Latin and Norman French, an interpreter was sworn to read them into English for the benefit of the jury. This was after Sir R. Sawyer had said: "Mr. Attorney has been pleased to charge in his information that this is a false, malicious, and seditious libel: both the falsity of it and that it was malicious and seditious are all matters of fact which, with submission, they have offered the jury no proof of, and I make no question but easily to demonstrate quite the contrary." The question whether or not the king had a dispensing power was clearly a question of law and not of fact, nevertheless the records were allowed to go to the jury as evidence that the law was as the bishops said it was. This carries the powers of the jury even further than they would be carried in the present day.

For many years after the Revolution of 1688 the law as to seditious offences received little addition or development by judicial decisions. A full history of its development from the Revolution to 1783 is given by Lord Mansfield in his judgment in the Dean of St. Asaph's case. I shall take it as my guide, giving, however, somewhat more fully the descriptions of the trials to which Lord Mansfield refers in a summary way. It begins thus: "We know there were many trials for libels in the reign of King William. There is no trace that I know of of any report that at all bears upon the question" (of the powers of juries) "during that reign but the case of *R. v. Bere*, which is in Salkeld: that was in the reign of King William, and the only thing there applicable to the present question is that the writing complained of must be set out *according to the tenour*. Why? That the court may judge of the very words themselves; whereas if it was to be *according to the effect* that judgment must be left to the jury." . . . "During the reign of Queen Anne we know several trials were had

<sup>1</sup> 12 *State Trials*, 374-375. "L. C.-J.: Read it in English for the jury to understand it. (Then Mr. Halstead was sworn to interpret the Record into English.)" In *R. v. Burdett* (4 B. & A. 181) Abbott, C.-J., refers to this, saying that "The evidence was addressed to the court rather than to the jury," but I think this is not accurate, at least if the report in the *State Trials* is correct.

<sup>2</sup> 21 *State Trials*, 1036-1038.

“ for libels, but the only one cited is in the year 1704, and  
 “ there the direction (though Lord Holt, who is said to have  
 “ done it in several cases, goes into the enormity of the libel)  
 “ to the jury was, if you find the publication in London you  
 “ must find the prisoner guilty. Thus it stands as to all  
 “ that can be found precisely and particularly in the reigns of  
 “ King William and Queen Anne.”

CH. XXIV.

One case, not here referred to, may be mentioned, because it looks at first sight as if a defendant had been not only permitted but challenged to prove the truth of a libel. A man named <sup>1</sup> Fuller published a statement that one Jones had made a deposition on oath stating that he (Jones) had in the interest of James II. distributed £180,000 in bribes to various statesmen. Being called upon by the House of Lords to produce Jones, he was unable to do so, and was ordered to be prosecuted for a libel. An information was accordingly filed against Fuller, which averred, *inter alia*, that “ the said scandalous libels were and are false and feigned “ and altogether contrary to the truth.” <sup>2</sup> Holt at the time asked Fuller (who had no counsel), “ Can you make it appear “ that they ” (the facts stated) “ are true ? ” Fuller was unable to do so, and was convicted. <sup>3</sup> In this case the falsehood was the gist of the charge, and the defendant was regarded rather as a cheat and impostor than as a libeller.

Soon afterwards (in 1704) occurred the case to which Lord Mansfield refers. <sup>4</sup> One Tutchin was convicted of libel for articles in a periodical called the *Observer*, which in these days would be described as opposition articles. They said,

<sup>1</sup> 14 *State Trials*, 517.

<sup>2</sup> *Ib.* 534.

<sup>3</sup> In *R. v. Burdett* (4 B. & A. 146-147) it was held that the truth of a libel could not be in any way given in evidence, not even in mitigation of punishment, but Bayley, J., says that there might conceivably be cases in which the question of the truth of a statement would make the difference between libel and no libel, and he mentioned as an illustration the assertion that a man was at a definite time and place convicted of a crime. Here the truth of the alleged fact might, he said, afford a defence to a charge of libel, but he does not explain his views fully. Fuller's case might afford an illustration.

<sup>4</sup> 14 *State Trials*, 1095-1200. Tutchin had been sentenced by Jeffreys, after Monmouth's rebellion, to be imprisoned for seven years, and whipped every year through every market town in Dorsetshire, which, it was observed, made a whipping every fortnight for seven years. He escaped his sentence by catching the small-pox, and after his recovery by purchasing a pardon. He went through other adventures, and was finally beaten so severely for one of his libels that he died of it.—14 *State Trials*, pp. 1197-1200.

CH. XXIV. in substance, that the ministry was corrupt and the navy ill-managed. Lord Holt was the presiding judge. The fair way of describing his charge seems to me to be that it shows that the question how far the jury were to judge of the character of a libel, and how far it was a question of law for the court, had not at that time been fully raised or appreciated. Holt does not pointedly say that the jury are to take the law from him. His charge seems to assume it, but some expressions in it may be taken otherwise. His words, as reported, are as follows:—<sup>1</sup>“They say they are innocent papers and no libels, and they say nothing is a libel but what reflects upon some particular person. But this is a very strange doctrine to say it is not a libel reflecting on the government, endeavouring to possess the people that the government is mal-administered by corrupt persons that are employed in such or such stations either in the navy or army. To say that corrupt officers are appointed to administer affairs is certainly a reflection upon the government. If people should not be called to account for possessing the people with an ill opinion of the government no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it. And nothing can be worse to any government than to endeavour to produce animosities as to the management of it; this has always been looked upon as a crime, and no government can be safe without it is punished.”

“*Now you are to consider whether these words I have read to you do not tend to beget an ill opinion of the administration of the government?* To tell us that those that are employed know nothing of the matter, and those that do know are not employed. Men are not adapted to offices, but offices to men, out of a particular regard to their interest and not to their fitness for their places. This is the purport of these papers.”

The words italicised do certainly look as if Holt meant to leave to the jury the character of the writing, but if the passage is read as a whole it seems to me that Lord Mansfield's

<sup>1</sup> P. 1128.

view of it is quite correct. Holt directs the jury positively as matter of law, that the paper is a libel. This is confirmed by the concluding words of the charge. After some observations on the evidence of publication (small quibbles on this subject formed the principal part of the defence) the charge ends thus: "Gentlemen, I must leave it to you. If you are satisfied that he is guilty of composing and publishing these papers in London you are to find him guilty."

For many years after Tutchin's case nothing of importance occurred upon this subject, though one trial took place which is in itself too characteristic and also too amusing to be passed over in silence. In the year 1719<sup>1</sup> W. Hendley, the vicar of Islington, and some of his friends who were probably Jacobites, "lucri avidi et nequiter et injuste intendentes grandes denariorum summas illicite lucrari et obtinere," took into the country a number of school children, to wit, twenty boys and thirty girls, and "inter sese et quam plurimas alias male dispositas personas juratoribus prædictis

<sup>1</sup> "Willelmus Hendley, nuper de Chislehurst in comitatu Kancie, Clericus; Georgius Campman, nuper de eadem, Painter; Robertus Hicks, nuper de eadem, Labourer; et Filius Harding, nuper de eadem, Packer; et Watterinus Pratt, nuper de eadem, Upholsterer; existentes persone, seditiose, et male disposite ad gubernationem hujus regni, sub excellentissimo Domino Georgio nunc regi feliciter stabilito, maxime avera." Both law Latin and law French became increasingly barbarous as time went on. Mediæval Latin and Norman French were pointed and expressive languages, but as English assumed a classical form, and the use of French and Latin survived merely for a few technical purposes, the English forms of them became jargon of the most barbarous kind. This change had reached its height by the middle of the seventeenth century. Compare *e.g.* these specimens:—

1663.

"Fuit agree per les Justices sur  
"conference touchant ceux queux  
"assemble eux in Farley Wood in  
"Yorkshire 1663 que sur indictment  
"pur compassing mort le roy overt  
"fait poet estre layd in consulting a  
"levyer guerre contre lui (que est  
"overt act de soymesme) et actual  
"assembling et levying guerre. . .  
"Le Count de Essex et South' in-  
"tended daler al Court daver prise  
"la reigne en lour power et remover  
"ascun de counceil, et a ceo force as-  
"sembled multitude de people."—  
1 Hale, P. C. 120-121.

1353.

"Assint est ordeue et etabli qe  
"touz marchantz Gascons et autres  
"estranges pussent amener sauve-  
"ment leur vins en Engleterre a queu  
"port qe lour plerra et faire ent lour  
"profit. Issint totes foitz qe le  
"botiller le Roi purra faire le pur-  
"veance le Roi de vins des aliens  
"quant besogne serra faisant paiement  
"pur meismes les vins deinz XL.  
"jours en manere come ad este usee  
"dauncien temps."—27 Edw. 3,  
st. 1, c. 6.

Or compare the Latin of Magna Charta with the miserable stuff in the text.

CH. XXIV. "ignotas conspiravere et confederavere cum prædictis pueris et  
 "puellis *pro* oberrare (*for* to wander), itinerari, et vagari ad  
 "diversas parochias in comitatu Kanciæ prædicto, et in aliis  
 "comitatibus Angliæ in parochialibus ecclesiis et aliis parochiis  
 "illicite et infeste lucrari colligere, et obtinere diversas grandes  
 "denariorum Summas colore et prætextu colligendi ellemosinas  
 "et charitatis dona pro sustentatione et mantentione præ-  
 "dictorum puerorum puellarumque." In other words they  
 were indicted for going about with school children and  
 preaching charity sermons on their behalf. This, it was sug-  
 gested, was seditious, and a wicked attempt to tax people  
 illegally. "The sum of £3 was raised even in that little  
 "parish (Chislehurst), and suppose ten thousand parishes in  
 "England, from each of which, if that sum were raised, it  
 "would be enough to bear the Chevalier's charges into Italy,  
 "and help him to consummate the marriage with the Princess  
 "Sobieski upon whom he might get new pretenders to the great  
 "disquiet of the Protestant interest." The judge (Powys, J.)  
 thought that "the manner of collecting had some resemblance  
 "with that of Cardinal Alberoni's, for he laid a tax on the people  
 "which they were forced to pay, and gave it the specious  
 "name of a free gift, *alias* charity. If this stratagem was to  
 "spread the nation is in danger of paying double taxes." The  
 defendants were convicted, and the judge fined them 6s. 8d.  
 each, and told them if they did not like the verdict they  
 might try a writ of error. <sup>1</sup>They seem to have preferred paying  
 their 6s. 8d. to incurring that expense. This case is the foun-  
 dation of the following curt report. <sup>2</sup>"It is unlawful for  
 "people to go about the country and collect charity unless  
 "they have letters patent. Per Powell, J." (it should be  
 Powys) "anon."

The case has a more serious interest as an illustration of

<sup>1</sup> The judge wrote an elaborate account of this ludicrous proceeding to the Lord Chancellor (Macclesfield), pp. 1414-1419. He treats the case with the greatest gravity. It lasted, he says, from 6 A.M. till noon, and he observes: "This case, if under a general consideration, is of a vast extent and mighty consequence. . . . The levying of money is the tenderest part of our constitution . . . and though it be said it is all but voluntary giving, yet it is a sort of compulsion, by the solemnity in the church, and vying with others, and being marked out if refusing or giving meanly."

<sup>2</sup> 11 Mod. 221.

the extent to which it was possible, up to a very recent date, to increase by judicial decisions the number of offences known to the law. CH. XXIV.

To return to Lord Mansfield's history of the law as to political libels. He continues, "We know that in the reign of George I. there were several trials for libels, but I have seen no note or traces of them, nor any question concerning them. In the reign of George II. there are others, but the first of which I have a note was in February, 1729, <sup>1</sup>R. v. Clarke, which was tried before L. C. J. Raymond, and there he lays it down expressly (there being no question about an excuse or about the meaning), he lays it down the fact of printing and publishing only is in issue." Lord Mansfield then proceeds to give a picturesque account of the trial, in 1731, of Francklin for publishing the *Craftsman*. He says, "The *Craftsman* was a celebrated party paper written in opposition to the party of Sir Robert Walpole, by many men of high rank and great talents. The whole party espoused it. It was thought proper to prosecute the famous Hague letter. I was present at the trial. It was in the year 1731. It happens to be printed in the *State Trials*. There was a great concourse of people; it was a matter of great expectation and many persons of high rank were present to countenance the defendant. They started every objection and laboured every point. When the judge overruled them he usually said, 'If I am wrong, you know where to apply.' The judge was my Lord Raymond, C. J., who had been eminent at the bar in the reign of Queen Anne, and had been Solicitor and Attorney General in the reign of George I., and was intimately connected with Sir Edward Northey, so that he must have known the ancient practice."

The Hague letter is said to have been written by Lord Bolingbroke. The *Craftsman* censured the foreign policy of the then government in reference to a treaty concluded with Spain, and charged them in language by no means violent with incapacity and bad faith. At the trial the argument of the counsel turned mainly upon the question whether the

<sup>1</sup> 17 *State Trials*, 667, note. It is of no interest.

CR. XXIV. expression "certain ministers" meant the king's ministers (which it obviously did). The judge ruled most emphatically that the only questions for the jury were publication and the truth of the innuendoes. <sup>1</sup> Then there is a third thing, to wit, whether these defamatory expressions amount to a libel or not? This does not belong to the office of the jury, but to the office of the court." He also said that if the innuendoes were proven, "I must say they are very scandalous and reflecting expressions, because they charge them with perfidy in breaking of treaties, ruining in a manner their country, &c., as you may see at large in the letter, and it is very evident that these treaties could not be made without the knowledge and direction of his Majesty. . . So, gentlemen, if you are sensible and convinced that the defendant published that *Craftsman* of the 2nd of January last, and that the defamatory expressions in the letter refer to the ministers of Great Britain, you ought to find the defendant guilty." Francklin was accordingly convicted.

This case is remarkable as marking the point at which the judges laid down the principle afterwards so strongly contested in a perfectly definite, uncompromising way. <sup>2</sup> An attempt was made to set aside the verdict on highly technical grounds, but the Chief Justice's direction was never complained of. Lord Mansfield says, "Mr. Fazakerly and Mr. Bootle were, as we all know, able lawyers, they were connected in party with the writers of the *Craftsman*, they never thought of complaining to the court of a misdirection, they would not say it was not law. They never did complain. It never was complained of, nor did any idea enter their heads that it was not agreeable to law." He adds, "Except that case in 1729 that is mentioned and this, the trials for libels before my Lord Raymond are not printed, nor to be found in any notes. But to be sure his direction in all was to the same effect. There are no notes that I know of, and I think the bar would have found them out on this occasion if there had been any that were material; there are no notes of the trials for libels before my Lord Hardwicke; I am sure there are none before L. C. J. Lee, till the year 1752, when the case of

<sup>1</sup> 17 *State Trials*, 672.

<sup>2</sup> 22 *ib.* 973, note.



"The King *v.* Owen came before him. This happens to be "printed in the *State Trials*, though it is incorrect, but "sufficient for the present purpose. I attended that trial "as Solicitor General."

The case of <sup>1</sup>R. *v.* Owen was a prosecution for a libel upon the House of Commons. The purport of Owen's publication was that Alexander Macdonald had been unjustly and oppressively committed by the House on account of his behaviour at the Westminster election. <sup>2</sup>The defendant's counsel urged the jury to acquit, on the ground that the publication was not malicious or proved to be false. The judge (Lee, L. C. J.) directed a conviction if the jury thought the publication proved. "L. C. J. Lee," says <sup>3</sup>Lord Mansfield, "was the most "scrupulous observer and follower of precedents, and he "directed the jury *as of course*." The jury persisted in acquitting the defendant generally, though they were asked specially whether they thought he had published the pamphlet.

This was, I believe, the first case (unless the case of the seven bishops be regarded as an instance of the same thing) in which a jury <sup>4</sup>in England exercised their undoubted power to return a general verdict of not guilty in a case of libel, when the court told them that they had no moral right to do so, that the question of libel or not was for the court, and that the publication under consideration was libellous.

Lord Mansfield continues his history thus: "When I was "Attorney General" (<sup>5</sup>from 1754 to 1756) "I prosecuted some "libels: one I remember, from the condition and circumstances "of the defendant. He was found guilty. He was a common- "councilman of the city of London; and I remember another

<sup>1</sup> 18 *State Trials*, 1203.

<sup>2</sup> Pratt, afterwards Lord Camden, was one of them.

<sup>3</sup> Lord Campbell says of him, "Highly honourable and respectable, he was "the dullest of the dull during the whole course of his life."—*Lives of the Chief Justices*, ii. 214.

<sup>4</sup> A remarkable case had occurred in New York. See the case of Zenger, 17 *State Trials*, 675, A.D. 1735. The speech of Zenger's counsel, Hamilton, was singularly able, bold, and powerful, though full of doubtful, not to say bad, law, which is brought out in some very able letters published at the end of the case. I may observe that the author of those letters would have found it difficult to defend himself on his own principles if he had been tried for a libel on Hamilton.

<sup>5</sup> Campbell, *Lives of Chief Justices*, ii. 381. Lord Mansfield was Solicitor General for twelve years.

CH. XXIV. "circumstance : it was the first conviction in the city of London  
 "that had been had for twenty-seven years. It was the case  
 "of *R. v. Nutt*, and there he was convicted under the very same  
 "direction before Lord Chief Justice Ryder. In the year 1756  
 "I came into the office I now hold. Upon the first prosecution  
 "for a libel which stood in my paper, I think (but I am not  
 "sure), but I think it was the case of *R. v. Shebbeare*, I made  
 "up my mind as to the direction I ought to give. I have  
 "uniformly given the same direction in all, almost in the same  
 "form of words. No counsel ever complained of it to the  
 "court. Upon every defendant being brought up for judg-  
 "ment, I have always stated the direction I gave, and the  
 "court has always assented to it."

The most remarkable of the decisions referred to by Lord Mansfield in this striking passage were given in the cases of the prosecutions of the publishers of Junius's celebrated letter to the king in 1770. They were the cases of <sup>1</sup> Almon, Miller, and Woodfall. Almon was convicted, Miller was acquitted, and in Woodfall's case the jury returned a verdict of "guilty of publishing only." Upon this last verdict a new trial was granted, but the proceedings were dropped. In Almon's case the great contest was as to the defendant's responsibility for the publication. The paper was proved to have been sold by his servant in his shop, but it did not appear that Almon himself knew of or authorised the sale. Lord Mansfield's direction upon this was that such a sale <sup>2</sup> "was sufficient evidence to convict the master of the house or shop, though there was no privity or concurrence in him, unless he proves the <sup>3</sup> contrary or that there was some trick or collusion."

In the case of Miller there was no question as to publication, for the letter had been republished in the paper (the *Evening Post*) published by him, but the counsel respectively attacked and defended the letter itself, Lord Thurlow describing it as

<sup>1</sup> 20 *State Trials*, 803, 870, and 895.

<sup>2</sup> *Ib.* 838.

<sup>3</sup> This expression is obviously wrong, as it implies that the publisher ought to prove his privity or concurrence in the publication in order to relieve himself from responsibility for it. The meaning is plain from other passages, and is that the sale in the shop in the ordinary course of business throws on the shopkeeper the burden of proving that the sale was without his privity or concurrence.

sedition and malignant, and Serjeant Glynn defending it as a piece of manly, wholesome, and dutiful advice to the king.

<sup>1</sup> Lord Mansfield with great elaboration stated to the jury the doctrine that they had to determine nothing except the question of publishing and that of the innuendoes. He admitted that they had a legal power to give a general verdict of not guilty, but denied their moral right to do so unless they doubted the publication or the truth of the innuendoes. In this case the jury acquitted the defendant generally. In Woodfall's case the direction was similar. The result I have already stated.

Though Lord Mansfield's direction in these cases was not questioned by a motion for a new trial, it <sup>2</sup> was vehemently attacked in both Houses of Parliament. In particular, Lord Chatham and Lord Camden censured him vehemently in the House of Lords. Lord Camden finally proposed questions to him which he refused to answer. Lord Mansfield had, by way of reply to the criticisms, made on his judgment, left with the clerk of the House of Lords a "Copy of the unanimous opinion of the Court of King's Bench in the case of The King against Woodfall."

The questions which Lord Camden asked upon it were these :—

1. Does the opinion mean to declare that, upon the general issue of not guilty in the case of a seditious libel, the jury have no right by law to examine the innocence or criminality of the paper if they think fit, and to form their verdict upon such examination?

2. Does the opinion mean to declare in the case above mentioned, where the jury have delivered in their verdict guilty, their verdict has found the fact only and not the law?

3. Is it to be understood by this opinion that, if the jury come to the bar and say that they find the printing and publishing but that the paper is no libel, the jury are to be taken to have found the defendant guilty generally, and the verdict must be so entered up?

4. Whether the opinion means to say that, if the judge, after giving his opinion of the innocence or criminality of

<sup>1</sup> 20 *State Trials*, 893, 894.

<sup>2</sup> *Campbell's Chief Justices*, ii. 480-490. See especially 488, 489.

CH. XXIV. the paper, should leave the consideration of that matter, together with the printing and publishing, to the jury, such a direction would be contrary to law?

Upon this Lord Mansfield observed that this mode of questioning took him by surprise, that it was unfair, that he would not answer interrogatories. Lord Camden replied, "I am willing that the noble and learned lord on the woolsack should have whatever time he deems requisite to prepare himself, but let him name a day when his answers may be given in, and I shall then be ready to meet him." Lord Mansfield said he was not bound to answer, and would not answer, the questions so astutely framed and irregularly administered, but he pledged himself the matter should be discussed. He refused, however, to fix a day for the discussion, and the matter was carried no further. After telling this story, Lord Campbell adds, "There is no denying that Lord Mansfield did on this occasion show a great want of moral courage." I think he showed an equal want of presence of mind. His answer surely ought to have been that it would be wholly inconsistent with his duty as Lord Chief Justice to discuss in a Parliamentary debate the merits of a judgment given in the Court of King's Bench; that the proper way of calling in question the propriety of the law so laid down was by proceedings in error in a case admitting of such proceedings; and that if the House of Lords wished for advice from him as a judge they ought to propose their questions solemnly to the whole body of judges. To engage a judge in a Parliamentary discussion of abstract legal questions is to place an almost insuperable difficulty in the way of his deciding them fairly and with an unbiased mind if they should be argued before him judicially.

Seven years afterwards, in 1777, <sup>1</sup>Horne Tooke was tried for libel in charging the troops employed against the Americans with murder. The libel was described as seditious, and as being "of and concerning his Majesty's government and the employment of his troops." The trial is remarkable mainly for the extraordinary impudence and random hare-brained cleverness of the defendant. In a legal point of view it is

<sup>1</sup> 20 *State Trials*, 651.

interesting as showing how, under certain circumstances, the law as to libel, as understood before the Libel Act, allowed a defendant to give what might be easily mistaken for evidence in proof of the innocence of his intentions, which would involve the consequence that the jury were to judge not only of the facts of publication and the truth of the innuendoes, but of the character of the publication as being libellous or not.

One defence upon which Horne insisted was that his statements were true, and in support of them he called Gould, an officer who had been engaged in the action at Lexington, and who gave an account of it. <sup>1</sup>The evidence was admitted by Lord Mansfield, on grounds which he explained both upon a motion for arrest of judgment and at the trial itself. On the motion in arrest of judgment, he said: "It is most certain that at the trial the information was considered to be" [for] "words spoke of and concerning the king's government, and his employment of his troops, that is the employment of the troops by government. Upon that ground the defendant called a witness—Mr. Gould. The Attorney General rose to object to him, but it was very clear that he was a proper witness, and he" [the Attorney General] "acquiesced immediately, because it was extremely material to show what the subject matter was to which the libel related; if it was the employment of the troops under proper authority that came within the charge in the information. Had it been a lawless fray (<sup>2</sup> which I believe I said at the trial), it would not; though the saying so might have been a libel of" [on] "the individuals, yet it would not have been this libel: it would not have been this libel of the king's troops employed by him. Now at first and at present it seems to me that 'of and concerning the king's government and the employment of his troops' pins it down. But I doubt a little upon it. There is some weight in the objection whether in the form of drawing there should not have been innuendoes." <sup>3</sup>It was afterwards held that this mode of statement was unnecessary.

<sup>1</sup> 20 *State Trials*, p. 778.

<sup>2</sup> He did so. See 20 *State Trials*, 760.

<sup>3</sup> *Ib.* 774.

CH. XXIV. This decision certainly operated under particular circumstances to open a much larger field to the defence than was commonly conceded in cases of libel, and I think it explains the celebrated case of *R. v. Stockdale*, which was the last trial of any importance for a political libel before Fox's Act came into force. I will accordingly mention it here, though out of the order of time. <sup>1</sup> Stockdale was tried for publishing a pamphlet by Logan (a minister of the Scotch Church, who died before the trial) in defence of Warren Hastings. It contains several passages which censured the prosecution warmly. The strongest expressions complained of were that certain charges "originate from misrepresentation and falsehood," that "an impeachment of error in judgment . . . characterises a tribunal of inquisition rather than a court of Parliament," and that "the world has every reason to suppose that the impeachment is carried on from motives of personal animosity, not from regard to public justice." On the motion of Fox, carried unanimously in the House of Commons, the publisher of the pamphlet which contained these passages (it was a pamphlet of 150 pages) was prosecuted for a libel on the House of Commons, by imputing to them injustice to Hastings. Erskine's defence was that when the pamphlet was read as a whole it would be seen that it referred, not to the House of Commons as a whole, nor to their public conduct, but to the proceedings of some particular persons. This, he argued at great length, appeared from reading not only the passages informed against but the context in which they were introduced, and <sup>2</sup> he availed himself with immense effect of this opportunity

<sup>1</sup> 22 *State Trials*, 237.

<sup>2</sup> This is the speech in which Erskine introduced the famous Indian chief, who "raised the war-sound of his nation" (p. 279). The argument into which he is introduced is extremely powerful as an appeal *ad homines*, though, as Erskine said himself, it constitutes "an anomalous kind of defence."—If you will govern India, you ought not to quarrel with a man who carries out your instructions in the only way in which they can be effectually carried out. It seems to me, however, to be greatly weakened by its unworthy admissions, and by the contradiction between what, after all, does amount to a defence of Hastings (though Erskine tried to avoid that inference) and the admission that "he may and must have offended against the laws of God and nature if he was the faithful viceroy of an empire wrested in blood from the people to whom God and nature had given it." To whom, I should like to know, had either God or nature given the Diwani of Bengal? In whatever sense God gave it first to the great Mogul, and afterwards to the subadars, of whom Suraja Dowlah was a fair specimen, he may be said to have taken it away

to dilate on many topics of a general nature. The logical connection of these topics with the main purpose of his speech was this: Mr. Logan's purpose when he said this, that, and the other, was not to attack the House of Commons but to defend Warren Hastings. Therefore the averments which must be established before the information can be proved are not true. This was how Lord Kenyon, who tried the case, understood it. <sup>1</sup>He said: "In applying "the innuendoes, I accede entirely to what was said by "the counsel for the defendant, and which was admitted "yesterday by the Attorney General as counsel for the Crown, "that you must upon this information make up your minds "that this was meant as an aspersion upon the House of "Commons, and I admit also that in forming your opinion "you are not bound to confine your inquiry to those detached "passages which the Attorney General has selected as offensive "matter, and the subject of prosecution." The defendant was acquitted.

I am particular upon this point because it appears to me to have been misunderstood by so great an authority as Lord Campbell. <sup>2</sup>He says that, according to the old doctrine, "the "defendant ought certainly to have been convicted, for the "act of publication was admitted, and the technical innuendoes "were proved, so that the acquittal proceeded upon the ground "that the intention of the pamphlet was fairly to discuss the "merits of the impeachment, not to asperse the House of "Commons, or in other words that the pamphlet was not a "libel."

The acquittal appears to me to have proceeded on the ground that the introductory averment (which was equivalent to an innuendo) that the words related to the House of Commons was not made out. Practically, in this particular case, the result was the same as if the jury had considered

from them and given it to Clive and the East India Company. As to nature, its maxim is *Vix victis*. As to the Indian chief and his war-whoop, what would the tribes whom he scalped have said about God's giving him the rivers and the forests of which Erskine talked? If God gave North America as a prize to be fought for by a set of prowling tribes of savage hunters, how can we say that he did not mean white men to join in the scramble?

<sup>1</sup> *22 State Trials*, 292.

<sup>2</sup> *Lives of Chief Justices*, iii. 48-49.

CH. XXIV. the whole matter ; but I think that Lord Kenyon trod exactly in the footsteps of his predecessors.

To return, however, to the order of time. The directions given by Lord Mansfield in the cases already referred to continued to be accepted as the law till the year 1783, when the Dean of St. Asaph's (Shipley) was prosecuted for publishing a pamphlet called *A Dialogue between a Gentleman and a Farmer*. It was written at a time when the disastrous results of the American War had led to the first great general agitation in favour of recasting the representative system. Its author was Sir William Jones (the Dean's brother-in-law), and the subject was the principles of government. It was prosecuted as a seditious libel on indictment by a private person (also called Jones, as also was the principal witness) on the ground apparently that towards the end of the pamphlet the right of subjects to bear arms was noticed in a manner capable of being represented by a hasty reader as advice to them to rebel.

The case was tried at Shrewsbury Assizes before Buller, J., and the defendant was defended by Erskine on the ground that the pamphlet was innocent, and that it was the province of the jury to judge of its guilt or innocence. The judge, after referring to the earlier decisions already mentioned, told the jury, as his predecessors had done, that the only questions for them were the fact of publication and the meaning of the innuendoes. He also abstained from giving any opinion whatever of his own as to whether the pamphlet was libellous or not, telling the jury that if they found a verdict of guilty it would be open to the defendant to move in arrest of judgment on the ground that there was no criminality in the paper. The jury found a verdict of "guilty of publishing "only," and a scene thereupon ensued between the judge, the counsel, and the jury, which has become celebrated, though I do not think it is properly understood. The question was what verdict the jury meant to give. The judge pointed out to them that the legal effect of "guilty of publishing only" would be to negative the innuendoes, which was not their intention, and Erskine insisted that whatever might be its legal effect the word "only" should be recorded as part of the verdict.



There are two different reports of the dispute, but they are much to the same <sup>1</sup> effect. The following is the important part of one of them:—

*Mr. Justice Buller:* Gentlemen, if you add the word *only*, it will be negating or at all events not finding the truth of the innuendoes; that, I understand, you do not mean to do. *Mr. Erskine:* <sup>2</sup>That has the effect of a general verdict of guilty. I desire your lordship, sitting here as judge, to record the verdict as given by the jury. If the jury depart from the word *only* they alter their verdict. *Mr. Justice Buller:* I will take their verdict as they mean to give it; it shall not be altered. Gentlemen, do you mean to find him guilty of publishing the libel? *One of the Jury:* Of publishing the pamphlet; we don't decide upon its being a libel or not. *Mr. Justice Buller:* And the meaning of the innuendoes as is stated in the indictment? *One of the Jury:* Yes; certainly. *Mr. Erskine:* Would you have the word *only* recorded? *One of the Jury:* Yes. *Mr. Erskine:* Then I insist that it shall be recorded. <sup>3</sup>*Mr. Justice Buller:* Mr. Erskine, sit down, or I shall be obliged to interpose in some other way. *Mr. Erskine:* Your lordship may interpose in any manner you think "fit."

It certainly seems to me that Erskine overstepped the limits of his duty, and forgot (for once in his life) what was due to the judge when he insisted that the word *only* should be recorded. It was the judge's clear duty to make the jury

<sup>1</sup> 21 *State Trials*, 953. The other account is in the footnote on the same and the preceding page. It is a little more dramatic.

<sup>2</sup> What? But shorthand-writer's notes are often inaccurate as well as the grammar which they record. The reporter's ear and finger act mechanically, but a man who does not hear with his mind necessarily hears wrong in many cases. I once told a jury that under given circumstances it was the duty of a railway servant "to act with caution, and, of course, with humanity." In the shorthand note this became, "to act with caution in the cause of humanity." Which, by the way, would be very good advice to many enthusiasts.

<sup>3</sup> The other report goes on thus:—"Mr. Justice Buller: Then the verdict must be misunderstood. Let me understand the jury. *Erskine:* The jury do understand their verdict. *Mr. Justice Buller:* Sir, I will not be interrupted. *Erskine:* I stand here as an advocate for a brother citizen, and I desire that the word *only* may be recorded. *Mr. Justice Buller:* Sit down, sir, or I shall be obliged to proceed in another manner. *Erskine:* Your lordship may proceed in what manner you think fit: I know my duty as well as your lordship knows yours. I shall not alter my conduct."

CH. XXIV. understand that the verdict given in these terms would be imperfect, and make a new trial necessary. This had been formally decided in Woodfall's case. On the other hand, a gentle reproof to Erskine, a simple observation that he was improperly interrupting the judge in giving the jury information necessary for the proper discharge of their duty, would have been more effective than an abortive threat to commit, and more proper in dealing with a man of Erskine's great eminence and remarkable generosity of temper. This essentially small<sup>1</sup> incident has been invested with a constitutional halo. For myself I can see in it nothing but an unimportant skirmish between a rather short-tempered judge and a most eminent advocate, in which neither was absolutely free from blame, especially if Erskine talked about "standing here as advocate for a brother citizen," and boasted of "knowing his duty."

The discussion continued for a considerable time, and with good humour, as the following short extract will show:—

"*Mr. Erskine*: I desire with great submission, the jury "having said guilty only of publishing, that it may be so "recorded. *Mr. Justice Buller*: Whether you say guilty "only of publishing, or guilty of publishing *only*, that "amounts to the same thing. You may put it thus: 'Guilty "'of publishing, but whether it is a libel or not you don't "'know,' if that is your intention. *One of the Jury*: That "is our intention."

<sup>1</sup> "The learned judge took no notice of this reply, and quailing under the "rebuke of his pupil" (say rather having recovered his temper), "did not "repeat the menace of commitment. This noble stand for the independence "of the bar would of itself have entitled Erskine to the status which," &c.—*Campbell's Chancellors*, viii. 277. I do not see how Erskine vindicated the independence of the bar on this occasion, or how it was in question at all; I see no rebuke on the one side, and no quailing on the other, but some temper on both sides. Apart from this, what did Erskine risk by "defying" the judge? If Buller had been so ill-advised as to commit him, he would have given him for all the rest of his life a better topic for eloquence and pathos than even his noble descent and the fervour of his religious belief. By being committed, Erskine would have suffered no inconvenience greater than a few nights rather uncomfortable lodging, and he would have moved for a new trial on the ground of the misconduct of the judge, with all his political partisans shouting at his heels. Whatever may have been the case in the days of the Star Chamber, it required, in 1783, more courage to give offence to one attorney in large practice, or to say what the newspapers did not like, than to assert the independence of the bar before all the judges in England, a performance which never since 1688 has required much courage. I am not aware that Erskine ever put in peril either his practice or his popularity, or that he was ever called upon to do either, except perhaps in Faine's case, mentioned below.

After some further discussion the verdict was entered accordingly. It is thus a mistake to suppose that on this occasion Erskine triumphed over his former tutor; on the contrary, the jury accepted the judge's statement of their verdict, and not the one which Erskine suggested.

In the ensuing term Erskine moved for a new trial on the ground of misdirection, and his argument on that motion, and the rule which was granted in consequence, occasioned the first and indeed the only solemn judicial discussion which ever took place on the doctrines connected with the old law of political libels. Erskine's argument is regarded as one of his greatest efforts, and it seems to me to deserve its reputation, though like some other celebrated performances it has been praised in an exaggerated way by <sup>1</sup> zealous partisans.

<sup>1</sup> Fox declared it to be "the finest argument in the English language." Lord Campbell says, "Erskine's addresses display beyond all comparison the most perfect union of argument and eloquence ever exhibited in Westminster Hall. He laid down five propositions, most logically framed and connected, which, if true, completely established his case, and he supported them with a depth of learning which would have done honour to Selden or Hale." It is one of the peculiarities of this remarkable argument, which undoubtedly is admirable in matter (except an egotistical peroration), manner, and arrangement, that it is by no means learned. Erskine's history, as he calls it, of trial by jury, is given in absolute ignorance of the fact, which for many years has been undoubted, that jurors were originally witnesses, and not judges at all. He cannot be blamed for not knowing this, but the fact that he did not know it shows that he was not a profoundly learned man. The only authorities he quotes on the subject are Blackstone and Bracton. This quotation from Bracton seems to me to be misunderstood and inaccurate. Erskine's words are, "Bracton says the curia and the pares were necessarily the judges in all cases of life, limb, crime, and disherison of the heir in capite. The king could not decide, for then he would have been prosecutor and judge; neither could his justices, for they represent him." The passage to which I suppose he referred (no reference is given) is part of Bracton's account of the law of treason, and is in these words: "Et tunc videndum quis possit et debeat judicare, et sciendum, quod non ipse rex, quia sic esset in querela propria actor et judex in judicio vite membrorum et exheredationis quod quidem non esset si querela esset aliorum. Item justitiarum? non cum in iudiciis personam domini regis cuius vicem gerit, representat" (sic). "Quis ergo iudicabit? Videtur sine preiudicio melioris sententiae quod curia et pares iudicabunt ne maleficia remaneant impunita, et maxime ubi periculum vite fuerit et membrorum et exheredationis cum ipse rex pars actrix debeat esse in iudicio."—Bracton, ii. 265, 266. It appears from this (1) that Bracton referred only to treason; (2) that he expressly says that his remark does not apply to common offences in which the king had no direct interest; (3) that he speaks with doubt, as of a matter not well established. The "*curia et pares*" I believe to be the *curia regis* and the peers, Bracton having in his mind the case, which no doubt was in those days the common one, of treason by some peer who levied war on the king. Bracton's references to juries or inquests I have already considered in detail.

Besides this slight and incorrect reference to Bracton, Erskine produces a few very obvious authorities, *R. v. Oneby* (2 Lord Raymond), *Coke upon*

CH. XXIV. In his motion on the rule *nisi* he laid down five propositions on which in the main his subsequent argument was founded. They were these :—

1. <sup>1</sup> When a bill of indictment is found, or an information filed, charging any crime or misdemeanour known to the law of England, and the party accused puts himself upon the country by pleading the general issue not guilty, the jury are generally charged with his deliverance from that crime, and not specially from the fact or facts in the commission of which the indictment or information charges the crime to consist; much less from any single fact to the exclusion of others charged upon the same record.

2. <sup>2</sup> I mean to maintain that no act which the law in its general theory holds to be criminal constitutes in itself a crime abstracted from the mischievous intention of the actor; and that the intention, even when it becomes a simple inference of reason from a fact or facts established, may and ought to be collected by the jury with the judge's assistance, because the act charged, though established as a fact in a trial on the general issue, does not necessarily and unavoidably establish the criminal intention by any abstract conclusion of

*Lyttelton*, Bushell's case, and a few other recent cases, which he uses rather as illustrations than as authorities. His junior (Welsh) showed more reading, and founded some highly ingenious arguments on ancient authorities. I suspect he suggested to Erskine an argument about the Statute of Westminster the Second, for it appears from his argument that he had thought a great deal about the meaning of it, which I do not think was the case with Erskine. Welsh very likely gave him the scrap of Bracton which he quotes. Erskine had much more important gifts than learning, and no competent judge would ever undervalue his logical power or his legal knowledge merely because of the brilliancy of his rhetoric, which ignorant persons suppose to be inconsistent with those qualities, but to compare him in point of learning to students like Selden and Hale seems to me extravagant. I do not think any man who had even superficially looked into history would have said as Erskine did: "No fact, my lord, is of more easy demonstration" (than the rights of juries), "for the history and laws of a free country lie open, even to vulgar inspection." The history of juries is obscure and imperfect in the highest degree, and the history and laws of countries which Erskine would not have called free are often more open to vulgar inspection than those of countries which he would have called free, by which he meant no doubt possessing popular government. The laws of Rome were not made generally "open to vulgar inspection," till long after the fall of the republic. British India has no parliamentary institutions, but its laws are open to every one, and so is its history. The study of French law and history was probably a less difficult matter in 1783 than the study of English law and history. Despotism in politics and religion is by no means unfavourable to learning. Where in England were more learned men to be found than the French Benedictines?

<sup>1</sup> 21 *State Trials*, 961.

<sup>2</sup> *Id.*

law, the establishment of the fact being still no more than evidence of the crime, but not the crime itself, unless the jury render <sup>1</sup> it so themselves by referring it voluntarily to the court by special verdict.

3. <sup>2</sup> An indictment for a libel, even where the slander of an individual is the object of it (which is capable of "being measured by precedents of justice), forms no exception to " the jurisdiction or duties of juries, or the practice of judges " in other criminal cases; that the argument for the difference, " viz. because the whole crime appears upon the record, is " false in fact, and even if true would form no solid or " substantial difference in law."

4. <sup>3</sup> A seditious libel contains no question of law.

5. " In all cases where the mischievous intention (which " is agreed to be the essence of the crime) cannot be col- " lected by simple inference from the fact charged, because " the defendant goes into evidence to rebut such inference, " the intention becomes then a pure unmixed question of fact " for the consideration of the jury."

The propositions are no doubt intelligible and logically connected, but there is no great literary skill in the way in which they are worded. Of the first and second of them Erskine said, that " though worded with cautious precision " and in technical language to prevent the subtlety of " legal disputation in opposition to the plain understanding of " the word, they neither do nor were intended to convey any " other sentiment than this, viz., that, in all cases where the " law either permits or directs a person accused of a crime to " throw himself upon a jury for deliverance by pleading gene- " rally that he is not guilty, the jury thus legally applied to

<sup>1</sup> These words are very obscure. What is meant by "it," and what by "so?" Besides, by finding a special verdict the jury do not turn facts into a crime (as Erskine seems to say), but express a doubt whether they constitute a crime or not. At p. 271, Erskine speaks of these propositions as "written " and maturely considered propositions," which he had delivered to the court, so that the confused language is not the fault of the reporter.

<sup>2</sup> 21 *State Trials*, 963.

<sup>3</sup> *Ib.* 966. This proposition is very obscurely worded. I suppose it means, "The question whether a given composition is a seditious libel is " a question of fact and not of law." This makes it fit to the fifth proposition. Erskine in his argument states this proposition much more fully and clearly. See below.

CH. XXIV. " may deliver him from the accusation by a general verdict  
 — " of acquittal founded (as in common sense it evidently must  
 " be) upon an investigation as general and comprehensive as  
 " the charge itself, from which it is a general deliverance." He<sup>1</sup> adds, " Having said this, I freely confess to the court that  
 " I am much at a loss for any further illustration of my sub-  
 " ject." No doubt these propositions do convey the gist of  
 great part of his argument. He goes, however, into a history  
 of the law of trial by jury, on which I have already made some  
 remarks, quotes some well-known authorities, and answers  
 some not very striking arguments which may have been ad-  
 vanced by his opponents, of whose arguments no report has  
 been published.

After this he restates his general argument in a new form  
 to the following effect. Granting, for the sake of argument,  
 that the question of the publisher's intention ought not to be  
 left to the jury, it is nevertheless a misdirection to direct the  
 jury to find the defendant guilty upon proof of the publica-  
 tion and of the innuendoes. Such a direction must be taken  
 to be a direction either to find a general verdict or a special  
 verdict. If it is regarded as a general verdict, it is open to  
 the objection that the jury are directed to affirm the guilt of  
 the prisoner, whilst one essential element of his guilt, namely,  
 the criminal intention which is necessary to the offence, is not  
 only not determined by them, or by any one else, but is with-  
 drawn from their consideration. If it is regarded as a special  
 verdict, it is open to the objection that their finding does not  
 enable the court to pronounce the prisoner to be guilty. The  
 essence of a special verdict is that it must contain a set of  
 statements which, taken together, exclude the possibility of  
 the innocence of the accused person, but the statements that  
 A published any writing you please, and that that writing  
 bore any sense you please, do not exclude the possibility of  
 A's innocence, for he may have published it innocently. For  
 instance (the illustration is not Erskine's), it is found by a  
 special verdict that A published a writing in these words,  
 " The king (meaning thereby King George III.) is a monster  
 " of wickedness;" such a special verdict would be consistent

<sup>1</sup> 21 *State Trials*, 973, 974.

with the publication having consisted in the reading of the libel in court by the clerk of assize upon the trial of the author. CH. XXIV.

From this Erskine infers that the criminal intention of the author is a fact to be found, like any other, by the jury. If they find a general verdict of guilty, the intention is affirmed, together with the other elements of the crime. If they find a special verdict, the intention must be set out specially upon the face of it, or the court cannot infer the defendant's guilt.

Erskine's <sup>1</sup> third proposition is that the case of a libel forms no legal exception to the general principles which govern the trials of all other crimes, that the argument for the difference, viz. because the whole charge always appears on the record, is false in fact, and that even if true it would form no substantial difference in law.

As to the first, the whole case does by no means necessarily appear on the record. The Crown may indict part of the publication which may bear a criminal construction when separated from the context, and the context omitted having no place in the indictment, the defendant can neither demur to it nor arrest the judgment after a verdict of guilty, because the court is absolutely circumscribed by what appears on the record, and the record contains a legal charge of a libel.

He is equally shut out from any such defence before the jury, for though he may read the explanatory context in evidence, yet he can derive no advantage from reading it, if they are tied down to find him guilty of publishing the matter which is contained in the indictment however its innocence may be established by a view of the whole work. The only operation which looking at the context can have upon a jury is to convince them that the matter upon the record, however libellous when taken by itself, was not intended to convey the meaning which the words indicted import when separated from the general scope of the writing. But, upon the principle contended for, they could not acquit the

<sup>1</sup> In what precedes I have given what I conceive to be the effect of Erskine's argument in a condensed form. He elaborates, illustrates, and repeats, as counsel usually do, and indeed must; but here I have taken the very words of Erskine's argument, subject to some insignificant exceptions. It is impossible to put his argument into a shorter or plainer form than that in which he is said to have put it himself.

CH. XXIV. defendart upon any such opinion, for that would be to take upon them the prohibited question of libel, which is said to be matter of law for the court.

Erskine supported this proposition by the celebrated illustration first suggested by Algernon Sidney. A is indicted for publishing a blasphemous libel in these words, "There is no God." Evidence is given that he sold a Bible which contains the words, "The fool hath said in his heart, There is no God." No innuendo being required, the jury would, he says, be bound upon the old view of the law to convict the defendant, because they had nothing to do with his intention, and when he moved in arrest of judgment he would be met with the answer that the indictment was good on its face, as the words were blasphemous in themselves, and the jury had found their publication. Lord Mansfield in the course of the argument met this by saying, "To be sure they (the jury) may judge from the whole work." To which Erskine replied, "And what is this, my lord, but determining the question of libel which is denied to-day?" "*Lord Mansfield*: They certainly may in all cases go into the whole context. *Mr. Erskine*: And why may they go into the context? Clearly, my lord, to enable them to form a correct judgment of <sup>1</sup>the meaning of the part indicted, even though no particular meaning be submitted to them by averments in the indictment."

<sup>2</sup> Erskine passes insensibly from his third to his fourth proposition, and argues at great length and with many illustrations that it is a question of fact and not of law whether a libel is or is not seditious. Towards the end of this part of his argument he restates his fourth proposition more fully and perspicuously than he had stated it before, "<sup>3</sup> Where a writing indicted as a libel neither contains, nor is averred by the in-

<sup>1</sup> Yes, but not of the intention of the author in the sense in which Erskine uses the words. The jury may look at the whole to see whether the words "there is no God" mean to deny the existence of God, but it does not follow that they are at liberty to consider what object the author had in view, or by what motives he was actuated when he made the assertion, if he did make it. This confusion between the meaning of the words and the intention and the motives of the author in using the words in that sense, in my opinion, pervades the whole of Erskine's argument, and vitiates great part of it, as I shall attempt to show more fully below.

<sup>2</sup> 21 *State Trials*, 1003.

<sup>3</sup> *Ib.* 1009.



“dictment to contain, any slander of an individual, so as to fall  
 “within those rules of law which protect personal reputation,  
 “but whose criminality is charged to consist (as in the present  
 “instance) in its tendency to stir up general discontent, that  
 “the trial of such an indictment neither involves, nor can in  
 “its obvious nature involve, any abstract question of law for  
 “the judgment of a court, but must wholly depend upon the  
 “judgment of the jury on the tendency of the writing itself  
 “to produce such consequences, when connected with all  
 “the circumstances which attend the publication.”

His most striking arguments are as follows. Suppose a man writes another a letter said to be an overt act of compassing the king's death, and suppose it was set out verbatim in an indictment as such an overt act, would the court tell the jury that the treasonable intention which made it an overt act of high treason was a mere inference of law, and not a matter of fact to be found by them? If yes, the inference follows that a man may be capitally convicted and executed without having had his guilt established by a jury, which, says Erskine, is absurd. If no, why apply to libel a rule which is not applicable to treason? This view struck Erskine so forcibly that he said, “I will rest my whole argument upon the analogy between these two cases, and give up every objection to the doctrine when applied to the one if upon the strictest examination it shall not be found to apply equally to the other.”<sup>1</sup>

He also argued that the question of seditious intention was and must in the nature of things be a question of fact and not of law, inasmuch as it must from the nature of the case depend upon a variety of circumstances which do not and cannot appear on the record to which the court is confined. Words indifferent, temperate, or even conciliatory in their literal meaning might be seditious if spoken or written under special circumstances. “Behold also the gallows which Haman hath made” is, as far as the words go, an inoffensive remark, but Ahasuerus understood them as they

<sup>1</sup> The answer is that the imagining of the king's death is the very definition of treason, but that publishing with a seditious or other illegal intention was no part of the definition of libel when Erskine spoke, though it has now in a sense become part of it.

CH. XXIV. were probably meant when he said, "Hang him thereon." To use Erskine's own striking language, "Circumscribed by the record, your lordship can form no judgment of the tendency of this dialogue to excite sedition by anything but the mere words. You must look at it as if it were an old manuscript dug out of the ruins of Herculaneum; you can collect nothing from the time when or the circumstances under which it was published, the person by whom, and those amongst whom, it was circulated; yet these may render a paper at one time and under some circumstances dangerously wicked and seditious, which at another time and under different circumstances might be innocent and highly meritorious."

He further asks how "the tendency of a paper to stir up discontent against Government, separated from all the circumstances which are for ever shut out from the record," can be "considered as an abstract question of law." His antagonists, he says, "have not told us where we are to find any matter in the books to enable us to argue such questions before the court, or where your lordships yourselves are to find a rule for your judgments on such subjects."

<sup>1</sup> Finally, he observes that the counsel for the Crown always argued to the jury to show that the libels they prosecuted were seditious, and that no one had ever been prevented as counsel for the defendant from arguing that they were not, and he asked why, if all this was mere surplusage, it was permitted by the court? He concludes this part of his argument by citing and examining several authorities. I have noticed most of them already. Speaking generally, I may say that his account of them naturally lays stress upon a few incidental observations and qualifying remarks which fell from different judges, and omits or slurs over the main points decided. I do not think he meets, or could meet, the assertion that they were all directly opposed to his view. Many certainly were, and he was no doubt

<sup>1</sup> No answer can be suggested to this, except the answer that for popular purposes a great deal of surplusage is usually admitted, and that if it is admitted on one side it must in fairness be admitted on both. Perhaps the true answer is, that in this, as in so many other cases, the law, under an appearance of clearness, was really crude and uncertain to the last degree.

aware of this. <sup>1</sup> Lord Campbell says: "In a copy of the tract  
 " which had formerly belonged to Lord Erskine himself, I  
 " find in his own handwriting, after the verdict at Shrews-  
 " bury, the following memorandum:—'In Michaelmas T.,  
 " ' which immediately followed, I moved the Court of King's  
 " ' Bench for a new trial for a misdirection of the judge, and  
 " ' misconduct after the verdict was returned into court. I  
 " ' made the motion from no hope of success, but from a  
 " ' fixed resolution to expose to public contempt the doctrines  
 " ' fastened on the public as law by Lord Chief Justice Mans-  
 " ' field, and to excite, if possible, the attention of Parliament  
 " ' to so great an object of national freedom.' " In his argu-  
 ment he <sup>2</sup> claims Lord Mansfield's decisions in *R. v. Woodfall*  
 and *R. v. Almon* as authorities in his favour. If he had said  
 that each case contained matter which was favourable to  
 his view he would have spoken the exact truth, though I  
 think he not unnaturally or improperly overestimated the  
 importance of that matter.

Erskine's last proposition was, "that in all cases where the  
 " mischievous intention which is agreed to be the essence of  
 " the crime cannot be collected by simple inference from the  
 " fact charged because the defendant goes into evidence to  
 " rebut such inference, the intention becomes then a pure,  
 " unmixed question of fact for the consideration of the jury."

The relevancy of this to the case in hand was that Dean  
 Shipley had given evidence at the trial to show that he pub-  
 lished the pamphlet, not in order to promote sedition, but in  
 order to clear his own character from the charge of having  
 wished to promote sedition. The evidence was that he had  
 prefixed to the pamphlet <sup>3</sup> an advertisement to the effect  
 that he, and a committee of which he was a member, had  
 been charged with "having testified their approbation of  
 " the following Dialogue which had been publicly branded  
 " with the most injurious epithets, and it is conceived that  
 " the one way to vindicate this little tract from so unjust a  
 " character will be as publicly to produce it. The friends of  
 " the Revolution will instantly see that it contains no prin-  
 " ciple which has not the support of the highest authority as

<sup>1</sup> *Chancellors*, vii. 277n.

<sup>2</sup> 21 *State Trials*, 1017.

<sup>3</sup> *Ib.* 892.

CH. XXIV. "well as the clearest reason." The advertisement went on to justify the tract. The contents of this advertisement, says Erskine, ought to have been left to the jury as evidence of the purity of the publisher's intentions or of his "motive for publishing" (which Erskine does not distinguish from intention), and the omission to do this was, he contended, a misdirection. In support of this view he <sup>1</sup>cited Lord Hale on the subject of intention, and some cases of no great importance or interest. He ended this most elaborate and justly celebrated argument with <sup>2</sup>an absurd peroration about himself.

I have anticipated the greater part of Lord Mansfield's judgment, by making the history of the law of libel since

<sup>1</sup> The passages apparently intended to be referred to are 1 Hale, P. C. 508, 509, and 229. The passage first referred to relates only to larceny, and the other only to a statute of Philip and Mary, which made the importation of counterfeit coin, with intent to utter, felony.

<sup>2</sup> "They, however, who may be disposed to censure me" (which nobody was) "for the zeal which has animated me in this cause, will at least, I hope, have the candour to give me credit for the sincerity of my intentions: it is surely not my interest to stir up opposition to the decided authorities of the court in which I practise; with a seat here within the bar at my time of life" (thirty-three years and ten months), "and looking no further than myself, I should have been contented with the law as I found it" (a remark which gave up a great part of his argument), "and have considered how little might be said with decency rather than how much; but, feeling as I have ever done upon the subject, it was impossible I should act otherwise. It was the first command and counsel to my youth always to do what my conscience told me to be my duty, and to leave the consequences to God. I shall carry with me the memory and, I hope, the practice of this parental lesson to the grave. I have hitherto followed it, and have no reason to complain that the adherence to it has been even a temporal sacrifice. I have found it, on the contrary, the road to prosperity and wealth, and shall point it out as such to my children. It is impossible in this country to hurt an honest man, but, even if it were possible, I should little deserve that title if I could upon any principle have consented to tamper or temporise with a question which involves in its determination and its consequences the liberty of the press; and in that liberty the very existence of every part of the public freedom." There are twenty-four personal pronouns in these twenty-two lines. Erskine must have known, and each of his hearers must have known that he knew, the absurdity of the suggestion conveyed by this passage, that he risked something by the argument he delivered, and made some sort of sacrifice to duty by delivering it. In fact he had had two special retainers in the case, each worth 300 guineas, and this particular argument gave him an opportunity for distinction which could hardly be valued in money. The vanity, which is one of the besetting sins of distinguished lawyers, and the vein of devotional fervour which was always breaking out in Erskine, mix oddly and most characteristically in this paraphrase of the doctrine that godliness is great riches, and has the promise of this world. There is another instance of his pleasure in expressing religious sentiment in the argument. "No man believes more firmly than I do that God governs the whole universe by the gracious dispensations of his providence," &c.—21 *State Trials*, 1015.

1688, which formed a considerable part of it, the foundation of my own account of the matter. In two words it amounted to this—that Buller, J., had in his summing up followed the practice of all his predecessors since the Revolution. This was undoubtedly true, and, as I have shown, it would have been easy to show that the practice had prevailed from much earlier times. After stating this, Lord Mansfield observed: “Such a judicial practice in the precise point from the Revolution, as I think, down to the present day, is not to be shaken by arguments of general theory or popular declamation.”

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In speaking of this judgment, in his defence of Paine, some years afterwards, Erskine said of Lord Mansfield: “He treated me not with contempt indeed, for of that his nature was incapable, but he put me aside with indulgence, as you do a child when it is lisping its prattle out of season.” This is just the impression which the judgment conveys.

Erskine afterwards moved in arrest of judgment, on the ground that the matter set forth in the indictment was not libellous. In this the court agreed, and judgment was arrested accordingly.

The decision of the court on the main question led, after an interval of nine years, to the passing of Fox's Libel Act, 32 Geo. 3, c. 60. There were no trials in the interval to which I need refer except that of Stockdale in 1789, which has been already noticed. When this act was under the consideration of Parliament,<sup>1</sup> seven questions were put by the House of Lords to the judges as to the existing state of the law. The result of the questions and answers, which were given unanimously, was to affirm the following propositions:—

1. The criminality or innocence of any act done (which includes any paper written) is the result of the judgment which the law pronounces upon that act, and must therefore be in all cases, and under all circumstances, matter of law and not matter of fact, and this as well where evidence is given for the defendant as where it is not given.

2. The truth or falsehood of a written or printed paper [charged to be a libel] is not material, or to be left to the

<sup>1</sup> 22 *State Trials*, 296-304.

CH. XXIV. jury upon the trial of an indictment or information for libel. The word "false" in an indictment or information is at most a word of form. "In point of substance the alteration in the description of the offence would hardly be felt if the epithet were *verus* instead of *falsus*."

3. <sup>1</sup> If the judge, on a trial for libel, is quite clear that the matter alleged to be libellous is not libellous, he may direct an acquittal although the publication and innuendoes are proved, but he ought to be very sure indeed; and, as a general rule, the safer course is to leave the matter to the court upon the record.

4. <sup>2</sup> The criminal intention charged upon the defendant in legal proceedings upon libel is generally matter of form, requiring no proof on the part of the prosecutor and admitting of no proof on the part of the defendant to rebut it. The crime consists in publishing a libel. A criminal intention in the writer is no part of the definition of libel at the common law. "He who scattereth firebrands, arrows, and death," which, if not a definition, is a very intelligible description of a libel, is *ed ratione* criminal; it is not incumbent on the prosecutor to prove his intent, and on his part he shall not be heard to say, "Am I not in sport?"

Notwithstanding these opinions, the Libel Act became law. It is in these words:—

"An Act to remove doubts respecting the functions of juries in cases of libel.

"Whereas doubts have arisen whether, on the trial of an indictment or information for the making or publishing any libel, where an issue or issues are joined between the King and the defendant or defendants on the plea of not guilty pleaded, it be competent to the jury impaneled to try the same to give their verdict upon the whole matter in issue: Be it therefore declared and enacted by the King's most excellent Majesty, by and with the consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that on every such trial the jury sworn to try the issue may

<sup>1</sup> This answer is given at much greater length.

<sup>2</sup> This is only part of the answer given, which embraces some other matters.

“ give a general verdict of guilty or not guilty upon the  
 “ whole matter put in issue upon such indictment and infor-  
 ‘ mation ; and shall not be required or directed by the court  
 “ or judge before whom such indictment or information shall  
 “ be tried to find the defendant or defendants guilty merely  
 “ on the proof of the publication by such defendant or  
 “ defendants of the paper charged to be a libel, and of  
 “ the sense ascribed to the same in such indictment or  
 “ information.

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“ Provided always that on every such trial the court or  
 “ judge before whom such indictment or information shall  
 “ be tried shall, according to their or his discretion, give their  
 “ or his opinion and directions to the jury on the matter in  
 “ issue between the King and the defendant or defendants  
 “ in like manner as in other criminal cases.”

It was also provided that the act was not to interfere with the jury's right to find a special verdict or the defendant's right to move in arrest of judgment.

The first section of this famous act consists of three parts. The first and most important provision was undoubtedly intended, in general terms, to overrule the law as laid down by the Court of King's Bench, and to establish the principles contended for by Erskine. It does this by *declaring* and enacting that the jury may give a general verdict on the whole matter put in issue by the indictment or information. What part of the indictment or information is put in issue by a plea of not guilty—in other words, which of its averments were matter of substance and which matter of form—the statute does not declare, but leaves to the decision of the court, and this, be it observed, after the judges had given their opinion that “ the criminal intention charged upon the  
 “ defendant in legal proceedings for libel is generally matter  
 “ of form, requiring no proof on the part of the prosecutor  
 “ and admitting of no proof on the part of the defendant to  
 “ rebut it.”

The provision that the jury are not to be required or directed to find a verdict of guilty merely on proof of the publication and innuendoes means that the jury not only have a legal power to return a general verdict, but that they have

CH. XXIV. also a moral right, and that it is their duty to do so if they see their way to it, and that the judge is not to tell them the contrary.

The provision that the judge shall, according to his discretion, give his opinion and direction to the jury on the matter in issue in like manner as in other criminal cases has, I think, been not unfrequently misunderstood. <sup>1</sup>It was no doubt, meant to prevent the notion that the Act was intended to alter, in regard to libel, the duties which the judge has to discharge in criminal cases in general, but this, I think, was only part of its meaning. For a considerable time after the Libel Act passed, the judges were in the habit of treating this enactment as a statutory direction to them to give the jury their opinion on the question whether the matter charged was libellous or not. For instance, in the famous trial of Hone, in 1817, for a blasphemous libel, Lord Ellenborough said: "I will deliver to you my solemn opinion, as I am required by Act of Parliament to do." But the practice was not uniform. <sup>2</sup>Lord Kenyon in several cases expressed no opinion at all. In later times judges have, I think, more frequently abstained from such declarations, considering that the words "in his discretion," and "as in other criminal cases," justify them in so doing.

I think that this particular clause must have had some reference to one of Erskine's contentions in the Dean of St. Asaph's case. He was confident that the pamphlet prosecuted was not libellous, and that the judge would not assert that it was, and he accordingly pressed him strongly to declare his opinion upon the subject to the jury. If the judge had done so, there can be no doubt that he would have said then, as he afterwards did on the motion in arrest of judgment, that the indictment was bad on the face of it, and the result would have been a general verdict of acquittal. Wishing, however, to follow precedent strictly, and perhaps to put the responsibility of a final decision on the court in *banc*, he expressed no opinion whatever upon the subject. In

<sup>1</sup> The proviso was introduced by Lord Eldon, then Solicitor-General. See Twiss's *Life of Eldon*, i. 207.

<sup>2</sup> E.g. in the case of Eaton, 22 *State Trials*, 785 (1798), and in the case of Reeve, 26 *State Trials*, 529 (1796).



various stages of the case Erskine earnestly complained of this, and no doubt the course taken did put the defendant in a less favourable position than he would have been in if the judge had given a direction, for if the direction had been favourable it would practically have ensured an acquittal, and if it was unfavourable it would (if the jury were also directed to convict on proof of the publication and innuendoes) do no harm. I think therefore that the direction means substantially this—the judge's position in trials for libel is the same as in other cases, and if he thinks the jury ought to acquit the defendant he ought to say so, and so contribute to the immediate determination of the case in his favour instead of leaving him to move in arrest of judgment.

It ought to be noticed that the act is wholly silent as to proving the truth of a libel.

This celebrated act, and the discussions which led to it, are perhaps the most interesting and characteristic passage in the whole history of the criminal law.

It would be intricate and tedious to go through all the arguments on the subject, and to say specifically what degree of weight appears to me to attach to each of them. I will give my own view of the matter, and will leave those who think it worth while to compare it in detail with the arguments and authorities above referred to. Speaking generally, I think that the whole discussion consists, on the part of the judges, of attempts to state in an inoffensive and somewhat indistinct way a view of the law which was unpopular though correct. In doing so I think they were led in at least one point into a considerable technical difficulty.

On the part of Erskine and others who took the popular side, the discussion consists of arguments most of which appear to me to be fallacies, though some are highly ingenious fallacies intended to show that the law actually was what they thought it ought to be. These arguments appear to me to rest to some extent upon a confusion of ideas between motive and intention, from which however the judges were not free, and which they certainly did not expose.

The Libel Act is no doubt on its face declaratory, but I look upon this simply as a statement put in the mouth of

CH. XXIV. Parliament by draftsmen who used that form of expression as a way of saying that the law which the Courts had in fact made ought to have been made otherwise than it was.

The first question to be considered is, What, in the latter part of the eighteenth century, was the proper definition of a seditious libel? Omitting technicalities, I think it might at that time have been correctly defined as written censure upon public men for their conduct as such, or upon the laws, or upon the institutions of the country. This is the substance of Coke's case, "*De libellis famosis*," which is the nearest approach to a definition of the crime with which I am acquainted. It was a definition on which the Star Chamber acted invariably, and which was adopted after the Restoration by the Court of King's Bench. It is in harmony with the whole spirit of the period in which it originated, and in particular with the law as to the licensing of books and other publications which then and afterwards prevailed. It was in substance recognised and repeated far into the eighteenth century, and was never altered by any decision of the Courts or any Act of Parliament.

That the practical enforcement of this doctrine was wholly inconsistent with any serious public discussion of political affairs is obvious, and so long as it was recognised as the law of the land all such discussion existed only on sufferance. This, however, by no means shows that it was not the law. If, however, it was the law, it would undoubtedly follow that the law and common practice had come into direct contradiction to each other. All through the eighteenth century political controversy was common and ardent, and on all occasions the freedom of the press was made the subject of boasts and applauses inferior only to those which were connected with trial by jury. Even the counsel for the Crown in prosecutions for political libels and the <sup>1</sup>judges who were most opposed to the popular view of the subject used to join in extolling the

<sup>1</sup> *E.g.* "The liberty of the press is dear to England. The licentiousness of the press is odious to England. The liberty of it can never be so well protected as by beating down the licentiousness. . . . I said that the liberty of the press was dear to Englishmen, and I will say that nothing can put that in danger but the licentiousness of the press."—Lord Kenyon, in *R. v. Cuthill*, 27 *State Trials*, 674. A little further on Lord Kenyon defines the

liberty of the press as an invaluable part of the British constitution, though they used always to contrast it with the license of the press, which was likened to Pandora's box.

I do not know that any one ever attempted to distinguish between liberty and license; but the expression liberty of the press had a definite legal meaning and also a definite popular meaning. Lord Mansfield before the Libel Act and Lord Kenyon after it gave correct and clear definitions of its legal meaning. It consisted, according to Lord Mansfield, in the power of publishing without a license, subject to the law of libel. It consisted, according to Lord Kenyon (after the Libel Act, which, however, in his opinion made no change in the law), in the power of publishing without a license, subject to the chance that a jury might think the publisher deserving of punishment. Each definition was in a legal point of view complete and accurate, but what the public at large understood by the expression was something altogether different,—namely, the right of unrestricted discussion of public affairs, carrying with it the right of finding fault with public personages of whose conduct the writer might disapprove.

It seems to me to follow from the history just given that this was absolutely opposed to the law, and I think that the rhetoric commonly used about the liberty of the press derived some part of its energy and vivacity from the consciousness which the lawyers who employed it must have had of the insecurity of its legal foundations—a circumstance which

liberty of the press thus: "It is neither more nor less than this, that a man may publish any thing which twelve of his countrymen think is not blamable, but that he ought to be punished if he publishes that which is blamable." The definition is admirably terse and correct from a legal point of view, but how does it distinguish liberty from license? If the definition given is substituted for "liberty of the press" the thing defined, the result is strange. "The fact that a man is permitted to publish with impunity any thing which twelve of his countrymen afterwards regard as not blamable, is dear to Englishmen, but that permission can never be so well protected as by punishing severely every one who miscalculates what juries will like." In other words,—The jury are *ex post facto* censors of the press. If they wish to make the power of publishing without any other license really valuable, they ought to be severe censors. A severe censorship is the best guardian of the liberty of the press. A very odd conclusion, practically not differing much from this—the press ought to be put under a severe censorship. This may or may not be true, but it is inconsistent with the doctrine that the liberty of the press is dear to Englishmen. Hobbes is nearly the only writer who seems to me capable of using the word "liberty" without talking nonsense.

CH. XXIV. exercised influence in more ways than one over much of that inordinate appetite for rhetoric which was characteristic of the eighteenth century.

If the leading principle, that a seditious libel means written censure upon any public man whatever for any conduct whatever, or upon any law or institution whatever, is fully understood and admitted, it becomes comparatively easy to solve the questions which were debated with so much vehemence as to the elements of the offence, and the provinces of the judge and the jury respectively in determining upon their existence. The maxim (said by Lord Mansfield to be the only one in the whole law to which there is <sup>1</sup>no exception) that questions of law are for the judge and questions of fact for the jury is sufficient for the solution of all of them,—nor is it, I think, difficult to say what are questions of law and what questions of fact.

In their answers to the questions put to them by the House of Lords, the judges said, I think unanswerably, that the criminality of any act whatever is, and from the nature of the case must be, the result of the judgment of the law upon a state of facts. Hence, questions of law being for the judge, and questions of fact for the jury, the judge's duty must be to tell the jury what judgment the law would pass upon a given state of facts suggested to the jury, supposing them to find its existence. Whether or not A wrote on a sheet of paper the words, "King George III. is a wicked man and deserves general detestation"? is a question of fact. Whether, having written those words on a piece of paper, A gave the piece of paper to B? is a question of fact. Whether, when A gave the paper to B, A knew what was written on it? is a question of fact. Whether to give a piece of paper so inscribed to another with such knowledge is an act of publication? is a question of law. Whether such a publication of such words amounts to the crime of seditious libel? must surely be a question of law also. It is precisely like such

<sup>1</sup> A captious critic might say that the question whether the law of a foreign country is this or that—whether, *e.g.* a marriage in Scotland can be contracted without any ceremony—is for the jury, and not for the judge. There are some remarks upon this in Lord Blackburn's charge to the grand jury of Middlesex in *R. v. Eyre*. See Mr. Finlason's *Report*, pp. 60, 61.

questions as the following: "If A killed B under such and such circumstances, did A murder B?" "If A, intending to deprive B permanently of his horse, and to appropriate it to himself fraudulently and without claim of right, rode the horse away, did A steal B's horse?" "If A, with intent to steal, broke into B's house at twelve at night, did A commit burglary?" Surely each of these is a question of law, and has never been supposed to be anything else. How, then, can the question, Whether the publication of particular words is or is not a crime, be anything but a question of law?

It may be gathered from the controversy of which I have given the history what was the answer to this question. It was that the great test of criminality is the presence of a criminal intention. This principle, and the maxim supposed to embody it, "Actus non facit reum, nisi mens sit rea," is the principal and favourite topic of Erskine's declamations. Mere killing, mere taking away a horse, mere breaking and entering a house at night, do not, he said in substance, amount to murder, theft, or burglary, respectively. The jury must find, in addition malice aforethought, an intent to steal, an intent to commit a felony, respectively, before a man can be convicted of any of these crimes. So the jury must in libel find not only the fact of publication, but the wicked intention charged in the indictment or information, before they can convict of libel. This, in a few words, is the substance of nearly the whole of his argument, and of all that was said on that side of the question by many writers and speakers.

The argument is I think perfectly sound, but it cannot be applied unless it is clearly understood.

It is undoubtedly true that the definition of libel, like the definitions of nearly all other crimes, contains a mental element the existence of which must be found by a jury before a defendant can be convicted, but the important question is, What is that mental element? What is the intention which makes the act of publishing criminal? Is it the mere intention to publish written blame, or is it an intention to produce by such a publication some particular evil effect? Is the definition of libel like the definition of malicious wounding, which involves no other intention than an intention to strike or

CH. XXIV. wound not justified or excused by law; or is it like the definition of wounding with intent to do grievous bodily harm, an offence which consists of the act specified coupled with the particular intention specified?

If the view of the definition of libel already given is correct, if all written blame of public men, laws, or institutions, amounted to seditious libel, then the only intention required to make the publication of a libel criminal was an intention to publish in a defamatory sense, and without legal excuse. Such an intention is undoubtedly required in nearly every case (though even now there is a remarkable exception to it, to be noticed hereafter), and its existence must undoubtedly at all times have been found as a fact by the jury.

It never was the law of England that a man committed the offence of publishing a seditious libel by accidentally dropping one out of his pocket, or by handing, in ignorance of its contents, a closed letter containing one to the person to whom it was addressed. To be a crime, the publication of a libel must always have been intentional. Moreover, the meaning of the whole of the words published taken together must always have been defamatory. It never was doubted that (to take Algernon Sydney's famous illustrations) a man accused of publishing the blasphemous libel, "There is no God," might, upon its being proved that he had sold a Bible, point out that the alleged blasphemy was preceded by the words, "The fool hath said in his heart"; or that a man charged with publishing the immoral libel, "Go and sin," might show that he added the words "no more." Again, it was never doubted that certain circumstances not only justified or excused a man who published a libel, but made it his legal duty to do so. Bracton states that when a man found a libel his duty was to take it to the king or his council, but to do so would be a publication, and so would the act of reading the libel in court when the libeller was put on his trial.

When, however, it is admitted that the questions, Whether the publication was intentional? Whether the indictment or information fairly represents the defamatory character of the matter published? Whether or not the publication was justified or excused by circumstances? are questions of fact for the jury,

the further question arises, Whether there is any authority for saying that the presence of any other specific intention is necessary in order to constitute the crime of publishing a seditious libel? I know of no authority for any such proposition before the passing of the Libel Act. The question may be tested thus. Would an indictment for a seditious libel have been good which, omitting formal parts, ran thus: "The jurors for our lord the king present that A intentionally and without justification or excuse published a seditious libel in these words, 'King George III. is a wicked man deserving of public execration'?" or might such an indictment have been demurred to on the ground that it did not aver that A intended to bring the king into contempt and to excite an insurrection and to promote disaffection or the like?

The answer to this question depends on the question already discussed. What is, or rather what was, the proper definition of a seditious libel? If a seditious libel is defined as the intentional publication, without lawful excuse or justification, of written blame of any public man, or of the law, or of any institution established by law, then the averment of any intention on the part of the defendant other than an intention to publish the blame is mere surplusage which need not be proved. If any further intention, such as, *e.g.*, an intention to produce disaffection or to excite an insurrection, is necessary to constitute the offence, then, no doubt, the averment of such an intention would be essential to the validity of the indictment.

I have given my reasons already for thinking that the first of these definitions was the true one, and it follows that the simpler form of indictment would have been sufficient. It is, however, undoubtedly true that the practice always was to fill indictments and informations with averments of every sort of bad intention on the part of the defendant. It is no exaggeration to say that they loaded him with abuse, as the illustration in the note will show. My own opinion is

<sup>1</sup> "The jurors, &c., present that W. D. S., &c., being a person of a wicked and turbulent disposition, and maliciously designing and intending to excite and diffuse among the subjects of this realm, discontents, jealousies, and suspicions of our lord the king and his government, and disaffection and disloyalty to the person and government of our lord the now king, and to raise

CH. XXIV. that nearly the whole of the matter thus introduced was surplusage, and that the indictment against Dean Shipley (for instance) would have been good if it had consisted only of the matter printed in italics and the necessary formal averments, but of course the introduction of the unnecessary averments afforded to Erskine and others a plausible argument in support of their view of the question. If the question whether Dean Shipley intended by publishing his pamphlet "to excite discontent and disaffection" or "to raise very dangerous seditious and tumults within this kingdom" was material, it was impossible to deny that it was a question of fact for the jury as much as the fact of publication and the fact that F. meant farmer and G. gentleman, and it was natural and obvious to ask why these averments were introduced if they were wholly immaterial and were on a level with the averments in indictments for murder that the prisoner acted at the special instigation of the devil? It would hardly have been considered decorous in that age to give the true answers, which would have been that the indictments preserved the style and temper of an age when round, full-mouthed abuse of people who gave offence to the government was thought natural and proper; that the law being vague and ill-ascertained, and perhaps if clearly ascertained likely to be extremely unpopular, it was best to err on the side of averring too much, so as to make the defendant look, at all events on the face of the proceedings, not only like a criminal, but like an extremely wicked man; that the draftsman was paid by the folio; and, above all, that in formal documents slavish adherence to precedents is the safest course.

"very dangerous seditious and tumults within this kingdom, and to draw the government of this kingdom into great scandal, infamy, and disgrace, and to incite the subjects of our lord the king to attempt by force and violence, and with arms, to make alteration in the government, state, and constitution of the kingdom, on, &c., at, &c., wickedly and seditiously published, and caused and procured to be published, a certain false, wicked, malicious, seditious, and scandalous libel of and concerning our said lord the king, and the government of this realm, in the form of a supposed dialogue between a supposed gentleman and a supposed farmer, wherein the part of the supposed gentleman is denoted by the letter G., and the part of the supposed farmer in such supposed dialogue is denoted by the letter F., entitled, &c., in which said libel is (sic.) contained the false, wicked, malicious, seditious, and scandalous matters following, to wit," &c.



The inference is that the matter really in issue on an indictment for seditious libel was as follows, namely: (1) the fact of publication; (2) the defendant's intention to publish the matter imputed to him in the sense ascribed to it by the indictment or information; (3) it was open to the defendant to prove under the plea of not guilty any matter of legal excuse or justification. Upon each of these points observations arise.

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As to (1), <sup>1</sup>publication of course meant an intentional publication. In practice this was tacitly assumed. The controversy never refers to it.

As to (2), the prosecutor had to prove the truth of the innuendoes, and it was open to the defendant to show by reference to the context either that the words published were published in a different sense from that imputed to them or that they related to a different subject-matter. He might show either that "There is no God" was part of the sentence, "The fool has said in his heart there is no God," or that the whole scheme of the work in which the sentence occurred showed that the words related not to the God of Christianity, but to the gods of heathenism, and that the sentence meant to say that no such god was a real being. Stockdale's case and Horne Tooke's case both show that under circumstances this might practically raise the question of the intention of the author in publishing as distinguished from the intention of the words published.

As to (3), the possibility that there might be such a thing as excuse or justification for the publication of a libel is admitted by Lord Mansfield in the case of Woodfall, and this admission was made great use of by Erskine in his subsequent arguments.

This is practically equivalent to saying that in all common cases the fact of publication and the truth of the innuendoes were the only points for the jury to decide.

If it is asked whether it would not be a question for the jury whether the language used did in fact impute blame either to public men or to existing laws, or to institutions,

<sup>1</sup> I pass over for the present the question of a bookseller's responsibility for acts done by his servant without his knowledge.

CH. XXIV. the answer I think is No, subject to what has already been said as to the right of the jury to determine the meaning of the words used by reference if necessary to the context and by finding the truth of the innuendoes. Assuming the words to be clear in themselves and to be fairly quoted in the indictment or information, it is difficult to see what question of fact there can be as to their meaning. They must speak for themselves. It would surely not be the duty of a judge to say to the jury, "You must consider whether the words 'George III. is an execrable tyrant' do or do not impute blame to him. If you think they do, they are a seditious libel." It would be the judge's duty I think to say positively these words do impute blame to George III., just as it would be his duty to say positively the words "George III. rode in Windsor Park" do not impute blame to him on their face, though by proper averments, which would be for the jury, and in connection with other matter, they might be shown to be seditious or even treasonable.

This view of the law as it stood before the Libel Act is supported by the analogy of civil actions for defamation and of the definitions of all other crimes.

In all common crimes it is the duty of the judge to decide in minute detail upon the criminality of acts said to have been done. In an indictment for wounding, for instance, it is a question of law and not of fact what amounts to a wound; whether, for instance, a <sup>1</sup> blow with a hammer on the face breaking the jaw in two places and making an extensive bruise inflicts a wound, if the surface of the body is not actually divided, and whether a division of an internal surface such as the skin of the inside of the mouth is sufficient to constitute a wound. So it is a question of law whether a man commits an assault by presenting a pistol at another, or by making threatening gestures with a stick. In cases of murder it is the duty of the judge to tell the jury whether any state of mind suggested to have existed when the act was done did or did not amount to what the law means by malice aforethought, and so of the mental elements of all other crimes whatever.

<sup>1</sup> 1 *Russ. Cr.* 921.

Perhaps, however, the most remarkable and instructive analogy is to be found in the law as to civil actions for defamation. In actions for defamatory words it is undoubtedly a question of law whether given words are or are not actionable, and in <sup>1</sup>old writers long lists of decisions (often grotesque) upon the subject are to be found.

Moreover, in all actions for defamation, whether by way of slander or by way of libel, a long series of decisions has established the circumstances under which blame is admissible. A statement of the result of them in the form of a set of seven propositions which collectively define what is meant by malice in relation to a libel on a private person will be found in <sup>2</sup>my *Digest*. These propositions all proceed upon the supposition, which indeed seems to me plain in itself, that language either does or does not convey blame, and that it cannot properly be said to be a question for either judge or jury whether it does so or not. Take *e.g.* the doctrine as to what is called <sup>3</sup>fair comment. Its terms imply that the defamatory nature of the comment speaks for itself. Suppose *e.g.* an action were to be brought against a critic for saying of a book "This is an excellent book"—no innuendo or other averment being used to show that the word was used ironically. It would be absurd to leave to the jury the question whether these words were defamatory. They were clearly not defamatory, and the proper answer to the action would be a demurrer. If the words were, "This is a wicked book," it would be equally plain that the words were defamatory, and the question for the jury would be whether the comment contained in them was fair. It is, however, perfectly

<sup>1</sup> See, *e.g.*, Comyn's *Digest*, title "Action on the Case for Defamation." To charge a woman with prostitution in the city of London is said to be actionable, because of certain customs of the city; *aliter* of the imputation applies to the city of Westminster (*Digest*, 10). It is actionable to say of a barrister, "He has no more *law* than a jackanapes," but not to say "He has no more *wit* than a jackanapes" (*Digest*, 22).

<sup>2</sup> Arts. 271-277, both inclusive.

<sup>3</sup> "The publication of a libel is not a misdemeanor if the defamatory matter consists of comments upon persons who submit themselves, or upon things submitted by their authors or owners, to public criticism, provided that such comments are fair.

"A fair comment is a comment which is either true, or which, if false, expresses the real opinion of its author (as to the existence of matter of fact or otherwise), such opinion having been formed with a reasonable degree of care, and on reasonable grounds."—*Digest*, art. 247, p. 189.

CH. XXIV. true that when the jury have to decide such questions as that of fair comment and the like they are obliged to form their own opinions as to the whole subject, the character of the language used as well as the rest.

Upon these grounds it appears to me that on the main question at issue between them the judges were right and Erskine wrong, in reference to the law as it then stood. At the same time the law was so harsh, indeed in reference to the state of things which even then existed so intolerable, that the judges did not state it nakedly and logically, but put it in a form which exposed them at particular points to arguments to which I see no answer. If they had contented themselves with saying that it was the duty of the judge to tell the jury whether the language imputed to the defendant did or did not constitute a seditious libel if it was published intentionally and without lawful excuse or justification, and if its meaning was fairly represented by the indictment, and that it was the duty of the jury to find a verdict accordingly; and if they had said that every writing which, under any pretence, censured any public man, or any law or institution, was seditious, I think they would have been right, assuming that they had no other duty than that of acting upon the law as it stood according to existing authorities. But they did not do this. They tried to make the verdict of guilty in trials for libel an imperfect special verdict, which would have the effect of convicting the defendant even if he was innocent in the opinion of the judge who tried him, subject to his getting the court to quash his conviction upon a motion in arrest of judgment. Erskine's arguments in Dean Shipley's case set the objections to this in all points of view in so clear a light that I need only refer to them. Shipley's case was in itself an unanswerable proof of the hardship to which defendants were exposed by it. He was convicted, held to bail, and put to all manner of expense, trouble, and anxiety for having published a paper which the judge who tried him did not regard as criminal, instead of having the benefit of a declaration of the judge's opinion, which would have been equivalent to a direction to the jury to acquit.

The effect of the Libel Act, and of the discussions which

led to it, was thus, to embody in the definition of the crime of seditious libel the existence of some kind of bad intention on the part of the offender. I do not think that the mere words of the act abstractedly considered have that effect. They are to the effect that the whole matter in issue upon a plea of not guilty to an indictment for libel is to be left to the jury as in other criminal cases, but they do not say what is in issue on such a plea. The general principle is that a plea of not guilty in a criminal case puts in issue all the material averments in the indictment, but the Libel Act does not say whether the averments as to the specific intentions of the defendant in such cases are or are not material. It no doubt, however, assumes them to be so, and the law has ever since been administered upon the supposition that they are.

The Libel Act must thus be regarded as having enlarged the old definition of a seditious libel by the addition of a reference to the specific intentions of the libeller—to the purpose for which he wrote. And a seditious libel might since the passing of that act be defined (in general terms) as blame of public men, laws, or institutions, published with an illegal intention on the part of the publisher. This was in practice an improvement upon the old law, which indeed was, as I have already pointed out, altogether inconsistent with serious political discussion. The alteration was skilfully made, and the legal reasons assigned for it were plausible, though I think they were nothing more. It is highly improbable that an attempt to give an express statutory definition of the crime would have produced anything better than the practical result of the Libel Act. At the same time it may be said that the definition thus obtained is open to a weighty objection which may be presented in various forms.

To make the criminality of an act dependent upon the intention with which it is done is advisable in those cases only in which the intent essential to the crime is capable of being clearly defined and readily inferred from the facts. Wounding with intent to do grievous bodily harm, breaking into a house with intent to commit a felony, abduction with intent to

CH. XXIV. marry or defile, are instances of such offences. Even in these cases, however, the introduction of the term "intent" occasionally leads either to a failure of justice or to the employment of something approaching to a legal fiction in order to avoid it.

The maxim that a man intends the natural consequences of his acts is usually true, but it may be used as a way of saying that because reckless indifference to probable consequences is morally as bad as an intention to produce those consequences the two things ought to be called by the same name, and this is at least an approach to a legal fiction. It is one thing to write with a distinct intention to produce disturbances, and another to write violently and recklessly matter likely to produce disturbances.

A further objection to referring to the defendant's intention in any case, and especially in defining the crime of libel with reference to it, is that a confusion is sure to occur between intentions and motives. Indeed in the many trials for seditious libel which followed the passing of the Libel Act, I have not found an instance in which the distinction was pointed out. The words are constantly used as if good motives and good intentions were convertible terms. It is, however, obvious as soon as the matter is mentioned that the two are distinct. A man may be led by what are commonly regarded as pure motives to form seditious or even treasonable intentions, and to express them in writing, just as he might be led to commit theft or murder by motives of benevolence. If a man who steals in order to give away the stolen money in charity, or a man who kills a child in order to save it from the temptations of life, is not excused on account of the nature of his motives, why should a man who writes a libel calculated and intended to produce a riot be acquitted because his motive was generous indignation against a real grievance? By making the intention of the writer the test of his criminality a great risk of this result is incurred. A jury can hardly be expected to convict a man whose motives they approve and sympathize with, merely because they regard his intention with disapproval. An intention to produce disaffection is illegal, but the motive for such

an intention may be one with which the jury would strongly sympathize, and in such a case it would be hard even to make them understand that an acquittal would be against their oath. CH. XXIV.

Another objection to the definition is that it is inconsistent with a rule of law which is still in force and which was for many years after the Libel Act acted upon without the smallest question or difficulty. This is the rule that not only the authors of seditious libels but every one who publishes them, and especially every bookseller who sells them, is liable to the same punishment as the author. This rule, indeed, has been carried so far that the publisher has been held to be criminally responsible for the acts of his servant, when they were done only under a general authority and when the master is altogether ignorant of them. In the case, for instance, of *R. v. Cuthill*, evidence was given to show that the pamphlet in question was published by a classical bookseller, who had never read it, and who published it under the impression that it was not a political work at all, supposing it to relate to the subjects on which the author (Gilbert Wakefield) usually wrote. Erskine, who defended Cuthill, admitted that the fact of publication was *prima facie* evidence of what he called "the motives charged in the indictment," but he contended that if he could satisfy the jury that the bookseller was in fact only negligent and inadvertent in the publication, he was entitled to be acquitted. This view of the matter was hardly adverted to by the judge (Lord Kenyon). Cuthill was convicted, and many such convictions have taken place since, without any question as to their propriety. This rule, indeed, was expressly recognised in Lord Campbell's Libel Act of 1843 (6 & 7 Vic. c. 96, s. 7), which provides that when on a trial for libel evidence has been given which establishes a *prima facie* case of publication against the defendant by the act of any other person by his authority, it shall be competent to the defendant to prove that the publication was made without his authority, consent, or knowledge, and that the publication did not arise from any want of due care or caution on his part. This provision clearly shows that a negligent publication of a libel by a bookseller who is ignorant of

<sup>1</sup> 27 *State Trials*, 641. See especially pp. 655, 663, 666, 673-675.

CH. XXIV. its contents is criminal, but such negligence is inconsistent with the presence of any such specific criminal intention as according to Erskine's view of the Libel Act is essential to the offence.<sup>1</sup>

If nothing had to be regarded in legal definitions except clearness and symmetry, a seditious libel ought to be defined with reference to the tendency of the matter published and without reference to the intention of the author; but as, on the one hand, the subject is one of great delicacy, and on the other of little practical importance in the present state of public feeling and practice on such subjects, the Criminal Code Commissioners recommended no modification in that which they believed to be the definition of the offence according to the existing law.

I now proceed with the history of the law. The Libel Act was passed in the session which ended on the 31st January, 1792, many months before the war between France and England broke out, and before the French Revolution had passed into its most violent stage, though war was then imminent between the French and the continental powers. The next four years were, perhaps, the most anxious and stormy in the history of every nation in Europe, and of this nation amongst the rest. The violence of the state of feeling which then prevailed shows itself at least as distinctly in the judicial as in the political history of the country. I have already referred to the trials for high treason in 1794. In 1792 and 1793 the trials for political libels and seditious words were frequent. No less than twelve are reported in the *State Trials*, and they are only specimens.

<sup>1</sup> Whilst these pages were passing through the press I had to try a man named Mertens for printing and publishing a libel in a paper called the *Freiheit*. The libel consisted of an eulogy of the horrible murder committed on the 6th May, 1882, on Lord Frederick Cavendish and Mr. Burke in Dublin. The evidence was that the defendant was a compositor, who had set up the type of the paper, though there was also evidence of his having taken part in other ways in the publication of the paper. I thought myself justified in telling the jury that if they thought that the defendant set up the type mechanically, and without any intelligent perception of the meaning of what he was printing, he ought to be acquitted, but that if he knowingly printed matter which they considered libellous he ought to be convicted, and he was convicted and punished on this direction. I am not sure that in former times this would not have been considered too favourable to the prisoner.



The number so chosen is only one less than the total number of trials for seditious libel reported from 1704 to 1789, both inclusive. I do not propose to go through all of them; it is enough to observe that they supply another illustration of a conclusion which is suggested by many other circumstances, that trial by jury is capable of being quite as severe a method of procedure as any other form of trial. The convictions after the Libel Act were as common as they were before, if not commoner. I will mention a few cases by way of illustration. <sup>1</sup>Duffin and Lloyd, two prisoners in the King's Bench prison, were convicted of "seditiously devising, contriving, and intending to excite and stir up divers prisoners to escape, by publishing an infamous, wicked, and seditious libel," in the shape of a placard, "This house," meaning the said prison, "to let. Peaceable possession will be given by the present tenants on or before the 1st day of January, 1793, being the commencement of the first year of liberty in Great Britain." They were convicted at once. This trial is important only as showing the feeling of the time. At most the paper was an excusable squib.

On the following day (December 18, 1792) a more important trial occurred. This was the <sup>2</sup>prosecution of Paine for publishing the *Rights of Man*. The information extracted various passages from that work said to be written with intent to vilify the Revolution of 1688, to represent that the King, Lords, and Commons tyrannized over the people, and to bring them into hatred and contempt. Paine was convicted, as soon as his defence was over, the jury saying that they did not wish to hear either reply or summing-up. It is indeed impossible to doubt that he did write with the intentions specified. The case is remarkable principally on account of Erskine's speech for the defence, which was his first important speech on the subject after the Libel Act. Erskine in this case seems to me to have shown true courage, for he was on what for a considerable time was the unpopular side, and he spoke with great energy and resolution, although Paine had written from Paris, where he was sitting as a member of the Convention, a letter to the Attorney-General full of brutality and threats,

<sup>1</sup> 22 *State Trials*, 318.

<sup>2</sup> *Ib.* 357-471.

CH. XXIV. <sup>1</sup> and in particular referring disrespectfully to George IV. As Erskine was then Attorney-General to the Prince of Wales this made his position painful. His defence is a remarkable performance in every way, especially when we remember that at the time Louis XVI. was awaiting his trial, the history of the September massacres was but four months old, and the first efforts of the coalition had ignominiously failed. The speech is an elaborate defence and exposition of the extent and nature of the liberty of the press as Erskine understood it, and as he had a right to understand it after the passing of the Libel Act. The substance of his argument (though he does not put it quite in that form) might be expressed somewhat as follows.

The Libel Act practically defines the crime of libel as publishing certain kinds of written blame with a bad intention, that is to say, from a bad motive.

A man who publishes what he really believes to be true from a desire to benefit mankind, does not act from a bad motive, however erroneous his opinions may be, and however harshly they may be expressed.

Therefore, no publication of any opinions really entertained is criminal unless the publisher wishes to injure mankind.

Practically the inference would be that there ought to be no prosecutions for seditious libel at all unless the matter published obviously tended to provoke people to commit some definite crime, or unless it contained definite attacks upon individual character. This is not unlike the conclusion at which we have in practice arrived in these days. Notwithstanding the Libel Act, juries did not accept it for many years after 1792.

Early in 1793 an <sup>2</sup> attorney named Frost was imprisoned

<sup>1</sup> See the letter, 22 *St. Tr.* p. 397. It refers, amongst other things, to "Mr. Guelph, or any of his profligate sons." This allusion to the habits of George IV. was too much for the Attorney-General (Macdonald). "Is Mr. Paine," he asked, "to teach us the morality and religion of implacability? Is he to teach human creatures, whose moments of existence depend upon the permission of a Being, merciful, long-suffering, and of great goodness, that those youthful errors, from which even royalty is not exempted, are to be treasured up in a vindictive memory, and are to receive sentence of irremissible sin at his hands? Are they all to be confounded in those slanderous terms, shocking for British ears to hear, and I am sure distressing to their hearts? He is a barbarian who could use such profligate expressions," &c., and all because George IV. was called "profligate."

<sup>2</sup> 22 *State Trials*, 471-522.

for six months, pilloried, made to find sureties for good behaviour for five years, and struck off the rolls (to which, though pardoned in 1813, he could not, in 1815, procure readmission) for saying in a coffee-house that he was for equality, and no king, and that the Constitution of the country was a bad one. He seems to have been more or less drunk at the time.

In the same year a dissenting minister named <sup>1</sup>Winterbotham was convicted at Exeter of speaking seditious words in a sermon, in which he was said to have spoken favourably of the French Revolution, to have called the taxes in England oppressive, and to have referred in somewhat strong language to the conditions on which English sovereigns held their authority, as illustrated by the Restoration of 1688. The balance of evidence to show that he had not said what was imputed to him was so much in his favour that the judge (Baron Perryn) summed up strongly for an acquittal on each of the indictments on which he was tried. The jury, however, convicted him in each case, and he was sentenced to be fined £100 for each offence, and to be imprisoned for two successive periods of two years, besides finding sureties for his good behaviour. Several other cases of the same kind are reported in the *State Trials*, and no doubt many occurred which are not reported.

In some cases, however, the defendants were acquitted. The most striking and characteristic is the case of Lambert, <sup>2</sup>Perry, and Gray, the proprietors and printer of the *Morning Chronicle*. They had published in that paper, on Christmas Day, 1792, as an advertisement, a <sup>3</sup>paper headed "An Address to the Friends of Free Inquiry and the Public Good," issued at Derby on the preceding 16th July. The substance of it is that "deep and alarming abuses exist in the British Government," that the taxes are too heavy, the frequency of war a matter to be viewed with concern, "cruel and impolitic wars" being one great cause of "our present heavy burdens;" that in order to remedy this there ought to

<sup>1</sup> 22 *State Trials*, 875.

<sup>2</sup> The father of the late Sir Erskine Perry, whose Christian name commemorated his father's sense of his obligation to Erskine on this occasion.

<sup>3</sup> Attributed to Mr. Erasmus Darwin, 22 *State Trials*, 1008.

CH. XXIV. be a reform of the representation, that "we see with the  
 " most lively concern an army of plunderers, pensioners, &c.,  
 " fighting in the cause of corruption and prejudice;" that  
 there exists "a criminal code of laws sanguine and ineffi-  
 " cacious, a civil code so voluminous and mysterious as to  
 " puzzle the best understandings," "the voice of free inquiry  
 " drowned in prosecutions," and other matter of the same  
 kind. Erskine repeated the same arguments as he had used  
 on other occasions. The argument on the other side was  
 that, considering the character of the times when the publica-  
 tion took place, the object of the defendants must have been  
 a bad one. Lord Kenyon in summing up, went so far as to  
 say that in December, 1792, <sup>1</sup> "the country was torn to its  
 " centre by emissaries from France. It was a notorious fact,  
 " every man knows it. I could neither open my eyes nor my  
 " ears without seeing and hearing them." Being published at  
 such a time, argued Lord Kenyon, "believing that the minds  
 " of the people of this country were much agitated by these  
 " political topics, on which the mass of the population can  
 " never form a true judgment, I think this paper was  
 " published with a wicked, malicious intent to vilify the  
 " government and to make the people discontented with the  
 " constitution under which they live . . . that it was done  
 " with a view to vilify the constitution, the laws, and the  
 " government of this country, and to infuse into the minds  
 " of his Majesty's subjects a belief that they were oppressed,  
 " and on this ground I consider it is a gross and seditious  
 " libel." The jury, after considering the matter from 2 P.M.  
 till 5 A.M., acquitted the prisoners, after an ineffectual  
 attempt to return a verdict of "guilty of publishing, but with  
 " no malicious intent," which Lord Kenyon, I think properly,  
 refused to receive.

The immediate effect of the Libel Act was, as appears  
 from these cases, to make the juries *ex post facto* censors of  
 the press. They exercised the function in a very singular  
 way. In 1796 <sup>2</sup>John Reeve, the author of a history of  
 English law which has not even yet been superseded, was  
 tried on a criminal information (filed by order of the House

<sup>1</sup> 22 *State Trials*, 1017.

<sup>2</sup> 26 *Ib.* 529.

of Commons) for a speculation as to the origin of Parliament, in which he said: "The government of England is a monarchy; the monarchy is the ancient stock from which have sprung those goodly branches of the legislature, the Lords and Commons, that at the same time give ornament to the tree and afford shelter to those who seek protection under it." In this and much other matter of the same sort it was said that Reeve unlawfully devised and intended "to destroy and subvert the true principles of the free constitution of this realm, and most artfully and maliciously to traduce, vilify, and bring into contempt the power and dignity of the two Houses of Parliament." Lord Eldon (then Attorney-General) prosecuted him, and must have felt oddly situated in trying to expound to the jury that some expressions contained in the alleged libel, and in particular the author's aversion to the word "Revolution," as applied to the events of 1688, were in a way unorthodox and hard to reconcile to the true view of the Bill of Rights, in short, that Reeve had carried his high Toryism just a little too far, and had become in relation to the golden mean what Tritheists on the one hand, and Sabellians on the other, are in reference to the Athanasian Creed. Lord Kenyon must have been equally puzzled in his summing up. He observed at some length upon the merits of free discussion, observing, <sup>1</sup> "I believe it is not laying in too much claim on the behalf of free discussion to say that we owe to it the Reformation, and that we owed to it afterwards the Revolution." He remarked that "although licentiousness ought beyond all controversy to be restrained, fair discussion ought not to be too hardly pressed upon." He also gave this remarkable direction to the jury: "If I were bound to decide it . . . I certainly should retire: I should take the charge with me, and I should examine the charge; I should take the pamphlet with me, I should examine the pamphlet, and I should see, with every fair leaning to the side of lenity and compassion, whether I thought the party was guilty or not. I say with every *fair* leaning, but still not with that leaning which is to do away with the effect of the criminal law of

<sup>1</sup> 28 *State Trials*, p. 591.

CH. XXIV. "the country." He does not seem on this occasion to have felt bound by his oath to express his opinion, as he did in the case of Lambert and Perry. It is to be hoped that this helped the jury, who returned this odd verdict: "The jury are of opinion that the pamphlet which has been proved to have been written by John Reeve, Esq., is a very improper publication, but being of opinion that his motives were not such as laid in the information, find him not guilty."

Passing over many cases to which reference might be made, I will mention two or three which may be regarded as important in the history of the administration of the law on this subject. <sup>1</sup> In 1810, Lambert and Perry, the proprietors of the *Morning Chronicle*, were for a second time prosecuted for a seditious libel. The libel imputed to them was in these words: "What a crowd of blessings rush upon one's mind that might be bestowed upon the country in the event of a total change of system! Of all monarchs, indeed, since the Restoration, the successor of George III. will have the finest opportunity of becoming nobly popular." Mr. Perry defended himself with the highest ability and was acquitted. Lord Ellenborough summed up in a very different style from Lord Kenyon. The effect of what he said is that moral blame must not be imputed to the king (the case of his deserving it is not suggested or considered), but that it is not libellous to suggest that his measures are mistaken. This is stated at considerable length, but with vigour and clearness, and the principle is applied with conspicuous fairness to the case under consideration. I am not prepared to mention any case before this in which a judge of such high authority as Lord Ellenborough had distinctly said that it was no libel to say that a king was mistaken in the whole course of his policy. It is somewhat remarkable that Lord Ellenborough illustrates his view by remarking that *even* Oliver Cromwell was mistaken, namely, in "throwing the scale of power into the hands of France when he turned the balance against the house of Spain." This implies that Oliver Cromwell was less likely to be mistaken than other rulers of England.

In the troubled times which followed the peace of 1815

<sup>1</sup> 31 *State Trials*, 335-368.

there were many prosecutions for political libels, and the offence of seditious libel received for the first time a kind of statutory definition. It was enacted in 1819, by 60 Geo. 3, and 1 Geo. 4, c. 8, that upon a conviction for blasphemous or seditious libel the court should have power to order all copies of the libel in the possession of the person convicted to be seized, and for the purpose of deciding what libels might be seized under its powers the act gives the following description of seditious libels: "Any seditious libel tending to bring into hatred or contempt the person of his Majesty, his heirs or successors, or the regent, or the government and constitution of the United Kingdom as by law established, or either House of Parliament, or to excite his Majesty's subjects to attempt the alteration of any matter in Church or State as by law established otherwise than by lawful means." Practically this is equivalent to saying a seditious libel is a libel which has any of the tendencies specified. No special change in the law relating to seditious libel has taken place since this time, though there have been several trials for that offence of considerable importance. Two of them deserve special mention—the trial of Sir Francis Burdett in 1820, and that of Cobbett in 1831. Sir F. Burdett was fined £2,000 and imprisoned three months for a somewhat violent and excited letter on the subject of the dispersion of the meeting at St. Peter's Field, Manchester, by the troops and yeomanry. This letter was written in Leicestershire, sent by some means to London, and there delivered to an agent of Sir F. Burdett, who at his request published it in a London newspaper. The trial was not, in a legal point of view, so interesting as the subsequent proceedings on a motion for a new trial. They constitute the most important judicial comment ever made on the Libel Act of 1792, and contain the fullest inquiry into the nature of the offence of libel to be found in any case with which I am acquainted.

One of the grounds on which a new trial was moved for was that the judge (Best, afterwards Lord Wynford,) had exceeded his duty as defined by the Libel Act. The court were unanimously of opinion that he had not. <sup>2</sup>His own

<sup>1</sup> 4 B. and A. 95.

<sup>2</sup> P. 131.

CH. XXIV. account of the part of his direction which had reference to  
this matter is as follows: <sup>1</sup>“ With respect to whether this was  
“ a libel I told the jury that the question whether it was pub-  
“ lished with the intention alleged in the information was  
“ peculiarly for their consideration; but I added that this  
“ intention was to be collected from the paper itself, unless  
“ the import of the paper were explained by the mode  
“ of publication or any other circumstances. I added  
“ that if it appeared that the contents of the paper were  
“ likely to excite sedition and disaffection, the defendant must  
“ be presumed to intend that which his act was likely to pro-  
“ duce.” Further on he says: “ I told the jury that they  
“ were to consider whether the paper was published with the  
“ intent charged in the information, and that if they thought  
“ it was published with that intent I was of opinion that it  
“ was a libel. I however added that they were to decide  
“ whether they would adopt my opinion. In forming their  
“ opinion on the question of libel I told the jury that they were  
“ to consider whether the paper contained a sober address to  
“ the reason of mankind, or whether it was an appeal to their  
“ passions calculated” (he does not say intended) “ to incite  
“ them to acts of violence and outrage. If it was of the former  
“ description it was not a libel; if of the latter description it  
“ was. It must not be supposed that the statute of George  
“ the Third made the question of libel a question of fact. If  
“ it had, instead of removing an anomaly it would have created  
“ one. Libel is a question of law, and the judge is the judge  
“ of the law in libel as in all other cases, the jury having the  
“ power of acting agreeably to his statement of the law or not.  
“ All that the statute does is to prevent the question from being  
“ left to the jury in the narrow way in which it was left before  
“ that time. The jury were then only to find the fact of the  
“ publication and the truth of the innuendoes, for the judges  
“ used to tell them that the intent was an inference of law to  
“ be drawn from the paper, with which the jury had nothing  
“ to do. The legislature have said that is not so, but that the  
“ whole case is for the jury.” This view of the effect of the

<sup>1</sup> *B. and A.* 120



Libel Act<sup>1</sup> was adopted by the whole court. The account which I have already given of the subject shows, I think, that it is in a legal point of view perfectly correct, and that the view taken by the judges in the eighteenth century was also correct, subject to the limitation which I have already stated.

Several other points were debated in Sir Francis Burdett's case, one of which illustrates in a remarkable way the manner in which questions<sup>2</sup> which one would suppose must have been decided may, in fact, remain undecided for centuries. The evidence in the case proved that Sir Francis Burdett wrote the letter in question in Leicestershire, and that by some means or other it was conveyed to London and there published in several newspapers by his orders, but the evidence to show that he published it in Leicestershire was, to say the least, by no means clear. It was alleged, however, that the offence was complete as soon as the letter was written with intent to publish it.<sup>3</sup> Three of the judges held that where a man writes a letter in one county and publishes it in another he may be indicted in either, and this made it unnecessary to determine whether the writing with intent to publish was in itself a misdemeanour.<sup>4</sup> Holroyd, J., expressed a decided opinion in the affirmative, and<sup>5</sup> Abbott, C. J., seemed to incline towards the same view. The question will probably never be decided, inasmuch as it was enacted by 7 Geo. 4, c. 64, s. 12, that an offence begun in one county and finished in another might be tried in either.

Prosecutions for political libels must have occurred between 1820 and 1830, for it appears from a report in the<sup>6</sup> *Annual Register* for 1822 that in that year a body was in existence called the Constitutional Association, which habitually prosecuted persons for that offence, and made them give up books and pay expenses, and engage to discontinue such publications. I have not, however, found any report of any case of libel

<sup>1</sup> Bayley, J., p. 147; Abbott, C. J., 183-184. Holroyd, J., gave no express opinion on this point, but he did not dissent, and no doubt agreed in what was said.

<sup>2</sup> *E.g.* it has never been decided whether signing is essential to the validity of a deed, or whether sealing is sufficient.

<sup>3</sup> Abbott, C. J., Holroyd, J., and Best, J.

<sup>4</sup> P. 135.

<sup>5</sup> Pp. 158-159.

<sup>6</sup> P. 397.

CH. XXIV. tried during that period of much interest either in the *Annual Register* or in an elaborate list of celebrated trials given in Haydn's *Book of Dates*.

Nearly the last trial of what may be called the old type was that of <sup>1</sup>Cobbett on the 7th July, 1831. He was tried for publishing an article in the *Political Register* in December, 1830, which was said to be meant to excite the agricultural labourers to burn ricks, destroy machinery, and commit other outrages. Lord Tenterden tried the case. Lord Denman, then Attorney-General, was counsel for the Crown, and Cobbett defended himself. He reviled the Whigs, he reviled the Attorney-General, he reviled all the newspapers, he reviled the ministry. He declared that he was singled out for persecution when worse offenders were left untouched, and to prove it made all sorts of attacks upon alleged libellers, and upon the course taken in regard to all sorts of offenders, some of whom, he said, had been hung when they should have been pardoned, and one pardoned, because he imputed his offence to <sup>2</sup>"Mr. Cobbett's Lectures," when he ought to have been hung. Lord Tenterden appears to have interfered once only. The defendant was entering upon the question whether Blackstone had "garbled a quotation from the Bible," when the judge observed, "Really, Mr. Cobbett, this is quite "irrelevant to the purpose." Cobbett quietly replied, "I do "not think so, my lord," and proceeded with his criticism without interruption. What excuse there could be for permitting the defendant to turn a trial for libel into a violent attack upon the motives and political conduct of his prosecutors it is impossible to say.

<sup>3</sup>Richard Carlile was tried before the Recorder of London (Mr. Knowlys) about the same time (January 10, 1831) for a similar offence. The charge was publishing a seditious libel inciting agricultural labourers to riot, insurrection, and arson. The libel complained of purported to be an address "to the "insurgent agricultural labourers." It began, "You are much

<sup>1</sup> Cobbett published a shorthand-writer's report of the trial, which I have. It is scarce, and the *State Trials* do not come below 1822. I am by no means confident of the completeness or fairness of the report.

<sup>2</sup> Cobbett keeps insisting on the poor man's mispronunciation, just as he represents the Scotch as bragging of their "antallact," as he rejoices to spell it.

<sup>3</sup> See a rather full report in 4 *C. and P.* 415.

“to be admired for everything you are known to have done during the last month. . . . Much as every thoughtful man must lament the waste of property, much as the country must suffer by the burnings of farm produce now going on, were you proved to be the incendiaries, we should defend you by saying you have more just and moral cause for it than any king or faction that ever made war had for making war. In war all destructions of property are counted lawful, upon the ground of that which is called the law of nations; yours is a state of warfare, and your ground of quarrel is the want of the necessaries of life in the midst of an abundance. . . . The more you have been oppressed and despised the more you have been trampled on; and it is only now that you begin to display your physical as well as your moral strength that your cruel tyrants treat with you and offer terms of pacification.” The passage contained more to the same effect. The Recorder’s charge is remarkable, principally for the earnestness with which he expressed his opinion on the passage from which I have given extracts: “Although you are at liberty, by 32 Geo. 3, to give a general verdict, yet by the same act I am bound to give you my opinion upon the law of the case as if it were a case of murder or of other species of offence,” and he added in reference to the passage extracted from: “I am bound in law and in conscience to tell you, and I do tell you as solemnly as I would pronounce the last supplication on my death-bed, that the matter set out in that count is a most atrocious, a most seditious, a most scandalous, and a most dangerous libel, calculated to encourage his Majesty’s subjects, who were then, as the libel states, in actual insurrection, to continue in that state. This must be the tendency of it.” Carlile was convicted, fined £200, and imprisoned for two years, and till he found sureties for his good behaviour for ten years.

Since the Reform Bill of 1832, prosecutions for seditious libel have been in England so rare that they may be said practically to have ceased. In one or two instances there have been prosecutions and convictions for writings amounting to a direct incitement to commit crimes, one of which I may

CH. XXIV. mention by way of illustration. In July, 1839,<sup>1</sup> riots took place in the Bull-ring at Birmingham, in the course of which some of the Metropolitan police were taken down to Birmingham, sworn in as special constables, and employed in the suppression of the riots. This excited the anger of a body called the General Convention, of which one Collins was a member. They published a placard containing three resolutions, describing the police as "a bloodthirsty and unconstitutional force from London," and strongly reflecting on the conduct of those by whom the police were sent there. For publishing this placard the <sup>2</sup>defendant was indicted for a seditious libel. The summing-up of the judge (Littledale, J.) states the modern view of the law on this subject plainly and fully: "You will first have to consider whether the statement "at the commencement of the indictment that there was an "unlawful assembly which was dispersed by the police be true "or not, and if it be true you will then have to consider "whether this publication was or was not a calm and temperate "discussion of the events which had occurred; for if the object "of it were merely to show that the conduct of the police "was improper, that would not be illegal, because every man "has a right to give every public matter a candid, full, and "free discussion. If the language of this paper was intended "to find great fault with the police force, even that might not "go beyond the bounds of fair discussion, and you have to "say, looking at the whole of this paper, whether or not it "does so. With respect to the first resolution, if it contains "no more than a calm and quiet discussion, allowing some- "thing for a little feeling in men's minds (for you cannot "suppose that persons in an excited state will discuss subjects "in as calm a manner as if they were discussing matters on "which they felt no interest), that would be no libel; but "you will consider whether the kind of terms made use "of in this paper have not exceeded the reasonable bounds "of comment on the conduct of the London police. With "respect to the second resolution . . . you are to consider " . . . whether they meant to excite the people to take the

<sup>1</sup> See cases of *R. v. Neale*, 9 *C. and P.* 481; *R. v. Howell and others*, *ib.* 87.

<sup>2</sup> *R. v. Collins*, 9 *C. and P.* 450.

“power into their own hands, and meant to excite them to  
 “tumult and disorder. . . . The people have a right to dis-  
 “cuss any grievances that they have to complain of, but they  
 “must not do it in a way to excite tumult. It is imputed  
 “that the defendant published this paper with that intent,  
 “and if he did so, it is in my opinion a seditious libel.” In  
 one word, nothing short of direct incitement to disorder and  
 violence is a seditious libel. A few cases have occurred very  
 lately. On the 25th May, 1881, <sup>1</sup>Most, a German, was tried  
 for writing an article in a newspaper which was found by  
 the jury to be intended to incite those who might read  
 it to assassinate sovereigns as the Emperor Alexander II.  
 of Russia was assassinated, and also to contain libels  
 upon foreign princes. He was convicted, and two other  
 persons, Schwelm and Mertens, were convicted for some-  
 what similar articles in the same paper in June and July,  
 1882.

Such are the leading points in the history of the law of  
 seditious libel in England. I may refer in connection with it  
 to a class of libels which, if not seditious, have nevertheless  
 a political character. <sup>1</sup>These are libels upon foreigners of  
 eminence, attacks upon whom, in their public capacity, are  
 likely to produce ill will or even war between this country  
 and the foreign nations to which the persons libelled belong.  
 Five cases of this sort have occurred. By far the  
 most remarkable of them is the case of Peltier, who was  
 tried on the 21st February, 1803, for a libel upon Napoleon  
 (then First Consul), which was said to contain <sup>2</sup>a suggestion  
 that he should be assassinated. Mackintosh's speech in his  
 behalf appears to me to be far superior as a composition to be  
 read to any of Erskine's speeches. It is remarkable, however,

<sup>1</sup> See my *Digest*, art. 99. It refers to all the cases on the subject, viz. *R. v. D'Eon*, 1 H. Blackstone, 510; *R. v. Gordon*, 22 *State Trials*, 213; *R. v. Vint*; *R. v. Peltier*, 28 *State Trials*, 529. To these must now be added *R. v. Most*, tried before Lord Coleridge at the Old Bailey, 25 May, 1881.

<sup>2</sup>  
 “ Il est proclamé chef et consul pour la vie,  
 “ Pour moi loin qu'à son sort je porte quelqu'envie,  
 “ Qu'il nomme j'y consens son digne successeur  
 “ Sur le pavois porté qu'on l'élise empereur ;  
 “ Enfin, et Romulus nous rappelle la chose,  
 “ Je fais vœu dès demain qu'il ait l'apothéose.”

—28 *State Trials*, 533.

CH. XXIV. that Peltier was convicted, though never called up for judgment, owing to the outbreak of war with France, which happened on the 29th April, 1803.

The law as to political libels has not been developed or altered in any way since the case of *R. v. Burdett*. I may, however, observe that if it should ever be revived, which does not at present appear probable, it would be found to have been insensibly modified to a great extent by the law as to defamatory libels upon private persons, which in modern times has been the subject of a great number of highly important judicial decisions. The result of them will be found in my <sup>1</sup> *Digest*. The effect of these decisions is, amongst other things, to give a right to every one to criticise fairly, that is honestly, even if mistakenly, the public conduct of public men, and to comment honestly, even if mistakenly, upon the proceedings of parliament and the courts of justice. Practically this by another road establishes pretty much the same theory as to the liberty of the press as was established by the long series of cases just referred to.

It is usual to describe the establishment of practically unlimited freedom of political discussion as a triumph of common sense, and as a conclusive proof of the idleness and absurdity of the restraints which have been removed. This view may no doubt be correct. It may also be true that the change marks a period in human affairs which is no more final than any of its predecessors, and that if in the course of time governments should come to be composed of and to represent a small body of persons who by reason of superior intellect or force of character or other circumstances have been able to take command of the majority of inferiors they will not be likely to tolerate attacks upon their superiority, and this may be a better state of things than the state of moral and intellectual anarchy in which we live at present. Which of these views is true it would be out of place to discuss here. It is enough to say that in this country and in this generation the time for prosecuting political libels has passed, and does not seem likely to return within any definable period.

<sup>1</sup> Chap. xxxii. articles 267-277, pp. 184-193.

Some other political offences remain to be noticed. I have pointed out that prosecutions for seditious words were not uncommon about the year 1794. No such prosecution, I believe, has taken place for very many years. Seditious language, however, has on several occasions been made the subject of prosecutions, the charge being that of unlawful assembly or seditious conspiracy, of which violent speeches have been regarded as overt acts.

Several memorable trials of this sort have taken place both in England and Ireland in the course of the present century. I have already given an account of the law of conspiracy in general, regarded as a branch of the law relating to attempts, incitement, and other inchoate, imperfect crimes. Its application to political and especially to seditious offences is comparatively modern, the first instance of such a prosecution with which I am acquainted being that of 'Red-head Yorke, in 1795. His trial is remarkable as an illustration of the way in which the law has been adapted to the various changes in the state of society which have taken place.

It would be difficult to say precisely at what period the use of completely organised voluntary associations for the purpose of obtaining political objects first became a marked feature of English political life, but it is certain that it received a great accession of importance, to say the least, when associations began to be formed for the purpose of procuring changes in the constitution of parliament and the other institutions of the country by constitutional means.

In earlier times the great questions which agitated the country hardly admitted of such associations. A voluntary association of the religious kind under the Tudors or Stuarts would have rendered its members liable to severe penalties under the Acts of Uniformity. An association for the purpose of dethroning James II. or for reinstating James III. would have been high treason.

It was not till the public at large, or considerable sections of them, began to agitate for changes in the constitution to be effected by Act of Parliament, that the formation of societies

<sup>1</sup> 25 *State Trials*, 1003.

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Many prosecutions for seditious conspiracy have occurred since that time. I may mention those of <sup>1</sup>Hunt and others, who were tried in 1820 for a seditious conspiracy of which the holding of the meeting dispersed at Manchester in 1819 was the principal overt act; <sup>2</sup>the trial of Vincent and others at Monmouth for a seditious conspiracy in connection with the Chartist disturbances in 1839; the trial of O'Connell and others in 1844 for a seditious conspiracy, of which the meetings held and speeches made in the course of the agitation for the repeal of the Union were overt acts, is another and a memorable instance; and I may also refer to the trial of Mr. Parnell and others on somewhat similar charges which took place at the end of 1880 and the beginning of 1881.

<sup>1</sup> The passages in *The Life of a Radical*, by Samuel Bamford, are principally occupied by this trial and the events which led to it.

<sup>2</sup> 29 *C. and P.* 91.



These prosecutions and others which might be referred to all proceed on principles very similar to those on which seditious libels are tried. The charge commonly is that the defendants conspired together to effect some purpose inconsistent with the peace and good government of the country, and that they manifested that intention by speeches made, meetings held, and other steps taken in concert. The proof commonly is that some sort of organisation was formed in which the defendants took part, and that things were written and said in consequence which were calculated to effect the objects in question.

No case sets this in so clear a light as the memorable one of <sup>1</sup>O'Connell. The indictment consisted of eleven counts, upon which there was as to three of the defendants a general verdict of guilty and a single sentence. Of the counts nine were declared by all the judges, when consulted by the House of Lords, to be good; two were declared to be bad. <sup>2</sup>The nine good counts charged, with different modifications, a conspiracy with intent to raise discontent and disaffection amongst the liege subjects of the Queen; to stir up jealousies, hatred, and ill-will between different classes of her Majesty's subjects; and especially to promote amongst her Majesty's subjects in Ireland feelings of ill-will and hostility towards her Majesty's subjects in the other parts of the United Kingdom, and especially in England; to diminish the confidence of her Majesty's subjects in Ireland in the general administration of the law therein; and to bring into hatred and disrepute the tribunals established by law in Ireland for the administration of justice; to bring about changes in the law by meetings held to hear seditious speeches and by seditious writings. <sup>3</sup>The other counts, which were held bad, charged in substance a conspiracy to cause meetings to be held for the purpose of obtaining changes in the government and constitution of the realm "by means of the exhibition and demonstration of the "great physical force at such meetings." This language was

<sup>1</sup> 11 *Cl. and F.* 155.

<sup>2</sup> The indictment is given at pp. 157-165. The summary in the text is taken from the opinion of Tindal, C. J., pp. 234 and 236. It gives the substance of the indictment.

<sup>3</sup> Pp. 234-235.

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held to be too vague and uncertain to enable the court to say positively that the combination which it described must necessarily be illegal. These counts, however, would it seems have been good if they had been properly drawn.

The remarkable part of this decision is that it shows how wide the legal notion of a seditious conspiracy is. It includes every sort of attempt, by violent language either spoken or written, or by a show of force calculated to produce fear, to effect any public object of an evil character, and no precise or complete definition has ever been given of objects which are to be regarded as evil. All those which are mentioned in O'Connell's case are included in the list, but there may be others.

In the present day the law as to seditious conspiracy is of greater practical importance than the law of seditious libel. Political combinations are so common, and may become so powerful, that it seems necessary that a serious counterpoise should be provided to the exorbitant influence which in particular circumstances they are capable of exercising.

Two points still remain to be noticed which have been passed over in the preceding history of the development of the law of libel. The first is the nature, extent, and history of the rule that it is no defence to a criminal prosecution for libel to plead the truth of the matter complained of. The second is the relation between the law of seditious libel and that which is known better perhaps on the continent than in England by the name of the right of public meeting.

With regard to the rule as to the irrelevancy of the truth of the matter complained of to a libel considered as a criminal offence, it is necessary, in the first place, to recall the authorities already discussed and the history of the offence related at so much length.

Referring for the details to what has already been said, I may observe that, according to the original theory of the law of libel such offences obviously fell into two main classes. The first class consisted of written blame cast upon the institutions and general conduct of the government. The second, of attacks upon individuals, whether they happened

to be public men or not. The principle more or less distinctly avowed, and frequently avowed with perfect distinctness, which regulated and indeed still regulates in theory the law as to offences of the first class, is that no man is to be permitted to attempt to bring into discredit the institutions of his country. If they have any defects the matter may be represented by petition to parliament, which has power to provide a remedy, but no one is to be permitted to appeal to the public at large on subjects of which most of them are incompetent to judge.

I have given the history of the gradual and informal steps by which this principle came to be qualified by an exception so nearly co-extensive with it that it has for common purposes, and in quiet times, practically superseded the rule. The exception is that criticism of existing institutions, intended in good faith for their improvement and for the removal of defects in them, is lawful, even if it is mistaken. With respect accordingly to such criticisms, it may still be said that the truth of the matter stated in a writing prosecuted as a seditious libel is immaterial. For instance, if a person were charged with seditious libel for asserting that the taxes were unjust and oppressive, and that the revenue was squandered on improper objects, the question for the jury would not and could not be whether the assertion was true, nor would evidence to prove its truth be admissible. The question would be whether the writer's object was to procure a remedy by peaceable means, or to promote disaffection and bring about riots.

With regard to attacks upon individuals, holding public positions or not, the principle was somewhat different, and the course taken by the law has also been different. Two grounds were assigned for this rule, as it affected men holding public positions. In the first place, it used to be said that the reason for punishing libels was their tendency to produce breaches of the peace, and that the truth of the libel would rather increase than diminish this tendency. As regards men holding public situations, this was open to

<sup>1</sup> "As the woman said, She would never grieve to have been told of her red nose if she had not one indeed."—Hudson's *Star Chamber*, p. 103.

CH. XXIV. — the obvious reply that it could hardly be supposed that a man in such a position would assault a person who libelled him for his public conduct, and no doubt the theoretical possibility that he might do so was alleged mainly as a decent technical reason for a rule which prevented the public discussion in pamphlets and newspapers of the conduct of public men. At a later period a reason commonly assigned for the rule was that if it were not enforced it would be possible for any one to put any one else upon his trial for any offence whatever, without legal evidence and without the other protections provided by law for persons accused of crimes. For instance, Horne Tooke charged the troops employed in America with murder, and the same and similar charges were made by Sir Francis Burdett against the yeomanry and soldiers who dispersed the Manchester meeting. It was said to be a hardship to these persons that the question whether they had committed murder should be tried in a prosecution to which they were not parties and behind their backs, and that if such a charge was brought at all it should be brought by a person prepared to undertake the responsibility of proving it in a court of justice by legal evidence. Great part of several of the judgments in *R. v. Burdett*, and more particularly on the question whether affidavits as to the truth of the allegations treated as libellous should be received in mitigation of punishment, turn upon this point.

It must be admitted that this argument has, at least in reference to a considerable number of libels, something unreal and technical about it which diminishes its weight. In a large number of cases the charges made against a public man's character by a newspaper or pamphlet do not charge him with anything for which he could be made responsible as a criminal, but only with misconduct, for which public discussion is practically the only available remedy. If the truth of such accusations were not allowed to be proved by way of a justification for making them much official misconduct and incapacity would be practically altogether unchecked. For cases of this kind, however, full provision has been made in two separate ways, namely, first, by the establishment of the rule that fair

comment upon matters of public interest is lawful—a rule established in a number of civil actions for libel, but equally applicable to criminal prosecutions; and secondly, by 6 & 7 Vic. c. 96, commonly called Lord Campbell's Act, which provides, though in terms 'not by any means free from difficulty, that it shall be competent for a defendant on an indictment or information for a defamatory libel to plead the truth of the matters charged, and that "it was for the public benefit that the said matters charged should be published."

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<sup>1</sup> The following difficulties occur upon the act—perhaps they are rather verbal than substantial:—

(1.) The expression "defamatory libel" has, or rather had, no ascertained legal meaning before this act was passed. It has been held not to include seditious or blasphemous libels (*R. v. Duffy*, 2 Cox, *C.C.* 49); but a seditious libel may also be defamatory. Personal misconduct might be imputed to eminent personages with a seditious intention, *e.g.*, an article imputing to George IV., whilst Prince of Wales, that he had secretly married a Roman Catholic, and that his subsequent marriage was bigamous, would have been both defamatory and seditious in the highest degree. The act leaves it doubtful whether such a libel could be justified or not.

(2.) The act says, s. 2, "The defendant, having pleaded such a plea as before mentioned, the truth of the matters charged may be inquired into, but shall not amount to a defence unless it was for the public benefit that the said matters charged should be published." It then says how the pleading is to proceed, but omits to say directly that the defendant is to be acquitted if he proves all that he is required to prove. This, probably, is only clumsy drafting. The act then goes on to say, "Provided always, that the truth of the matter charged shall in no case be inquired into without such plea or justification." This raises a difficulty. In s. 4 it is provided that if any one maliciously publishes a defamatory libel, "knowing it to be false," he is to be liable to two years' imprisonment; and s. 5 says, that if any one "maliciously publishes a defamatory libel," he shall be liable to be punished for one year. If a man indicted under s. 4 may prove the truth of the matter charged by way of showing that he could not know the matter charged to be false, the proviso in s. 2 is too narrow; and if he cannot it is difficult to see how any one can ever be convicted of such an offence as publishing a libel knowing it to be false, for it would be monstrous to suggest that the prosecutor might show that the defendant knew the libel to be false by giving evidence of its falsehood and of his knowledge of it, and that the defendant might not contradict him.

The difficulty may be thus illustrated:—A is indicted for publishing, knowing it to be false, that B led a grossly immoral life in his youth, the fact, if true, being one in which the public have no interest. B gives evidence to show that the assertion is false to A's knowledge. If A may contradict this by proving the assertion to be true, there is a case in which the truth of an alleged libel may be inquired into without any such plea of justification as the act permits, which contradicts in terms the proviso quoted. If A may not contradict the evidence given by B, the maxim "Hear both sides" is violated.

(3.) S. 7 allows a defendant to answer a presumptive "case of publication" by the act of some other person by his authority," by proving that in fact the publication was made without his consent or knowledge, and did not arise from want of due care on his part, but it omits to say whether such proof is to entitle him to an acquittal, or to go in mitigation of punishment. Probably, however, it means the former.

CH. XXIV. I think that it would have been well to except from this provision libels which charge any one with committing an indictable offence, for it certainly is a grievous hardship on a man that he should be liable to be practically put upon his trial for any crime whatever by any person who chooses to run the risk of being himself prosecuted for libel for so doing, and that when so treated he should, speaking practically, be compelled to swear to the falsehood of the accusation, and to be obliged to answer upon oath to a cross-examination as to the whole of his life. The expression, Liberty of the Press, means in reality (like all other phrases into which the word liberty enters) the power of the press, and upon this point I think the press has far more power over the reputation of people in general than it ought to have.

The Newspaper Libel and Registration Act, 1881 (44 & 45 Vic. c. 60), seems to me to carry this power to a height extremely dangerous to private reputation. Libellers in newspapers are by its provisions made a privileged class, for they may not be prosecuted for their crimes without the leave of the Director of Public Prosecutions,—a privilege accorded to no other criminal whatever. I do not complain of the extension to newspaper libels of the Malicious Indictments Act, for I think it ought to be applied to all criminal proceedings; but the provision that matters of justification may be given in evidence before the committing magistrate seems to me to be opposed to every principle hitherto recognised in English criminal procedure. Cases ought to be tried before courts, not before committing magistrates; and if the magistrate goes into matter of justification and excuse—madness, for instance—the preliminary procedure becomes a superfluous trial. It is also an abortive trial, for, though the magistrate may dismiss the case, he must bind over the prosecutor to indict if he desires it. The section which privileges fair reports of public meetings appears to me most objectionable, though not likely to be repealed. It is in keeping with that indifference to personal dignity and paltry curiosity about private affairs which is one of the contemptible points of the habits of life of our day.

Far from relaxing the law as to newspaper libel, I should

wish to see its stringency increased. It seems to me that the definition of libel should be so enlarged as to include the publication of any matter, true or false, constituting an intrusion upon private life, not capable of being shown to be in some definite way required for the public good. Why should a man be allowed (if indeed he is by law allowed) to make another's life a burden to him by publishing accounts of every sort of minute detail about his private life and personal affairs for no other reason than to make money by pandering to the prurient love for petty gossip which writing of this sort at once promotes and gratifies? The domestic spy, who picks up personal gossip for the purpose of publishing it in the papers, appears to me to be of the same family as the wretch who extorts hush-money by threats to publish.

The second matter to be noticed is the relation of the law of seditious libel, seditious words, and seditious conspiracy, to the right of holding public meetings for political purposes.

To hold an unlawful assembly or meeting is an offence known to the common law. It was defined by the Criminal Code Commission after much consideration in the following words, reference being made to a passage in the report given in the footnote.

“An<sup>1</sup> unlawful assembly is an assembly of three or more

<sup>1</sup> “The definition of an unlawful assembly in Part VI. depends entirely on the common law.

“The earliest definition of an unlawful assembly is in the *Year-Book*, 21 Hen. 7, 39. It would seem from it that the law was first adopted at a time when it was the practice for the gentry, who were on bad terms with each other, to go to market at the head of bands of armed retainers. It is obvious that no civilised government could permit this practice, the consequence of which was at the time that the assembled bands would probably fight, and certainly make peaceable people fear that they would fight. It was whilst the state of society was such as to render this a prevailing mischief that the earlier cases were decided; and consequently the duty of not provoking a breach of the peace has sometimes been so strongly laid down as almost to make it seem as if it were unlawful to take means to resist those who came to commit crimes. We have endeavoured in section 84 to enunciate the principles of the common law, although in declaring that an assembly may be unlawful if it causes persons in the neighbourhood to fear that it will needlessly and without reasonable occasion provoke others to disturb the peace tumultuously, we are declaring that which has not as yet been specifically decided in any particular case. The clause as to the defence of a man's house has been inserted because of a doubt expressed on the subject. Forcible entry and detainer are offences at common law; and section 95 we believe correctly states the existing law.”

CH. XXIV. "persons who, with intent to carry out any common purpose,  
 "assemble in such a manner or so conduct themselves when  
 "assembled as to cause persons in the neighbourhood of such  
 "assembly to fear on reasonable grounds that the persons so  
 "assembled will disturb the peace tumultuously, or will by  
 "such assembly needlessly and without any reasonable  
 "occasion provoke other persons to disturb the peace  
 "tumultuously."

"Persons lawfully assembled may become an unlawful as-  
 "sembly if they conduct themselves with a common purpose  
 "in such a manner as would have made their assembling  
 "unlawful if they had assembled in that manner for that  
 "purpose.

"An assembly of three or more persons for the purpose  
 "of protecting the house of any one of their number against  
 "persons threatening to break and enter such house in  
 "order to commit any indictable offence therein is not  
 "unlawful."

If a meeting is held for the purpose of speaking seditious words to those who may attend it, those who take part in that design are guilty of a seditious conspiracy, of which the seditious words spoken are an overt act, and their meeting is an unlawful assembly. If at a meeting lawfully convened seditious words are spoken of such a nature as to be likely to produce a breach of the peace, the meeting may become unlawful in all those who speak the words or do anything to help those who speak to produce upon the hearers their natural effect. The speaking of the seditious words is in itself an offence in the speaker, but a mere meeting for the purpose of political discussion is not in itself illegal unless the circumstances under which it is convened or its behaviour when it is convened is such as to produce reasonable fear of a breach of the peace, nor do I think that bare presence at such a meeting as a hearer or spectator makes a man guilty of any offence, though it may expose him to serious consequences if the meeting becomes disorderly and has to be dispersed, for in such a case force may be used against all persons who are present, whether they take part in the unlawful object of the meeting or not. The law upon the



subject was <sup>1</sup>stated fully in the famous case of *Redford v. Birley*, which was an action brought by a person who was injured on the occasion, against the captain in command of the yeomanry who dispersed the meeting at Manchester in 1819.

CH. XXIV.

In conclusion I will notice shortly some of the provisions of the French and German codes on offences, analogous to those which have been the subject of the present chapter.

It is remarkable that the French *Code Pénal* contains no provisions at all corresponding to the seditious offences known to the law of England, but the absence of such provisions is supplied by <sup>2</sup>an elaborate and somewhat intricate series of enactments relating to the press. Many of the laws in force apply to conditions imposed on the publication of books, newspapers, &c., which it would be foreign to my purpose to describe or discuss. The earliest law now in force which creates press offences of the nature of libels is the law of May 17, 1819. <sup>3</sup>It enacts in the first place that every one who "par des discours, des cris ou menaces proférés dans des lieux ou réunions publiques soit par des écrits, des imprimés, des dessins, des gravures, des peintures ou emblèmes vendus ou distribués mis en vente ou exposés dans les lieux ou réunions publiques, soit par des placards et affiches exposés au regard du public, aura provoqué l'auteur ou les auteurs de toute action qualifiée crime ou délit à le commettre sera réputé complice et puni comme tel." The description of the manner in which press offences may be committed given in this article runs through the subsequent legislation, which usually provides that every one who does something by any of the means referred to in the law of May 17, 1819, Article I, shall incur certain consequences.

If we turn to the *Code Pénal* it will be seen that the article first quoted is capable of being so interpreted as to be extremely severe. For instance, by Article 87, "l'attentat dont le but est, soit de détruire ou de changer le gouvernement," is a crime punishable with transportation. If such

<sup>1</sup> 3 Starkie, *N. P.* pp. 102-107; motion for new trial, pp. 110-128.

<sup>2</sup> Collected in Roger et Sorel, *Lois Usuelles*, under the head "Presse," pp. 989-1018.

<sup>3</sup> P. 991.

CH. XXIV. an offence is committed, every person whose words or writings may be regarded as having incited any one to take part in it would be an accomplice, and so liable under Article 59 to the same punishment. The importance of this, however, depends upon the manner in which the word "provoquer" may be interpreted in practice.

By <sup>1</sup> Articles 2 and 3 of the same law a provocation to a crime or *délit* by the same means not followed by the actual commission of the offence suggested is punishable in the case of a provocation to a crime by imprisonment for from three months to five years, and in the case of a *délit* for from three days to two years.

In order to appreciate the effect of these provisions it must be recollected that the *Code Pénal* contains many provisions as to public functionaries resembling nothing known to our law. The following are a few instances.

By Article 201 ministers of religion who in the exercise of their functions deliver any discourse "contenant la critique " ou censure du gouvernement, d'une loi, d'un décret du " Président de la République ou de tout autre acte de l'autorité " publique," may be imprisoned for two years.

By Article 222, "Lorsqu'un ou plusieurs magistrats de " l'ordre administratif ou judiciaire, lorsqu'un ou plusieurs " jurés auront reçu dans l'exercice de leurs fonctions ou à " l'occasion de cet exercice quelque outrage par paroles par " écrit ou dessin non rendu public, tendant dans divers cas " à inculper leur honneur ou leur délicatesse celui qui leur " aura adressé cet outrage sera puni d'un emprisonnement de " quinze jours à deux ans." By the following articles insults to any person holding any sort of official position are punishable with more or less severity. By the press law almost any criticism upon public men for their public conduct might be punished as a "provocation" to some one of these offences.

An offence still more likely to be regarded as being provoked by writings in the papers is *Rébellion*, as defined by the *Code Pénal* (Articles 209-220). Under this name the French law includes all resistance to isolated acts of the Government:—"Toute attaque, toute résistance avec violence,

<sup>1</sup> P. 992.

"et voies de fait envers les officiers ministériels, les gardes champêtres, ou forestiers, la force publique, les préposés à la perception des taxes et des contributions, les porteurs de contraintes, les préposés des douanes, les séquestres, les officiers ou agents de la police administrative ou judiciaire, agissant pour l'exécution des lois, des ordres, ou ordonnances de l'autorité publique, des mandats de justice, ou jugements, est qualifiée, selon les circonstances, crime ou délit de rébellion." The circumstances which determine the quality of the offence are the number of the offenders and their being armed or not. <sup>1</sup> Variations are rung on these points with the minute and rather fanciful precision characteristic of the French Code.

Besides the provisions by which writers may become the accomplices of other persons, the legislation to which I am referring creates a number of substantive offences which may be committed by writers on public affairs. Thus <sup>2</sup> Article 8 of the law of May 17, 1819, subjects to a year's imprisonment, "tout outrage à la morale publique et religieuse ou aux bonnes mœurs par l'un des moyens énoncés en l'article 1."

<sup>1</sup> The articles run thus :—

	Persons.	Armed or not.	Punishment.
Rebellion by	20	armed	travaux forcés à temps.
„	20	not armed	reclusion.
„	3 to 20	armed	reclusion.
„	3 to 20	not armed	6 months' to 2 years' imprisonment.
„	1 or 2	armed	6 months' to 2 years' imprisonment.
„	1 or 2	not armed	6 days' to 6 months' imprisonment.

Nothing would be easier than to put cases showing the extreme hardship which this apparently neat but really trivial and superficial arrangement might produce. <sup>2</sup> P. 992.

CH. XXIV. <sup>1</sup> Article 13 defines "diffamation" as "toute allegation ou imputation d'un fait qui porte atteinte à l'honneur ou à la considération de la personne ou du corps auquel le fait est imputé."

It defines "injure" as "toute expression outrageante terme de mépris ou d'invective."

Subsequent articles punish with fine and imprisonment, "la diffamation envers tout dépositaire ou agent de l'autorité publique pour des faits relatifs à ces fonctions," also "la diffamation envers les ambassadeurs, ministres plénipotentiaires, envoyés, chargés d'affaires, ou autres agents diplomatiques."

In the <sup>2</sup>law of May 26, 1819, which regulates the procedure in these cases the following provision occurs: "nul ne sera admis à prouver la vérité des faits diffamatoires si ce n'est dans le cas d'imputations contre des dépositaires ou agents de l'autorité, ou contre toutes personnes ayant agi dans un caractère public de faits relatifs à leurs fonctions." The exception to this rule is in singular contrast to the law of England as it stood in 1819, and it differs from the spirit of French legislation in general, which is specially favourable to persons in authority.

On <sup>3</sup>25th March, 1822, a further law on the press was enacted, which is still in force though the punishments have been to some extent modified, and though its provisions have been applied to the new order of things. The principal offences created by it are <sup>4</sup>as follows: Art. 1.—"Quiconque . . . aura outragé ou tourné en dérision la religion de l'État." Art. 3.—"L'attaque . . . des droits garantis par les articles 5 et 9 de la charte constitutionnelle." Art. 4.—"Quiconque . . . aura excité à la haine ou au mépris du gouvernement du roi." Art. 5.—"La diffamation ou l'injure . . . envers les cours, tribunaux, corps constitués, autorités ou administrations publiques." Art. 6.—"L'outrage fait publiquement d'une manière quelconque à raison de leurs fonctions ou de leur qualité soit à un ou plusieurs membres de l'une des deux chambres, soit à un fonctionnaire public, soit enfin

<sup>1</sup> P. 993.

<sup>3</sup> Roger et Sorel, 996.

<sup>2</sup> P. 994.

<sup>4</sup> Art. 1, p. 9.

“à un ministre de la religion de l'État, ou de l'une des religions dont l'établissement est légalement reconnu en France.” Finally, omitting some matters of less importance, Art. 10 provides that “Quiconque par l'un des moyens énoncé en l'article 1 de la loi du 17 Mai, 1819, aura cherché à troubler la paix publique en excitant le mépris ou la haine des citoyens contre une ou plusieurs classes de personnes” shall be liable to a maximum imprisonment of two years.

Upon the establishment of the Republic of 1848 these laws were not only maintained but extended. By the law of<sup>1</sup> Aug. of 11 that year it is enacted (Art. 1) that “tout attaque par l'un des moyens, &c., contre les droits et l'autorité de l'assemblée nationale, contre les droits et l'autorité que les membres du pouvoir exécutif tiennent des décrets de l'assemblée, contre les institutions républicaines, et la constitution, <sup>2</sup> contre le principe de la souveraineté du peuple et du suffrage universel,” shall be punishable by fine and imprisonment, which may extend to five years.

By Art. 3 an attack “contre la liberté des cultes, le principe de la propriété, et les droits de la famille” exposes its author to fine and imprisonment from a month to three years.

Article 5 punishes “l'outrage fait publiquement d'une manière quelconque à raison de leurs qualité soit à un ou plusieurs membres de l'assemblée nationale, soit à un ministre d'un des cultes qui reçoivent un salaire de l'État.” On the 27th July, 1849, a law was passed which extended the 7th article of the law last mentioned to attacks “contre les droits de l'autorité que le President de la République tient de la Constitution et aux offenses envers sa personne.” The following new provision was also made (Art. 3):<sup>3</sup> “Toute attaque par l'un des mêmes moyens, contre le respect dû aux lois et l'inviolabilité des droits qu'elles ont consacrés, toute apologie de faits qualifiés crimes ou délits par la loi pénale sera punie d'un emprisonnement d'un mois à deux ans et d'une amende de seize francs à mille francs.”<sup>4</sup> Laws have also been made

<sup>1</sup> Roger et Sorel, 1001.

<sup>2</sup> These words are strange to a reader of M. Taine's *Origines de la France Contemporaine*.

<sup>3</sup> Roger et Sorel, 1002.

<sup>4</sup> See, in particular, law 11 May, 1868, p. 1012; 15 April, 1871, p. 1014; 6 July, 1871, p. 1015.

CH. XXIV. as to the licensing and suppression of newspapers, but the only additional offence which need be noticed as having been created by later legislation is contained in <sup>1</sup>Art. 1 of the law of Dec. 29, 1875, which extends Art. 1 of the law of Aug. 11, 1848, to "toute attaque par l'un des moyens énoncés en l'article 1 de la loi du 17 Mai, 1819, soit contre les lois constitutionnelles, soit contre les droits et les pouvoirs du gouvernement de la République qu'elles ont établi."

The German law upon the subject presents some points of resemblance and some of marked contrast to the French law. It is much simpler and less stringent. <sup>2</sup>It is contained so far as I can ascertain, in the law on the Press passed 7 May, 1874, and in certain provisions of the *Strafgesetzbuch*. The first article of the law of 1874 says: <sup>3</sup>"The freedom of the Press is subject to those restrictions only which are prescribed or admitted by the present law." It proceeds to lay down various regulations as to the publication of newspapers and other periodicals. It defines (Articles 20 and 21) the degree of responsibility which attaches to various persons connected with a periodical <sup>4</sup>if its contents are criminal, but it is silent as to what amounts to a crime.

There are, however, provisions in the *Strafgesetzbuch* which supply the silence of the Press law on this subject. Thus Article 110, which closely resembles some of the articles of the French law of 1819, punishes with fine and imprisonment up to two years every one who "publicly before an assembly" or by <sup>5</sup>publication or public promulgation or public exhibition "of writings or other representations incites to disobedience to the laws or ordinances having the force of law, or orders made by the government within its competency." Article 111 puts every one who by any of the above-mentioned means

<sup>1</sup> Roger et Sorel, 1016-1017.

<sup>2</sup> The quotations below are from Rudorff's *Strafgesetzbuch nebst den gebräuchlichsten Reichs-Strafgesetzen*, 1881.

<sup>3</sup> "Die Freiheit der Presse unterliegt nur denjenigen Beschränkungen welche durch dies gegenwärtige Gesetz vorgeschrieben oder zugelassen sind."—P. 178.

<sup>4</sup> "Begründet der Inhalt einer Druckschrift den Thatbestand einer Strafbarenhandlung, so wird der verantwortliche Redakteur der Verleger, der Drucker," &c.—P. 184.

<sup>5</sup> "Verbreitung." A "Verbreiter" is defined in the press law thus: "Derjenige welcher die Druckschrift gewerbsmassig vertrieben oder sonst öffentlich verbreitet hat."—P. 185.

<sup>1</sup>incites any one to an act punishable by law on the same footing as an accessory before the fact (*Anstifter*). If the incitement is not followed by any effect the punishment is reduced to fine up to 600 marks and imprisonment up to a year.

The offences punished by the *Strafgesetzbuch* to which it is likely that these provisions should apply are not so numerous, nor are they defined in such sweeping terms as in the *Code Pénal*. It is obvious, however, that so general a provision must be capable of being so construed as to impose great restrictions on public discussion.

There are some provisions which apply more directly to what we should call seditious libels. <sup>2</sup>Article 130 punishes every one who "in any way dangerous to the public peace publicly incites" (*anreizt*) "different classes of the population to acts of violence against each other." By <sup>3</sup>Article 131 every one is liable to punishment who "publicly affirms or publishes false or distorted facts, knowing that they are false or distorted, in order thereby to bring into contempt the measures or orders of the government."

Besides these general provisions the *Strafgesetzbuch* contains many enactments as to the offence of "Beleidigung," which may be translated insult, and resembles the "injuria" of the Roman lawyers. It includes, however, insult by writings, &c. Two chapters of the *Strafgesetzbuch* are concerned with it, namely, chapters ii. and xiv. of the Second Part. Chapter ii. is headed "Beleidigung des Landesherrn" and punishes insults to the Emperor and the rulers of the different states of the confederation. Thus <sup>4</sup>"wer den Kaiser" or certain other sovereigns "beleidigt" is liable to imprisonment up to five years. The same offence against other princes of the confederate states is punishable less severely (see Articles 95-101).

The fourteenth chapter of the Second Part relates to the offence of "Beleidigung" simply. It is treated of in <sup>5</sup>articles 185-200, which seem from their terms to apply chiefly to private insults and libels, though insults to and libels on public men for their public conduct are evidently intended to be included. By Article 185, "die beleidigung" is declared to

<sup>1</sup> "Auffordert." <sup>2</sup> P. 58. <sup>3</sup> P. 59. <sup>4</sup> Art. 95. <sup>5</sup> Pp. 80-86.

CH. XXIV. be punishable by fine up to 100 marks or imprisonment up to a year, or <sup>1</sup> if it is committed by an act the fine may be 1,500 marks, and the imprisonment two years. No definition of the offence is given in this Article. By Article 186 it is provided that "whoever asserts or publishes a fact relating to another which has a tendency to bring him into contempt or to dishonour him in public opinion, is, unless the fact is notoriously" (*erweislich*) "true, punishable as for insult," —the punishment is fine and imprisonment up to a year in general, and a higher fine and imprisonment up to two years when the insult is public or is effected by the publication of writings, pictures, or representations. A subsequent Article (192) provides that proof of the truth of a fact alleged or published is not to exclude punishment for an insult under Article 185, if the existence of insult is established either by the form of the affirmation or publication, or by the circumstances under which they occur. I suppose that the result of the two enactments would be that if A were to say of B, truly, "You committed theft at such a time and place," he would, under Article 186, be justified by showing the truth of his assertion; but that if A called out "Thief" after B in the street simply for purposes of insult he would be liable to be punished under Article 185. Provision is made by Article 187 for an increased severity of punishment if the matter published is false to the knowledge of the offender. Article 193 protects unfavourable judgments upon scientific, artistic, and professional performances; communications made in the exercise or for the protection of rights, or the protection of legitimate interests; reproofs and censure by superiors to inferiors; official reports or judgments by a public officer; and similar cases, unless the form of the communication or the circumstances under which it is made show the existence of insult (*Beleidigung*).

It is remarkable that by Article 189 the publication of facts known to be false to the prejudice of the reputation of a deceased person is punishable on the demand of a parent, child, widower, or widow of the deceased.

<sup>1</sup> "Mittels einer Thätlichkeit begangen wird." "Thätlichkeit," I suppose, corresponds to the French "voie de fait," which, though not exactly confined to an assault, commonly means an assault.



Besides these provisions a very stringent law was passed on the 21st October, 1878, "against <sup>1</sup>the generally dangerous efforts of Social Democracy." This law prohibits (Art. 1) societies "which by social, democratic, socialist, or communistic efforts aim at the overthrow of the existing order of government or society," or in which the same effects come <sup>2</sup>to light "in a manner which endangers the public peace particularly the harmony of different classes of society."

By Article 11 publications of the same character (the words of the definition just given are repeated) are forbidden, and periodicals of which a single number is forbidden may be suppressed. Various administrative provisions, which I pass over, are contained in the law as to the extent and effect of the prohibitions to be imposed. By subsequent Articles (17-20) the infringement of these prohibitions is punished by various terms of fine and imprisonment.

From this comparison of the laws relating to what may in one word be called sedition in three great nations it seems to follow that the law of France is by far the most severe, and the law of Germany more severe than that of England; but the great and striking peculiarity of the law of England lies in its historical character. It was worked into its present form by a process which lasted for at least 150 years, and of which the history is traceable for a much longer time. That process was hardly aided by the legislature at all, and such assistance as the legislature did give was afforded in such a way as to be wholly unintelligible to a person unacquainted with the history of the common law and the decisions upon it. It is still more worthy of remark that though the law of England, if used in a stringent manner, might be at least as severe as the law of Germany as embodied in the *Strafgesetzbuch*, it has in practice become almost entirely obsolete, so far as press offences are concerned, for a period of about fifty years.

<sup>1</sup> "Gesetz gegen die gemeingefährlichen Bestrebungen der Sozialdemokratie."—P. 197.

<sup>2</sup> "Zu Tage treten."