A HISTORY

OF

THE CRIMINAL LAW

OF ENGLAND.

BY

SIR JAMES FITZJAMES STEPHEN, K.C.S.I., D.C.L.,

A JUDGE OF THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION.

IN THREE VOLUMES.

VOL. III.

London:

MACMILLAN AND CO.

1883.

CONTENTS.

CHAPTER XXXII.

CHAPTER XXXIII.

CHAPTER XXXIV.

A HISTORY

OF

THE CRIMINAL LAW OF ENGLAND.

CRIMINAL LAW.

CHAPTER XXVI.

HISTORY OF THE LAW RELATING TO MURDER AND MANSLAUGHTER.

HAVING in the preceding chapters given the history of offences against the tranquillity of the state, I pass to the history of offences against individuals. Most of these are punishable under the various provisions of the five consolidation acts of 1861, namely, 24 & 25 Vic. cc. 96, 97, 98, 99, and 100. These statutes define most of the crimes which they punish, and I shall have to notice both the history of the acts themselves, and the history of some of their detailed provisions; but they do not define, but assume the definitions of the most important of those crimes; particularly homicide and theft.

Each of these definitions has a history of its own, of considerable interest, quite distinct from the history of the act by the provisions of which the crime defined is punished. In the present chapter I propose to deal with the history of the definition of the offence of homicide in its two forms of murder and manslaughter. In the next chapter I shall examine, so far as I think it necessary to do so, the other provisions of the act relating to offences against the person.

The manner in which and the occasions upon which people

CH. XXVI. may be killed, and the circumstances by which the moral character of the act of killing is determined vary little, in the times and countries with which I am concerned, and I will try to make a statement of them. The vast mass of cases which have at different times been decided about homicide have supplied the materials for this statement; but as my present object is to make the subject intelligible without dwelling on technicalities, I will not at present refer to them specifically.

The subject obviously divides itself as follows:—

1. What is homicide?

2. In what cases is homicide lawful, and in what cases is it unlawful?

3. What is the nature of the distinction between the two forms of unlawful homicide, murder and manslaughter?

It is only by this preliminary analysis of the result that the process by which it was reached can be understood.

First, then, What is homicide?

Homicide obviously means the killing of a human being by a human being; but each member of this definition suggests a further question. When does a human being begin to be regarded as such for the purposes of the definition? What kind of act amounts to a killing?

With regard to the first question the line must obviously be drawn either at the point at which the fœtus begins to live, or at the point at which it begins to have a life independent of its mother's life, or at the point when it has completely proceeded into the world from its mother's body. It is almost equally obvious that for the purposes of defining homicide the last of these three periods is the one which it is most convenient to choose. The practical importance of the distinction is that it draws the line between the offence of procuring abortion and the offences of murder or manslaughter, as the case may be. The conduct, the intentions, and the motives which usually lead to the one offence are so different from those which lead to the other, the effects of the two crimes are also so dissimilar, that it is well to draw a line which makes it practically impossible to confound them. The line has in fact been drawn at this point by the law of

England; but one defect has resulted which certainly ought to be remedied. The specific offence of killing a child in the act of birth is not provided for, as it ought to be. It was proposed by the Criminal Code Commissioners to remove this defect[1] by making such an act a specific offence punishable with extreme severity, as it borders on murder, though the two should not be confounded.

The question what amounts to killing is of greater difficulty and intricacy and it will, I think, be found to divide itself into several subordinate questions, all having reference to the extension to be given to an expression which in its obvious primary sense presents no difficulty. Where one man with his own hand stabs, strikes, or strangles another, and so causes his death, he obviously kills him, but the exact limits of the phrase are by no means obvious. The practical questions which arise are these. Killing may be defined as causing death directly, distinctly, and not too remotely; but several questions occur as to the limitations imposed upon the word "causing" by these qualifications. The following classification of the subject is, I think, sufficient for practical purposes.

A man may be killed either by an act or by an omission. Killing by an act is the common case and shall be considered first.

In order that a man may be killed by an act the connection between the act and the death must be direct and distinct, and though not necessarily immediate it must not be too remote. These conditions are not fulfilled (1) if the nature of the connection between the act and the death is in itself obscure, or (2) if it is obscured by the action of concurrent causes, or (3) if the connection is broken by the intervention of subsequent causes, or (4) if the interval of time between the death and the act which causes it is too long. Whether in particular cases these conditions are or are not fulfilled is always a question of degree dependent upon circumstances. The principle may be illustrated in a variety of ways, but no precise and completely definite statement of it can be made.

[1] See section 212 of Draft Code.

CH. XXVI.

Killing by an act which causes death in a common well recognised way either immediately or after an interval of time insufficient to disguise or complicate the connection between the cause and the effect is the typical and normal case, and this is well illustrated by the old form of indictments already described. "A. in and upon B. did make an assault, and with "a knife which he the said A. held in his right hand did give "to B. on the left breast one wound of the length of one inch "and of the depth of four inches, of which the said B. for four "days did languish, and languishing did live, and of which on "the fifth day the said B. died." The extreme particularity of such indictments shows a consciousness on the part of the early lawyers of the narrow limits of their own knowledge, and of the importance which they attached both to alleging and to proving that the unlawful act done was in fact the immediate distinct cause of the death of the deceased.

The possibility of framing an indictment for given conduct was, so long as the ancient strictness of pleading was observed, the true test of criminality, just as the question whether a given act would fall within any one of the known forms of action was regarded as the test of its being a contract or a tort.

This is illustrated by the case of witchcraft. It was for many centuries believed that people could be killed by witchcraft, but such supposed acts were never prosecuted as murder because the mode in which witchcraft operated was unknown, and so could not be stated in an indictment.

Belief in homicidal [1] witchcraft being exploded, the difficulty which it might once have caused can no longer arise, but cases may still occur in which death is caused by an act inflicting no definite assignable bodily injury upon the person killed, or in which death, if followed by such an injury, may or may not be regarded as the effect of it. Thus, for instance, it is often said, and sometimes truly, that a son breaks his mother's heart by dissolute and extravagant habits, or that a woman dies because she has been seduced and deserted.

[1] I say "Belief in homicidal witchcraft," because the belief in spirit-rapping is the modern representative of belief in witchcraft, and is as common and as earnest as its predecessor. It seems to me to be just about as well founded, and to be based upon the same fundamental absurdities.

In cases of this kind it would generally be impossible to prove any definite connection between any one act on the part of the person said to cause the death, and the actual occurrence of the death. Whether mere grief and anxiety ever killed a thoroughly healthy person, and if so, what were the special symptoms which brought the death about, is, I suppose, doubtful. I know of no instance in which the question whether such conduct is homicide has ever been raised.

Another set of cases in which it might be doubtful whether homicide had been committed or not are those in which an obscure mortal injury is definitely caused by an apparently inadequate cause—a cause at least which does not usually produce such results. A very slight nervous shock might in many cases kill a person suffering under disease of the heart as effectually as a shot or a stab. I suppose there are cases in which acts which in health would pass unnoticed, such as the disarrangement of a pillow, sudden waking from deep sleep, or the sudden communication of bad news, might cause the death of a sick person, just as a man hanging over a precipice might be killed by loosening a stone or a root. In all such cases the connection between cause and effect is not only definite, but when the facts are known it is obvious; but they are all cases in which death is caused without the infliction of any such obvious definite bodily injury as seems to have been required by the old law in order to make an act homicide. To shout in the ear of a sleeping man who has certain diseases of the heart may be as effectual a way of killing him as a stab with a knife, but at first sight such a death would not be described as being caused by any definite bodily injury. Should such a case occur in the present day I think it would be regarded as killing.

There are few, if any, decisions and not many dicta on this subject in the books. The only one of much importance with which I am acquainted occurs in [1] Hale's *Pleas of the Crown*. "If any man either by working on the fancy of "another, or possibly by harsh or unkind usage, puts another "into such passion of grief or fear that the party either dies

[1] i. 429.

CH. XXVI. "suddenly or contracts some disease whereof he dies, though "as the circumstances of the case may be, this may be "murder or manslaughter in the sight of [1] God, yet *in foro* "*humano* it cannot come under the judgment of felony, "because no external act of violence was offered, and secret "things belong to God, and hence it was that before the "statute of 1 James 1, c. 12 witchcraft or fascination was not "felony, because it wanted a trial" (I suppose this means because it could not be proved), "though some constitutions "of the civil law make it penal."

The great improvements which have taken place in medical knowledge since Hale's time of course make it possible in the present day to speak much more decisively on the question whether death has been caused by a given act or set of acts than was formerly possible. It might be impossible to say precisely whether a woman's death was caused by the unkindness of her husband, but where death was caused by a definite nervous shock or the like, I suppose there would be no difficulty in ascertaining the fact.

With regard to concurrent causes of death questions of the utmost difficulty often arise, especially upon trials for manslaughter; but the difficulty lies entirely in ascertaining the facts, and not in applying the law to them. Every effect is caused by every event of which it may be affirmed that if it had not happened the effect would not have been produced. Leaving out of consideration the remote and accidental causes of death, it often happens that several events are so connected with a given death that it is difficult to say which of them caused it.

For instance, a man in weak health is violently assaulted, and dies after some weeks or months. Upon a *post-mortem* examination it appears that he suffered under a mortal disease which no doubt was one cause of his death. The question, however, arises whether but for the violence he received he would have died when he did? The law is perfectly clear, that if by reason of the assault he died in

[1] There is something rather grotesque in the notion of God's recognizing the distinction between murder and manslaughter, as will appear when the history of the definition is given.

the spring of a disease which must have killed him, say in the summer, the assault was a cause of his death; but the difficulty of deciding the fact is often very great. I lately tried a case in which a man was accused of having caused his wife's death by a blow on the head. There was evidence that he struck her, there was also evidence that after he struck her she had jaundice and inflammation of the brain, and a premature confinement attended with some unfavourable circumstances (which, however, would tend to relieve the inflammation of the brain), after which she died. Whether the blow was the cause of this train of symptoms, or whether it was merely an accidental antecedent of them was a question of considerable intricacy and difficulty, though certain details as to the character of the inflammation of the brain showing its origin led to the prisoner's conviction.

The following are instances of concurrent causes of death. A man receives an injury for which he undergoes a surgical operation, of the results of which he dies. He refuses to undergo a surgical operation which would probably have cured him, and in consequence of his refusal he dies. The surgeon who attends him is incompetent and pursues a wrong course of treatment, either from ignorance or from bad faith, and this ends in his death. The surgeon's treatment is proper, but the patient will not observe his directions and dies. In all these cases the deceased is regarded as having been killed by the injury except in the case of the malpractice of the surgeon; but it is also worth while to observe that in all of these the connection between the act and the death caused by it is direct and distinct, though it cannot in any of them be called immediate. In each of them the man would not have died as he did if he had not been wounded; but also in each case something different from his wound caused his death, and was a more immediate cause of it than the wound.

I pass next to the cases in which, though the connection between the death and the injury is direct and distinct, other causes have intervened sufficiently distinct from and independent of the injury to prevent the case from being treated as homicide. It is needless to refer to cases where the cause

is obviously remote. No one would say, for instance, with reference to this subject, that a man's parents had caused his death by causing his birth. The only cases worth examining are those which illustrate the limit. One obvious limit is length of time. Instances of death from wounds or other injuries received many years before death are [1] not unknown. In some cases of this sort the connection is clear. In general it would be obscure. The law of England has laid down an arbitrary rule for criminal purposes upon this subject. No one is criminally responsible for a death which occurs upwards of a year and a day (that is, more than a complete year reckoning the whole of the last day of the year) after the act by which it was caused.

A more remarkable set of cases are those in which death is caused by some act which does unquestionably cause it, but does so through the intervention of the independent voluntary act of some other person. Suppose, for instance, A. tells B. of facts which operate as a motive to B. for the murder of C. It would be an abuse of language to say that A. had killed C., though no doubt he has been the remote cause of C.'s death. If A. were to counsel, procure, or command B. to kill C. he would be an accessory before the fact to the murder, but I think that if he had stopped short of this A. would be in no way responsible for C.'s death, even if he expected and hoped that the effect of what he said would be to cause B. to commit murder. In Othello's case, for instance, I am inclined to think that Iago could not have been convicted as an accessory before the fact to Desdemona's murder, but for one single remark—"Do it not with poison, "' strangle her in her bed." [2]

[3] This principle would apply to the case, often discussed but never expressly decided, of murder by false testimony.

[1] It is stated, *e.g.* that Andrew Jackson received a wound in a duel which displaced some of his internal organs, and rendered him liable to occasional severe fits of sickness, one of which, many years after the duel, caused his death. Sir William Napier received a ball in his back in the Peninsular War which caused him frightful torture for the rest of his life, and might, I suppose, have caused his death.

[2] As, however, Othello killed himself, Iago, in the then state of the law, could not even have been brought to trial in England.

[3] See the case of R. *v.* McDaniel, 19 *St. Tr.* 810, note, in which this view was acted upon, though no express judicial opinion was given upon it.

Oates directly and distinctly caused the death of several innocent persons by perjury, but the fact that the judges and juries who tried the cases acted upon their own responsibility, and because they chose to believe Oates's testimony, so disconnected his perjury from the death which he caused that even in 1685 it was not thought possible to convict him of murder. An instance of a somewhat similar kind is this. A woman dies in her confinement. It can hardly be said that the father of her child has killed her, though the connection between his act and her death is perfectly distinct. Even if the connection which caused the birth of the child was a rape, I do not think that the death would amount to murder; nor would it be so if a husband, tired of his wife, and being warned that her death would be the probable result of childbirth, intending and hoping to cause her death, actually caused it in the manner supposed. Death by childbirth and the connection which leads to childbirth are separated from each other by so many possibilities, and the circumstances which render childbirth dangerous or otherwise have so little relation to its distant cause, that I think if the question were ever raised it would be considered that the cause of death was too remote for the act to be regarded as homicide. Somewhat similar illustrations might be supplied by the case of infection. A. hoping that B., his enemy, will catch the small-pox, induces him to walk down a street in which many persons are sick of it. B. catches the small-pox and dies. A. no doubt has caused B.'s death, but in a manner so remote and dependent on so many contingencies that it could hardly be said that he had killed him. Should such a case occur however, and should the facts be plainly proved, it is difficult to say how the court might ultimately decide.

Thus far I have illustrated the proposition that in the case of killing by an act the act must be connected with the death, directly, distinctly, and immediately. I now come to the case of killing by omissions.

The idea of killing by an omission implies, in the first place, the presence of an opportunity of doing the act the omission of which causes death. It would be extravagant to say that a man who having food in London omits to give

CH. XXVI. it to a person starving to death in China has killed the man in China by omitting to feed him; but it would be natural to say that a nurse who being supplied with food for a sick person under her care omits to give it, and thereby causes the sick person's death, has killed that person. Whether a person, who being able to save the life of another without inconvenience or risk refuses to do so, even in order that he may die, can be said to have killed him is a question of words, and also a question of degree. A man who caused another to be drowned by refusing to hold out his hand to save him probably would in common language be said to have killed him, and many similar cases might be put, but the limit of responsibility is soon reached. It would hardly be said that a rich man who allowed a poor man to die rather than give, say £5, which the rich man would not miss, in order to save his life, had killed him, and though it might be cowardly not to run some degree of risk for the purpose of saving the life of another, the omission to do it could hardly be described as homicide. A number of people who stand round a shallow pond in which a child is drowning, and let it drown without taking the trouble to ascertain the depth of the pond, are no doubt, shameful cowards, but they can hardly be said to have killed the child.

Whether the word "killing" is applied or not to homicides by omission is to a great extent a question of words. For legal purposes a perfectly distinct line on the subject is drawn. By the law of this country killing by omission is in no case criminal, unless the thing omitted is one which it is a legal duty to do. Hence, in order to ascertain what kinds of killing by omission are criminal, it is necessary, in the first place, to ascertain the duties which tend to the preservation of life. They are as follows:—A duty in certain cases to provide the necessaries of life; a duty to do dangerous acts in a careful manner, and to employ reasonable knowledge, skill, care, and caution therein; a duty to take proper precautions in dealing with dangerous things; and a duty to do any act undertaken to be done, by contract or otherwise, the omission of which would be dangerous to life. Illustrations of these duties are the duty of parents or guardians, and in

some cases the duty of masters, to provide food, warmth, clothing, &c., for children; the duty of a surgeon to employ reasonable skill and care in performing an operation; the duty of the driver of a carriage to drive carefully; the duty of a person employed in a mine to keep the doors regulating the ventilation open or shut at proper times. To cause death by the omission of any such duty is homicide, but there is a distinction of a somewhat indefinite kind as to the case in which it is and is not unlawful in the sense of being criminal. In order that homicide by omission may be criminal, the omission must amount to what is sometimes called gross, and sometimes culpable negligence. There must be more, but no one can say how much more, carelessness than is required in order to create a civil liability. For instance, many railway accidents are caused by a momentary forgetfulness or want of presence of mind, which are sufficient to involve the railway in civil liability, but are not sufficient to make the railway servant guilty of manslaughter if death is caused. No rule exists in such cases. It is a matter of degree determined by the view the jury happen to take in each particular case.

These considerations give a sufficiently distinct notion of what is meant by homicide according to English law. The next important question relating to it is as to the distinction between lawful and unlawful homicide.

As one of the great objects of all law, and particularly of criminal law, is the protection of life, it follows that homicide must, as a rule, be unlawful, so that it is necessary to consider only those cases in which it is lawful. A further division may be made between justifiable homicide and excusable homicide. This distinction has some historical interest, though at present it involves no legal consequences.

Homicide may be regarded as the highest form of bodily injury which can, in the nature of things, be inflicted. It is no doubt possible to suggest cases of mutilation and humiliation which would convert life into a lingering course of agony and shame, and would so be far more terrible than death, but such cases are rare, and need not be specifically considered. The cases, therefore, in which homicide is lawful may be considered in connection with those in which bodily injuries in

CH. XXVI.

general are lawful. There are cases in which the infliction of minor injuries is lawful, though the infliction of death is unlawful, but I know of no case (except the single case of capital punishment) in which an occasion which would justify the infliction of death would not justify the infliction of minor injuries.

The following, then, are the principal cases which justify or excuse the infliction of death, or minor personal injuries:—

1. The execution of legal punishment and legal process.
2. Keeping the peace.
3. The prevention of crime.
4. Private defence.
5. Consent.
6. Accident.

To this might be added injuries inflicted during war, but these I do not propose to consider, having already to some extent referred to them.

The infliction of legal punishments, and the execution of legal process belong to the subject of criminal procedure, and have already been considered. If the subject is followed out in all its details, it is intricate, and requires elaborate treatment; but the general principle upon which it depends is simplicity itself. The execution of legal process and the infliction of legal punishments are the very reasons for which the criminal law exists, and it would involve a fundamental contradiction if they were not themselves lawful actions.

This general principle is qualified by two subordinate principles equally plain. The first is that no greater amount of force can be lawfully employed in any case than that amount which the person who employs it regards upon reasonable grounds, and in good faith, as necessary for the attainment of his object. The other is that where a man acts in the discharge of what, under a mistake of fact, he supposes, on reasonable grounds, to be a legal duty, or in what he supposes, on reasonable grounds, to be the defence of his person or his house against serious instant danger (as, for instance, if a man resisted people pretending by way of joke to rob him), his position is, generally speaking, the same as it would have been

if the facts which he supposed to exist had really existed. If, however, under a mistake of fact he uses violence, which, if the supposed facts had existed, he would have been under no legal obligation to use, and which he did not believe to be necessary for the immediate protection of his life or habitation, he acts at his peril, and if he is mistaken is not justified. For instance, a man shoots a person whom he supposes upon reasonable grounds to be a burglar breaking into his house, though in fact he is not. He is justified. Another man shoots a person whom he believes on reasonable grounds to be a felon whom he cannot otherwise arrest. He is not justified if he is mistaken. If he was a police officer, whose duty it is to arrest felons, he would be justified.

Simple and obvious as these principles are, a full statement of the law upon the subject would be tedious and intricate, because when the principles stated have to be applied to facts, a number of subordinate distinctions arise which it is necessary to consider.

Without going into details I will indicate the nature of these questions. The execution of a lawful sentence, process, or warrant, is of course justifiable, but difficulties arise if the sentence, warrant, or process is illegal, or if a mistake is made as to the person affected. So in regard to arrests without warrant, there are differences between the position of peace officers, persons charged by peace officers to assist, and private persons. There are also differences between the arrest of persons found committing crimes, the arrest of persons suspected of having committed felonies, and the prevention of the escape of persons arrested, whether by peace officers or private persons. These distinctions, however, have little general interest, and I need not dwell upon them.

I now come to acts of violence necessary for the preservation of peace and the prevention of crime. The distinction between these two objects is matter rather of language than of substance, for on the one hand every breach of the peace is a crime; and on the other, no force can prevent crimes except crimes of violence. No one uses force or would be in any way justified or excused in using force to prevent a man from committing forgery or perjury. It is, however,

CH. XXVI.

convenient to distinguish the two cases, because the questions arising on them differ. The force employed for the suppression of a riot or of treason by levying of war is of a different kind, and usually gives rise to questions of a wholly different nature from the employment of force against a burglar or highway robber.

As the cases of preservation of the peace and the prevention of crime are closely connected, so the prevention of crime and self-defence are also closely connected. If a highway robber attacks a peaceable person with murderous violence, the person attacked has two or even three grounds on which his conduct in resisting, even with deadly weapons, may be justified. They are, first that of self-defence; secondly, the prevention of a crime; and thirdly, the arrest of a felon. His rights in these three capacities do not in this particular case materially differ. If, instead of being attacked by a robber, he was attacked by a furious madman, the case would be one of self-defence only, but his rights would be precisely the same, except that he would not be justified in killing the madman if he tried to escape upon resistance, and could not otherwise be taken.

Where the violence to be resisted does not amount to a felony, but is an assault more or less aggravated, the person assaulted has a right to resist, the degree of the resistance being regulated by the nature of the assault. Even if the assault has been provoked by the person assaulted he may nevertheless defend himself, unless the provocation given by him was in itself an assault, and the violence provoked by that assault was no more than was necessary for the immediate self-defence of the party who employs it. But in all cases the duty of the person who begins an affray is when resisted to run away as soon and as far as he can, nor is he regarded as defending himself, in any violence which he may use, unless he is pursued, overtaken, and subjected to unnecessary violence. The older authorities, indeed, go so far as to say that it is in all cases the duty of the party assaulted to run away; but this I think ought to be restricted to cases of what amounts to a challenge to fight with deadly weapons.

The right of defending proprietary rights by force varies

CH. XXVI.

accidentally, or, which is the same thing, unintentionally, in the doing of an act in itself lawful, or in itself unlawful. It may also occur by reason of the omission to perform a legal duty tending to the preservation of life. The following are typical instances of these four classes of accidental death.

1. A. fires a gun at a mark. The gun bursts and kills B.

2. A. fires a gun at a mark without giving proper warning or taking proper care in placing the mark and kills B.

3. A. fires a gun at C. with intent to murder him, the gun bursts and kills B., A.'s accomplice.

4. A. fires a gun at C. with intent to murder him and kills B. whom A. had not warned to stand out of the way.

In each of these cases the death of B. is unintended. In the first and third cases the death of B. is what may be called a pure accident; it is not only unintended, but it arises from circumstances which a prudent man would not naturally foresee or take precautions against, and which A. cannot have thought of, for if he had, he would certainly not have fired the gun. But in the first case A. is doing an innocent, and in the third a most wicked action.

In the second and fourth cases A. omits a precaution proper under the circumstances, but in the second case the act itself is innocent; in the fourth it is so wicked that the omission to give warning to B. would hardly be regarded as an aggravation of the moral guilt of firing at C.

These differences exist in the nature of things, and I merely note them for the present without discussing the way in which they are treated by English law, further, than by saying that homicide caused accidentally by any unlawful act is unlawful. The expression, "unlawful act," includes, I believe, all crimes, all torts, and all acts contrary to public policy or morality, or injurious to the public; and particularly all acts commonly known to be dangerous to life.

The only additional remark I have to make upon the law relating to justification and excuse for the infliction of bodily injury has reference to the subject of consent. Where death is caused the consent of the party killed to his own death is regarded as wholly immaterial to the guilt of the person who causes it. If an injury less than death is caused

the consent of the party injured seems to supply a defence, unless the injury itself is illegal, or unless the circumstances under which it is inflicted make it illegal. A consent to be maimed, or a consent to be beaten in a prize fight does not prevent the offender from being guilty of an offence.

The next question is as to the distinction between the two forms of unlawful homicide, namely, murder and manslaughter. The distinction has been elaborated by an immense number of decisions extending over several centuries, of part of which I shall give the history. At present, however, I am occupied only with the analysis of the result. It is intricate, though I think it is capable of being reduced to greater precision than might at first sight be expected. This is the fault, not of the judges nor of the legislature, but of the nature of things. In homicide, as in all other crimes, the definition consists of two parts, the outward act and the state of mind which accompanies it; and there is no crime (unless it be treason or libel) in which so many different possible states of mind have to be considered. The case, moreover, is liable to one special qualification which is peculiar to this particular offence. Whatever else the definition includes it must include the fact of death; but there is no definite connection at all between the fact of death and the moral guilt or public danger of the act by which death is caused. The most deliberate, desperate and cruel attempt on life may not cause death, the most trifling assault may cause it. Death may be intentionally caused under circumstances of the greatest possible atrocity, or under circumstances which produce rather pity for the offender than horror at the offence; or, again under circumstances which indicate determined defiance of the law, but do not involve any special ill will to any particular person. This extreme variety in the circumstances under which, and the intentions with which death may be occasioned is the true cause of the great difficulty which has been found in giving satisfactory definitions of the different forms of homicide.[1]

[1] I hope I may not be regarded as egotistical in saying that I have been led by circumstances to consider this matter more frequently and in greater

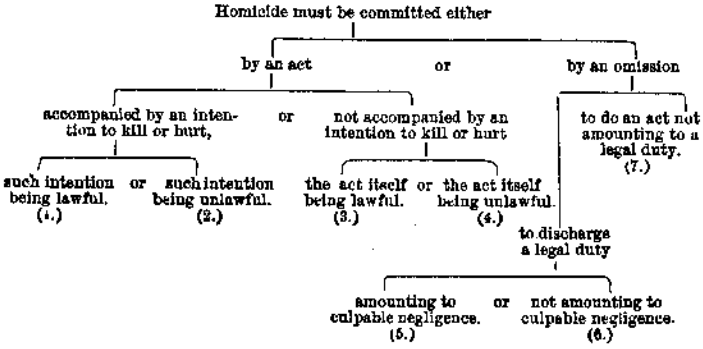
CH. XXVI.

The following account, I think, shows that the matter is capable of being reduced to a form which can be shown to comprehend every possible mode of taking life, and to provide, for such of them as are treated as criminal, punishments bearing a proportion both to their moral guilt and to the public danger which they involve. The first step is to classify homicide as lawful and unlawful; the next to divide unlawful homicide into the two offences of murder and manslaughter. All homicide is unlawful which is neither justifiable nor excusable according to the principles already stated; but in order to classify unlawful homicide so as to enable us to proceed to divide it into degrees we must have regard to two things, namely, the nature of the act or omission by which death is caused as being in itself lawful or unlawful, and the intention by which that act or omission is accompanied. It may not unnaturally be asked whether the motive ought not to be considered as well as the intention. I think that it ought not. As matter of evidence the existence of a motive for an offence is always important. In reference to punishment the nature of the motive may in particular cases be of importance; but the motives of the offender ought never in my opinion to enter into the definition of an offence. The reason is that it is always extremely difficult to ascertain or prove them; because they are generally mixed, and nearly always fluctuating; and because they do not affect the public danger or actual mischief of the crimes which they cause.

The following table will, I think, be found to be exhaustive in this view, and to exhibit every imaginable case of

detail than any previous writer upon it. I had to consider it repeatedly whilst Legal Member of Council in India, in connection with the definition in the Indian Penal Code, which has been the least successful part of that great work (see pp. 313-314, *post*). I drew a bill in 1874, called the "Homicide "Law Amendment Bill," which was introduced by the late Mr. Russell Gurney into Parliament, and was referred to a Select Committee, which reported upon it at considerable length. A full consideration of the subject of homicide will be found in my *Digest of the Criminal Law*, ch. xxiii., and *note*, xiii. p. 350. As the result of the inquiry there recorded I drew the Draft Code of 1878, and my Draft, after a most minute and searching discussion, was adopted, with few modifications, by the Commission of 1879.

homicide which can possibly occur in any time or country, or under any system of law :— CH. XXVI.



I will now proceed to examine it in detail.

It shows that in the nature of things there must be seven kinds of homicide in every country in which the intentional infliction of bodily harm is lawful in some cases and unlawful in others, and in which some acts are in themselves lawful and other acts unlawful. These conditions being fulfilled by the laws of all civilised countries, it may be said generally that there must be seven kinds of homicide. I can think of no case which does not fall under one, at least, of them, though no doubt some might fall under more than one.

So far the analysis of the offence depends upon the nature of things. I have next to consider how it is related to the law of England. By our law, four of these forms of homicide (viz., Nos. 1, 3, 6, and 7) are not punished as crimes, and three (viz., Nos. 2, 4, and 5) are so punished.

1. Homicide by an act intended to kill or hurt, the intention being lawful. This covers all cases of intentional justifiable homicide.

2. Homicide by an act intended to kill or hurt, the intention being unlawful. This covers all cases of intentional unlawful homicide effected by an act.

3. Homicide by an act not intended to kill or hurt, the act itself being lawful. Homicides of this kind are not unlawful unless the death is also caused by an omission to discharge a legal duty. All cases of pure accident fall under this head.

CH. XXVI.

4. Homicide by an act not intended to kill or hurt, the act itself being unlawful. All homicides of this kind are by the law of England unlawful.

5. Homicides by an omission, amounting to culpable negligence to discharge a legal duty. These homicides are in all cases unlawful.

6. Homicides by an omission not amounting to culpable negligence to discharge a legal duty. These homicides are in no case unlawful in the sense of being criminally punishable, though they may involve civil liability.

7. Homicides by an omission to do an act not amounting to a legal duty. These homicides in no case involve any legal responsibility.

We are now able to form a distinct conception of homicide unlawful by the law of England, and it may be thus defined:—

[1] Homicide is unlawful—

(*a*) When death is caused by an act done with the intention to cause death or bodily harm, or which is commonly known to be likely to cause death or bodily harm, and when such act is neither justified nor excused by the principles stated above.

(*b*) When death is caused by an omission, amounting to culpable negligence, to discharge a duty tending to the preservation of life, whether such omission is or is not accompanied by an intention to cause death or bodily harm.

(*c*) When death is caused accidentally by an unlawful act.

It should be observed, in reference to this analysis of the subject, that every omission to discharge a legal duty intended to cause bodily injury must amount to criminal negligence. The omission must by the force of the term be negligence, and the presence of the intent to hurt must make that negligence criminal. Moreover, the question of justification or excuse can scarcely apply to such omissions, because circumstances which would justify the infliction of intentional injury by an act would usually prevent the duty supposed to be violated by the omission from arising.

With reference to the second head, it must be observed

[1] *Digest*, art. 222.

that there are cases of unlawful homicide which may be considered as falling under both of the heads of which the proposition consists. A man fires a gun down a street wantonly, and kills or wounds one of the passers-by. This may be described either as an unintentional homicide by an act in itself unlawful, or as homicide by an omission to use proper precautions in doing a dangerous act. The former is the more natural description of the two, but it is conceivably possible that some case might arise where the carelessness with which an act causing death was done was a more prominent feature in the transaction than the unlawfulness of the act.

It will however, I think, be found that every case of unlawful homicide which can be imagined, and in particular that all the cases referred to in the[1] 200 pages of *Russell on Crimes* which deal with this matter, fall under one or the other of the two heads just stated, which are equivalent to the somewhat longer statement given above. Putting the matter very shortly, indeed, and omitting qualifications, it may be stated that all unlawful homicide is either the result of unjustifiable, inexcusable, intentional violence, or the unintentional result of an unlawful act, or the result of carelessness in doing an act lawful or unlawful, or of an omission to perform a legal duty.

I now come to the distinction between murder and manslaughter, which is, that in murder the act or omission by which death is caused is attended by one or more of the states of mind included under the description of malice aforethought, whereas in cases of manslaughter malice aforethought is absent.

Upon this matter it must be observed, in the first place, that though the lawfulness or unlawfulness of homicide is determined in the manner already described by reference to the character of the offender's act as being intentional, careless, or otherwise, it is necessary, in order to determine the degree of guilt involved in his act, to discriminate between the different kinds of bodily harm which he may intend to do, and the different kinds of carelessness of which he may be

[1] 1 *Russ. Cri.* pp. 641-852, fifth edition.

CH. XXVI.

guilty. The distinction has been worked out by slow degrees and in a cumbrous way by the labours of many generations of judges who have interpreted in reference to particular cases the expression "malice aforethought," which itself has a remarkable history. Passing over the history for the present, I give the result, which is that malice aforethought is a common name for the following states of mind preceding or co-existing with the act or omission by which death is caused:—

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

(*b*) Knowledge that the act or omission which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

(*c*) An intent to commit any felony whatever.

(*d*) An intent to oppose by force any officer of justice in arresting or keeping in custody a person whom he has a right to arrest or keep in custody, or in keeping the peace.

By applying this definition of malice aforethought to the definition already given of unlawful homicide, we get the following results:—

In cases of unlawful homicide, death caused by an act or omission intended to cause bodily injury is murder, if the intention of the offender is to cause the death of, or grievous bodily harm to, any person whatever. It is manslaughter if the intention is to inflict bodily harm not grievous, unless the person on whom the bodily harm is intended to be inflicted is an officer of justice engaged in the execution of his duty, or unless the offender is engaged in committing a felony, in each of which cases it is murder to cause death by the intentional infliction of any bodily harm whatever.

Death caused unintentionally is murder if the unlawful act or omission by which death is caused is known to the offender to be eminently dangerous to life, or if the unlawful act amounts to a felony, or possibly if the person killed is an

officer of justice in the discharge of his duty. In other cases the offence is manslaughter, if anything.

Lastly, the presence of certain provocations given by the deceased, and not provoked by the offender, will reduce murder to manslaughter. I now proceed to give the history of this body of law.

HISTORY OF THE LAW OF HOMICIDE.

The Roman law on the subject of homicide was contained in the "Lex Cornelia de sicariis et veneficiis," and such parts of it as remain are to be found in title viii. of the 48th book of the *Digest*. It has had little influence on the law of England on the subject at any part of its history, and has, as it seems to me, little intrinsic merit, as it recognises few of the distinctions inherent in the subject.

In the early English laws the subject of homicide is frequently treated, though by no means so frequently as theft. In the laws of Æthelbirht provisions are made as to the "bot" to be paid for [1] slaying "in the king's tun," [2] "in an eorl's "tun," [3] "at an open grave," and the same code contains [4] various other provisions as to the bot to be paid by or for particular persons. In most of the laws provisions of greater or less elaboration occur as to the different sums to be paid as bot, were, or wite for different kinds of homicide. The sums vary partly, according to the position in life of the person slain, and partly according to the circumstances under which the homicide takes place. The provisions which throw any light on the definition of the offence, or which distinguish different kinds of homicide are few. The damages to be paid to the family of the deceased, and the satisfaction to be made to the person whose peace had been broken by the homicide, are much more prominent, and seem to have been regarded as much more important, than what we should call the criminal consequences of the offence. These, however, are not altogether unnoticed.

[1] Thorpe, i. 5; Æthelbirht, 5.
[2] *Ib.* p. 7, law 13.
[3] P. 9, law 22.
[4] See 6, 7, 23, 24, 25, 26.

CH. XXVI.

The earliest and most important provisions of the kind are to be found in the laws of Alfred. [1] "Let the man who "slayeth another wilfully perish by death. Let him who "slayeth another of necessity or unwillingly, or unwilfully, as "God may have sent him into his hands, and for whom he "has not lain in wait be worthy of his life and of lawful "bot if he seek an asylum. If, however, any one pre-"sumptuously and wilfully slay his neighbour through guile, "pluck thou him from my altar to the end that he may "perish by death." Again, [2] "If an ox gore a man or a "woman so that they die, let it be stoned, and let not its "flesh be eaten. The lord shall not be liable if the ox "were wont to push with its horns for two or three days "before and the lord knew it not; but if he knew it and he "would not shut it in, and it then shall have slain a man or "a woman, let it be stoned; *and let the lord be slain*, or the "man be paid for, as the witan decree to be right."

"[3] If a thief break into a man's house by night, and he be "there slain the slayer shall not be guilty of manslaughter. "But if he do this after sunrise he shall be guilty of man-"slaughter, and then he himself shall die unless he were an "unwilling agent."

Whether these re-enactments of the Mosaic law were practically more than a kind of denunciation of homicide on religious grounds, or whether they were actually executed as law, it is now of course impossible to say; but it is obvious that the enactments themselves are very meagre. They roughly indicate a distinction between intentional and unintentional homicide, and point to premeditation or waylaying as a circumstance of aggravation; but they suggest that in every case whatever, even in the case of unintentional homicide, it was *primâ facie* lawful, and even proper, to slay the slayer, and as no exception is made excusing the person who

[1] Thorpe, i. 47; Alfred, 13. This is taken from Exodus xxi. 12, 13, 14:—
"12. He that smiteth a man so that he die shall be surely put to death.
"13. And if a man lie not in wait, but God deliver him into his hand, then "I will appoint thee a place whither he shall flee.
"14. But if a man come presumptuously upon his neighbour to slay him with "guile, thou shalt take him from mine altar that he may die."

[2] Alfred, 21; Thorpe, i. 47. This is taken from Exodus xxi. 28, 29.

[3] Thorpe, i. 51; Alfred, 25. This is taken from Exodus xxii. 2, 3.

exercises this right, a single homicide might lead to an endless blood feud, which perhaps often happened in those days.

The [1] laws of Ine contain some provisions as to wers and bots, and there is in the laws of Æthelstan a [2] provision which implies that if a "morth slayer" failed to get a proper number of compurgators he might be put to death. "Let it "stand within the doom of the chief men belonging to the "burh whether he shall have his life or not." "Morth" means "secret," and its use in the early laws seems not to be confined to cases of homicide, but to extend to all secret crimes. "Morth-works," deeds of darkness, is an expression occasionally used. This passage, however, is the first occasion known to me, on which any phrase occurs which at all resembles the word murder as the name of a kind of homicide. There are references to the weres payable for homicide in the laws of [3] Ethelred, and in [4] the ordinance respecting the Dunsetas, and in the [5] laws of William the Conqueror, and of Henry I. One curious provision on the subject occurs in the [6] laws of Cnut. "If there be [7] open morth so that a man "be murdered, let the slayer be delivered up to the kinsmen; "and if there be a prosecution, and he fail at the lād let the "bishop doom." This is the only case, with the exception of the passages already referred to in Alfred's laws, which I have found, in which homicide is treated as a crime in our sense of the word, rather than as a wrong, and even in this case the law rather gives the kindred an opportunity of revenging themselves than inflicts punishment.

The word "murdrum," as the Latinised form of "morth," first occurs in the laws of [8] Edward the Confessor, which

[1] Thorpe, i. 149; Ine, 74, 76.
[2] Thorpe, i. 225; Æthelstan, 6.
[3] Thorpe, i. 287; Ethelred, 5.
[4] Thorpe, i. 353, No. 5.
[5] "Si hom ocist auter, e il seit cunuissant" (confessing) "e il deive faire "les amendes, durrad" (I suppose shall give) "de sa manbote al seinur pur "le franch home x. sol. e pur le serf xx. sol."—Thorpe, i. 470; William, No. vii. In the *Leges Henrici Primi* there are two laws on this subject, lxix. and lxx. The last-mentioned law is extremely elaborate, providing for the cases of free men killing slaves, Welsh (Waliscus) slaves killing English freemen, Englishmen killing Danes (Dacus), Danes killing Englishmen, freemen killing each other, and people of the same or of different ranks killing each other, and many other cases. Thorpe, i. 572, &c.
[6] Thorpe, i. 407; Cnut, 57.
[7] It is suggested that this means a murder which has been discovered, and so become open. "Open secrecy" is a contradiction in terms.
[8] Thorpe, i. 448; Edw. Con. xv. xvi.

CH. XXVI

purport to have been collected under William the Conqueror by commissioners appointed for the purpose. They often speak historically rather than in the present tense. The account contained in them of "murdrum" is as follows: "Quando aliquis alicubi murdritus reperiebatur querebatur "apud villam nisi inveniebatur interfector illius et si inveniri "poterat justicia regis infra viii. dies interfectionis tradebatur. "Si vero inveniri non poterat mensem et diem unum ad "eum perquirendum in respectum habebant, et si non invenie- "batur colligebantur in villa XLVI. marce." This being thought too heavy a burden for the township (the law proceeds) was imposed on the hundred. The history of the institution is then given: "Murdra quidem inventa fuerunt "tempore Cnuti regis; qui post adquisitam terram et secum "pacificatam, remisit domum exercitum suum precatu baro- "num de terrâ; et ipsi fuerunt fidejussores erga regem quod "illi quos retineret in terra firmam pacem haberent. Ita "quod si quis de Anglis aliquem ipsorum interficeret, si non "posset defendere &c., judicio Dei, ferro vel aqua, fieret justicia "de eo. Si autem aufugeret solveretur ut supra dictum est."

This law is a remarkable instance of the transition from the view that homicide was a wrong to the survivors, to the view that it was an offence against the state. The English nobility, to get rid of the bulk of the Danes, all go bail for the lives of those who remain. The liability for murder was thus extended over a larger area than it covered in common cases, though it was still regarded as a matter to be paid for.

The most important passage in the early laws relating to homicide, indeed the only one which looks as if it was intended to give any sort of definition of the offence, is to be found in the [2] *Leges Henrici Primi*. After the passage already referred to about weres, occurs a law (lxxi.) which begins as follows:—"Si quis veneno, vel sortilegio, vel "invultuacione seu maleficio aliquo faciat homicidium sive

[1] The laws are thus headed:—"Post quartum annum adquisicionis regis "Willelmi istius terre scilicet Anglæ consilio baronum suorum fecit summoniri "per universos patriæ comitatus Anglos nobiles, sapientes et in lege suâ "eruditos ut eorum consuetudines ab ipsis audiret."—*Ib.* 442.

[2] Thorpe, i. pp. 576-582.

"illi paratum sit sive alii nichil refert, quin factum morti-
"ferum et nullo modo redimendum sit. Reddatur utique
"qui fuerit reus hujusmodi parentibus et amicis interfecti,
"et eorum misericordiam aut Judicium senciat, quibus ipse
"non pepercit." In the notes to this law it is said that the first three lines are corrupt, but that the meaning appears to be that homicide by poison, witchcraft, wounding or other "maleficium" is inexpiable. There is a difficulty in accepting this view because elaborate provisions about weres and bots are made in other parts of the work, and indeed the law under consideration goes on to say, "si beneficio legis ad "misericordiam vel concordiam perturbatur, de wera mortui "plene satisfaciat, et witam et manbotum," &c. May not the meaning be that homicide by poison, witchcraft or fascination, whether directed against the deceased or any other person, is to be treated as a crime notwithstanding its mysterious character, and that it is to be regarded *primâ facie* as inexpiable? This view is strengthened by the fact that the law contains a provision that, in[1] a certain obscure contingency the matter is to be reserved for the Bishop's judgment.

The "diffinicio Homicidii" follows. It has no intrinsic value, but it seems to have been authoritative as it is to some extent used by Bracton. "Homicidium fit multis modis, "multaque distancia in eo est, in causa, et in personis. "Aliquando etiam fit per cupiditatem, vel contencionem "temporalium, fit etiam per ebrietatem, fit per jussionem "alicujus, fit etiam pro defensione et justicia"—"fit etiam "homicidium casu consilio."

These are the principal though they are not all the references to homicide in the laws before the Conquest as enacted by their various authors or as collected under William I. and Henry I. It will be observed that they treat homicide almost entirely as a wrong, that they do not in any case attempt anything approaching to a systematic definition of it, that the only approach to a distinction between different

[1] "Si res in compellacione sit, et emundacione miseveniat." I have no idea what this means. I guess that "invultuatio" means fascination, looking on a man with the evil eye.

CH. XXVI.

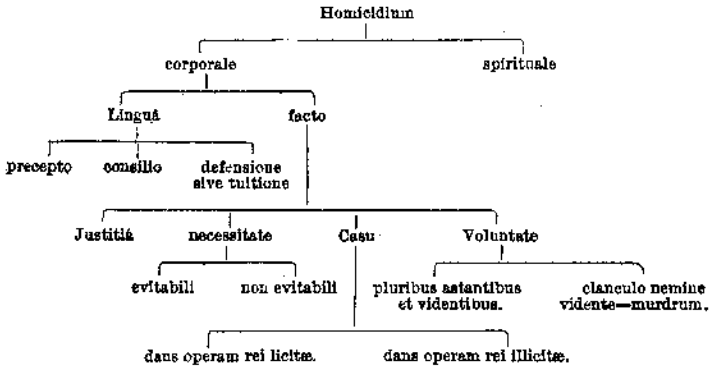
kinds of homicide is that which consists of the introduction of the word "morth-slaying," whence a little later comes "murdrum," which is distinguished from other forms of the offence not by any peculiarity in the offence itself, but by the fact that the criminal is unknown. Accidental death is referred to very shortly in two places in Alfred's laws.—[1] "If "at their common work one man slay another unwilfully let "the tree be given to the kindred, and let them have it off "the land within xxx. days; or let him take possession "of it who owns the wood." [2] Another law (very obscurely worded) implies that if a man carries his spear heedlessly whereby another stakes himself on it, the carrier of the spear is to pay the were of the deceased.

Such was the law upon this subject at the time of, and soon after, the Norman Conquest. Its development after that event was very slow. [3] Glanville's account of the matter is in these words:—"Duo autem sunt genera homicidii. "Murdrum, quod nullo vidente, nullo sciente clam perpe- "tratur, præter solum interfectorem et ejus complices— "Est et aliud Homicidium, quod constat in generali "vocabulo, et dicitur, simplex Homicidium." This remark would, if the definition of murdrum were omitted, constitute a remarkable anticipation of the later division of the crime into murder and manslaughter, and if "nullo vidente, nullo "sciente clam perpetratur," is meant merely as a description of the circumstances under which murder is usually committed, and not as a strict legal definition, the passage may still be considered in that light. In the Assizes of Clarendon and Northampton the word "murdratores" occurs in connection with "robbatores," but the first writer who enters into the matter with any detail is Bracton.

Bracton, as I have already observed, considers the definitions of crimes in connection with the procedure for their punishment, and amongst others he considers homicide at considerable length and in several places. He first [4] defines

[1] Thorpe, i. p. 71; Alfred, 13.
[2] *Ib.* p. 85; Alfred, 36.
[3] Lib. xiv. c. 3.
[4] Bracton, ii. pp. 274-275; *De Coronâ*, ch. iv.

homicide "as hominis occisio ab homine facta," and he then proceeds to divide it in a way which may be exhibited in a tabular form as follows :—



These divisions says[1] Sir Horace Twiss, are taken from the Breviarium Extravagantium collected by Bernhard, of Pavia, from Decretals not collected by Gratian.

I do not see the use of the division into homicide *linguâ* and homicide *facto*. Homicide by command or counsel seems to belong to the general subject of accessories to which Bracton refers on several occasions, and what is meant by "homicide by the tongue by defence" I do not know.[2] The division of homicide *facto* into cases of justice, necessity accident, and intention, recognises some of the distinctions I have pointed out as the result of much subsequent experience, but it does so very imperfectly. The divisions are not mutually exclusive. All homicide by way of either justice or necessity is intentional. Moreover, the idea of necessity seems to exclude the adjective "evitabilis." The words were no doubt ill-chosen, and their adaptation to facts gave a great deal of trouble, and led to, or were used to excuse, many mistakes afterwards.

The distinction between voluntary homicide in the presence

[1] Preface, lviii.

[2] Bracton's own explanation hardly comes up to his statement: "Lingua "ut si quis dissuadet et sic dissuadendo retinebit aliquem a bono proposito "volentem alium liberare a morte et sic quodam modo indirecte facit quis "homicidium."—P. 278. Protecting a person in the commission of homicide by ordering others not to interfere, would be a similar case, and would correspond better with "defensione," but this is conjectural.

CH. XXVI.

of witnesses and in the absence of witnesses is not only a distinction without a difference, or with only an accidental difference, but it is also open to the remark that if there are no witnesses it is impossible to say whether the homicide was *necessitate, casu,* or *voluntate,* (in Bracton's sense of the word).

[1]With regard to the punishment of homicide Bracton says, "Pœna vero homicidii commissi facto variatur: pro homicidio "vero justitiæ justa et recta intentione facto non est aliqua "pœna injungenda."

In speaking of appeals he says [2] "si felo convictus fuerit pro "morte hominis vel pro alia felonia, ultimo puniatur supplicio "sicut morte vel membrorum truncatione." In another passage it is implied that the punishment was usually death, [3] for he says that in certain cases persons suspected of murder "pœnam capitalem non condent."

Murder is considered by Bracton apart from homicide [4] in general. The definitions of murder and of homicide *voluntate* are as follows:—"[5] Voluntate ut siquis ex certâ scientiâ, et in "assultu præmeditato, irâ vel odio, vel causâ lucri, nequiter et "in feloniâ et contra pacem domini regis aliquem interfecerit."

"[6] Murdrum vero est occulta extraneorum et notorum "hominum occisio, a manu hominis nequiter perpetrata, et "quæ nullo sciente vel vidente facta est, præter solum "interfectorem et suos coadjutores et fautores, et ita quod "non statim assequatur clamor popularis." Bracton explains at length the different members of this proposition in a very minute way, of which the following is a specimen:— "Occulta dicitur, quia occisor ignoratur, nec scitur quis ille "fuit qui occidit. Item extraneorum et notorum hominum, "ut comprehendatis tam masculum quam fœminam et sic "excludatis animalia bruta quæ ratione carent. Extraneorum "dico, quia sive interfectus cognitus fuerit sive ignotus "dicitur Francigena, nisi Englescheria et quod Anglicus sit "probetur perparentes et coram justitiariis præsentatur." [7] He also gives a singular account of the manner of presenting

[1] Bracton, ii. 278. [2] *Ib.* 290. [3] *Ib.* 406.
[4] *Ib. De Coronâ*, ch. xv.; ii. p. 384.
[5] *Ib.* 278. [6] *Ib.* 384. [7] *Ib.* 390.

Englishry, which was differently understood in different parts of the country. He says, "In quibusdam vero comitatibus "præsentatur Englescheria sive mortuus fuerit masculus sive "fœmina, per duos masculos ex parte patris et per duas "fœminas ex parte matris, de propinquioribus parentibus in- "terfecti, qui olim dicebantur to lange and to bred." (I suppose two long and two broad, *i.e.*, two ancestors and two collaterals.) "In quibusdam comitatibus præsentatur per unum "masculum ex parte patris et per unam fœminam ex parte "matris."

The effect of a presentment of Englishry was to free the hundred from the fine which was to be paid if the presumption that the person slain was a Frenchman was not removed. The fine as well as the offence was called "murdrum," and many rules as to the cases in which it was or was not payable are laid down by [1] Bracton. I have found no definition in Bracton as to what constituted Englishry. In his time about 200 years after the Conquest, the great mass of the population must have been both English born and the children and grandchildren of English born ancestors, and the presentment of Englishry must have begun at least to assume the character of a mere legal form, necessary in order to save the hundred from a fine, but otherwise almost unmeaning.

Various doctrines relating to homicide, which afterwards became and still are recognised as parts of the law of England, are to be found in Bracton. For instance, he lays down the rule that the blow of one is in certain cases the blow of all. [2] "Possunt autem esse plures culpabiles de "homicidio sicut unus, ut si plures rixati fuerint inter se, "in aliquo conflictu, et aliquis sit interfectus inter tales, nec "appareat ex quo nec ex cujus vulnere, omnes dici possunt "homicidæ, et illi qui percusserunt, et qui tenuerunt malo "animo dum percussus fuerit. Item et illi qui voluntate "occidendi venerunt licet non percusserunt. Item et illi qui "nec occiderunt, nec voluntatem occidendi habuerunt, sed "venerunt ut præstarent consilium et auxilium occisoribus."

Elsewhere [3] in defining "injuria" he has some remarks upon homicide which show the antiquity of certain parts of

[1] Bracton, 388-390. [2] *Ib.* 278. [3] *Ib.* 544-545.

CH. XXVI.

our law. "Si quis unum percusserit et occiderit cum alium "percutere vellet in feloniâ tenetur. Item si cum levius "credidit percussisse, gravius percusserit et occiderit tenetur. "Debet enim quilibet modum et mensuram adhibere in suo "facto. Et est injuria talis quæ inducit ultimum suppli- "cium cum criminaliter agatur. Est et alia quæ non nisi "pœnam pecuniariam tantum et quandoque eandem pœnam "cum carceris inclusione secundum facti qualitatem." I do not feel sure whether this last clause means that assaults are sometimes punished with fine and imprisonment, or that assaults which cause death are so punished in some cases. If the latter is his meaning the law in his day was more rational than it afterwards became.

There are, however, some cases in which Bracton carries the law as to homicide to a length which was not adopted in later times. Thus, he says, [1] "Si sit aliquis qui mulierem "prægnantem percusserit vel ei venenum dederit per quod "fecerit abortionem, si puerperium jam formatum vel anima- "tum fuerit, et maxime si animatum, facit homicidium." In another passage he seems to imply that he regarded causing death by a voluntary omission to perform what was not a legal duty, as homicide. After [2] saying that those who command persons to strike or kill "immunes esse non "debeant a pœnâ," he adds, "nec etiam ille qui cum posset "hominem a morte liberare non liberavit." He took indeed to a great extent the ecclesiastical view of homicide, for he says that if a war is unjust "tenebitur occisor: si autem "justum sicut pro defensione patriæ, non tenebitur nisi hoc "fecerit corruptâ voluntate et intentione." He points out indeed that if a judge who justly condemns a criminal to death does so [3] "ex livore vel delectatione effundendi hu- "manum sanguinem, licet juste occidatur iste, tamen peccat "mortaliter" (Judex) "propter intentionem corruptam."

As to casual homicide, he distinguishes between casual homicide in a lawful act without negligence, casual homicide in a lawful act with negligence, and casual homicide in an unlawful act. In the two cases last mentioned the homicide is unlawful. This, again, is in accordance with

[1] Bracton, 278. [2] *Ib.* 280. [3] *Ib.* 275-276.

more modern decisions, and represents the existing law. In cases of casual homicide by a lawful act done without negligence Bracton thought that the person who caused the death committed no offence at all. He gives a curious illustration which must, I suppose, have occurred in actual practice. [1] "Si cum pilâ luderet quis manum tensoris [ton-" soris] quem non vidit pilâ percussit, ita quod gulam alicujus " preciderit et sic hominem interfecerit, non tamen cum occi-" dendi animo, absolvi debet." This is the modern opinion, but it did not always prevail, as I shall show immediately. On the other hand he seems to lay down the rule to which I have already referred as having for a short time prevailed in this country that the will is to be taken for the deed, but the passage in which he does so presents some difficulties. He says "In maleficiis autem spectatur voluntas et non exitus." [2]

This is the substance of Bracton's account of the crime of homicide. It lays down, though not very correctly or systematically, some of the leading distinctions connected with the subject, but it is singular that, turning as it does so very largely upon moral considerations, its principal distinction—that between voluntary homicide and murder—should have no relation to morality; that it should take no notice of the different grades of evil intention which may accompany voluntary homicide; and that it should omit altogether the question of provocation. It classifies under the same head homicide by a sword and homicide by a blow with the fist, homicide by a person provoked in the highest degree, and homicide by a robber.

[3] Fleta copies and somewhat abridges Bracton. [4] Britton treats the subject very concisely. He omits many of the

[1] Bracton, ii. 398.

[2] Bracton, ii. 400. The rest of the passage is as follows: "Et nihil interest " occidat quis an causam mortis præbeat, sed ibi distinguitur inter veram " causam et infortunium de animalibus quæ ratione carent vel aliis rebus " inanimatis quæ dant occasionem, sicut navis, arbor quæ oppressit vel hujus-" modi. Recte autem loquendo, res firma sicut domus vel arbor radicata " quandoque non dant causam nec occasionem, sed facit ille qui se stulte gerit, " nec equus multotiens. Item nec navis, nec batellus in salsâ, licet in aquâ " dulci et hoc per abusionem sicut in multis aliis casibus." This is a singular and indeed obscure passage. The meaning of the words is plain enough, but it is difficult to follow the order of the ideas.

[3] Fleta, lib. i. chaps. 23, 30, 33, 34. In this last chapter the obscure passage quoted above is omitted.

[4] Britton, lib. i. chaps. vi. vii. vol. i. pp. 34-39.

CH. XXVI.

topics dealt with by Bracton, and adds to the cases stated by him, "Ceux ausi qi fausement par louver ou en autre manere "ount nul homme dampne ou fet dampner a la mort par faus "serment." He also states their punishment. [1] "Si juge- "ment face encountre eux si lour soit ajugé mort pur mort; "et lour biens moeble soiñt nosz et lour heyrs desheritez. "Et volums aver de lour tenementz de qi qe unques soint "tenuz le an et le jour."

The [2] *Mirror* contains little more on this head than an abridgment of Bracton.

As I have already observed, there are no text writers upon the criminal law between Bracton and his followers and Coke. The Year-books, so far as I can ascertain, make few references to the subject of the definition of homicide, though a large proportion of the cases in FitzHerbert relate to the procedure upon prosecuting for that offence. Some points, however, in the early history of the law are still ascertainable.

In the first place I may observe that murders of a particular class were separated from other cases of homicide by being classified as petty treason. The first reference to such an offence which I can quote is in the [3] 75th chapter of the *Leges Henrici Primi*, which describes it as being punished by flaying alive. "Si quis dominum suum occidat, si capiatur, "nullo modo se redimat, set de comacione vel excoriacione "severagentium animadversione dampnetur ut diris tor- "mentorum cruciatibus et male mortis infortuniis infelicem "prius animam exhalasse, quam finem doloribus excepisse "videatur; et si posset fieri, remissionis amplius apud inferos "invenisse, quam in terra reliquisse protestetur." The offence is elaborately compared to the sin against the Holy Ghost. In Bracton there is no special reference that I know of to this offence. Something a little like it is mentioned in [4] Britton, but in the statute of treasons (25 Edw. 3, st. 5, c. 2, A.D. 1350) it is fully defined: "And, moreover, there is another manner "of treason, that is to say, when a servant slayeth his master, "or a wife her husband, or when a man, secular or religious,

[1] Vol. i. p. 35. [2] Ch. i. s. 9. [3] Thorpe, i. p. 579.
[4] Britton, book i. ch. ix. vol. i. p. 40.

"slayeth his prelate to whom he oweth faith and obedience."[1] The use of this subdivision of murder I do not understand. There was some additional severity in the punishment, and accessories before and after were all principals, but the offence was originally clergyable as well as murder. It was, as I have [2] already said, excluded from clergy in 1496 by 12 Hen. 7, c. 7. It continued to exist as a separate offence till the year 1828, when it was enacted by 9 Geo. 4, c. 31, s. 2, that every offence which before the passing of that act would have amounted to *petit* treason should be deemed to be murder only and no greater offence.

A matter of more importance and interest, though it is in itself extremely obscure, is the origin of the division of the crime of homicide into different degrees. In Bracton, as I have shown at length, "murder" meant secret killing, involving a fine on the township. Homicide or manslaughter was the general name under which every sort of slaying was comprehended, and those forms of slaying which happened by pure accident or inevitable necessity were regarded as not being criminal. When the necessity was not inevitable, or when the accident was one for which the party was to some extent to blame, he was, according to Bracton, responsible.

The precise consequences of "tenetur" are not mentioned, and nothing is said as to the way in which the fact that the necessity was not inevitable, or the accident not free from blame, was to be decided. A series of authorities, which I now proceed to examine, and which were long misunderstood, show, I think, that this part of the law of homicide was the first to attract the attention of the courts, and that it led by degrees to the present law on the subject. I will give the authorities in the order of time. The first authority is a passage in Bracton which I have hitherto passed over. In stating the cases in which the hundred is not to pay the fine called murdrum, he says that [3] in the case of those who die by misadventure no fine shall be paid (nullum erit

[1] Long afterwards there seems to have been a doubt whether a child who killed his father or mother was guilty of petty treason, but it was held that it was not unless he acted as servant to them.—Lambard, 245.

[2] Vol. i. p. 463.

[3] Bracton, ii. 388.

CH. XXVI. murdrum), although in certain parts of the country the custom is otherwise. In 1267, by the statute of Marlbridge (52 Hen. 3, c. 25), it was enacted that "murdrum de cetero non "adjudicetur coram justiciariis ubi infortunium tantummodo "adjudicatum est, sed locum habeat murdrum in interfectis "per feloniam et non aliter." This, no doubt (though it was afterwards misunderstood), means that the local customs referred to by Bracton should be abolished, and that the principle laid down by him should be observed throughout England. It is further to be observed that there was no need to refer in this act to the cases of homicide under a necessity which might have been avoided. In a case where this happened the person who caused the death must of course be known, and when the person by whom the death was caused was known, no "murdrum" was due from the township. The only cases in which the act could apply would be cases in which some stranger who could not be identified as an Englishman was found dead under circumstances which led to the inference that his death was accidental, *e.g.* if he were found drowned with no marks of violence. The statute therefore throws little light on the subject, though its words, when rightly understood, seem to imply that killing "per infortunium" was in those days so far from being felony that the two were contrasted with each other.

The next authority is the Statute of Gloucester, in 1278 (6 Edw. 1, c. 9). It is in these words: "Le Rey comaunde "qe nul brief de la chauncelerie seit graunte de mort de home "de enquere si home occie autre par mesaventure ou sei "defendaunt on en autre manere par felonie, mes si tel seit "en prison e devaunt justices errauns ou justices assignez a "Ghaole deliverer se met in pais de bien et de mal e len "trusse par pais qil eit fet se defendaunt ou par mesaventure "dunqe par record des justices face le Rei sa grace si lui plest."

That is, "The king commands that no writ shall be "granted out of the chancery of the death of a man to "inquire whether a man killed another by misadventure "or in self-defence, or in other manner [1] by felony, but if

[1] The translation in the Statute Book is "in other manner without felony," which is clearly wrong. Coke, in his exposition of the Statute of Gloucester

"such a person is in prison and before the justices in eyre or "justices of gaol delivery, puts himself on the country for "good or evil, and if it is found by the country that he "did it in self-defence or by misadventure then, on the "record of the justices, the king shall pardon him if he "will."

This act by its opening words abolished the writ *de odio et atiâ*, which was issued, as I have already explained, in order that a jury might say whether a person accused of homicide was accused duly or maliciously in order that in the latter case he might be bailed. It would seem from this statute that the commonest cases of accusations "de odio et atiâ" were cases of misadventure or self-defence. The survivors of the deceased in such cases were likely to accuse of wilful homicide those whose negligence or violence had caused their relation's death; and the statute provides that these cases are no longer to be bailable, and that when the trial comes on, the jury, if they think that the case was one of self-defence or misadventure, are neither to convict nor acquit, but to find specially to that effect, upon which the king, if he pleases, may, upon the record or report of the justices, pardon the party. What happened if the king did not pardon the party does not appear. [1] Coke thinks that the words "if he pleases" "are but words of reverence to the "king, for the king is obliged *ex merito justitiæ* to grant the "pardon." At the same time the necessity for a pardon shows that some degree of guilt was supposed to be attached to killing by misadventure or in self-defence.

Another act, which throws some light on the subject, is the statute 21 Edw. 1, st. 2, A.D. 1293, "de malefactoribus in parcis." This act, "ut malefactores in forestis, chaceis parcis "et warrennis de cetero plus timeant in eadem intrare et "malefacere quam consueverunt," provides that the foresters, parkers, or warreners, if they find trespassers who will not

(*Second Institute*, p. 314), prints "sans felony," and translates without felony, but the "par felony" appears in the Statutes of the Realm, the most authentic of all the editions of the Statute Book, and in Pickering's *Statutes*, where the translation is "without felony." Foster follows Coke, *Discourse of Homicide*, p. 282.

[1] *Second Institute*, 316.

CH. XXVI.

yield themselves "after hue and cry made to stand unto the "peace, but do continue their malice," are not to be troubled or punished if they kill any such trespasser in arresting him, but they are warned against acting maliciously.[1] This act supplies a case of homicide which was regarded as absolutely justifiable. The forester or park-keeper was not to be "pun- "ished or disturbed" if he acted within the powers given by the act.

In 1310 [2]an entry appears upon the Parliament Roll of 3 Edw. 2, in answer to a petition complaining of the ease with which pardons were granted to homicides and other offenders, in these words: "Le Roy voet que desoremes ne soit graunte "pardon de felonie forsque en cas ou anciennement soleit "estre grantez cest a saver, si hom tue autre par mesad- "venture ou soy defendant, ou en deverie" (insanity) "et ce soit trove par record de justices." This seems to show that in such cases pardons were granted as of course.

The result of these authorities seems to be that, in the end of the thirteenth and the beginning of the fourteenth centuries, juries were bound in cases of trials for homicide, where the defence was misadventure or self-defence, to find specially that such was the case, upon which the king was bound to grant his pardon. Probably he would do so upon terms as to fines and forfeitures which would depend on the degree of blame which might be considered to attach to the defendant by reason of the avoidable nature of the necessity under which he had killed the deceased, if the case was one of self-defence; or the amount of carelessness he had shown if the case was one of accident. Several entries in the Year-books, given in [3]FitzHerbert, throw light upon this. The following are instances:—

S. being indicted for the death of N. and pleading not guilty, the jury found that S. and N. quarrelled on their way to the public-house, and in the course of the quarrel N. struck

[1] This act remained in force till it was repealed by 7 & 8 Geo. 4, c. 27, and strangely enough it was repealed, "as to India," by 9 Geo. 4, c. 74, s. 125.

[2] 1 *Rot. Par.* 443*b*.

[3] Corone, 284, 285, 286, and 287. All in 3 Edw. 3—eyre of Northampton, A.D. 1330.

S. with an ash stick on the head so that he fell, and S. got up and ran away as far as he could, and N. followed S. with the stick in his hand to kill him if he could, and drove him to a wall situated between two houses which he could in no wise pass; and when S. saw that N. wanted to kill him with the stick, and that he could not avoid death unless he defended himself, he took a certain [1] poleaxe and struck N. with it on the head, of which N. immediately died, and the said S. immediately after fled as far as he could. Wherefore the jurors said that S. killed N. in self-defence, and not by felony or of malice aforethought, and that he could not otherwise escape from death. Therefore S. is remitted to prison to wait for the mercy of the king in the custody of the sheriff. His chattels, xx. *s.*, [2] whereof the sheriff is to answer, and then S. is to purchase a pardon, &c.

This case is followed by two others (286 and 287), in each of which the circumstances were nearly the same, and in each of which the person accused is said to have fled for the offence, and accordingly to have had his chattels confiscated. The purchase of the pardon for the death seems, however, to have been independent of the chattels.

Other cases on the same iter (Nos. 288 and 289) illustrate the difference then made between excusable and justifiable homicide. In one the jurors acquitted men who, when a person refused to be arrested for felony and "repug-"nabat cum quodam gladio quantum potuit" [3] killed him. The following cases are somewhat similar (289, 290):—

There is one statute of considerably later date which throws some further light on this subject. It is 24 Hen. 8, c. 5, passed in 1532, and entitled, "That a man killing "a thief in his defence shall not forfeit his goods." The statute recites with the verbosity characteristic of Henry VIII.'s statutes, that it had been doubtful whether a person who killed any one who attempted to rob or murder him in his own house, or on or near the highway, was to forfeit his goods "as any other person should do that by chance-medley

[1] "Quend. polhack."
[2] "Und. viĉ. r̃ et puis purch. chr̃e de pardon, &c."
[3] "Quidam Johannes filius de B. qui obiit velociter ipsum appropenquavit et "caput ejus gladio amputavit ut ipsum qui se legi justic. non permisit."

CH. XXVI. "should happen to kill any other person in his defence," and enacted that for the future no forfeiture should be incurred in any such case, but that persons so killing should be entitled to be acquitted simply. This statute clearly proves that killing in self-defence did involve forfeiture of goods, as a rule, in 1532, whatever may have been the case in Bracton's time.

It is, I think, by no means improbable that (as [1] Foster suggested) this method of treating homicide in self-defence, or by accident, as matters requiring a pardon and possibly involving some forfeiture (though the evidence as to this in cases where there was no flight is not clear) may have been the last remnant of the old system of bot and wite, of which I have already spoken. In 1340 Englishry was abolished by 14 Edw. 3, st. 1. c. 4, which recites that "Moultz des mes-"chefs sont avenuz en divers pays d'Engleterre qils "navoient mis conisance de presentement d'Englescherie "parquoi les communes des countes estoient sovent devant "les justices errantz amercesz a grant meschief du people." Accordingly, "Soit l'Englescherie et le presentement dycel "pur toutz jours ouste."

The abolition of Englishry, which was a remnant of the effects of the conquest of England by Frenchmen, was by no means an unnatural step on the eve of the great war in which the English conquered France. The result of it was to cut away the ground of the distinction taken by Bracton between voluntary homicide in general and murder. The name "murder," however, had no doubt come into common use, though the presentment of Englishry had, as the statute tells us, come to be so antiquated and unfamiliar that fines on the county for the want of it were regarded as mere acts of oppression. The word murder therefore would naturally become the name of the worst kind of homicide.

Homicide would thus consist of (1) murder, indistinctly conceived of as the worst species of the offence; (2) homicide per infortunium et se defendendo, which, though blameable to some extent, involved no other consequences than expense in getting a pardon, forfeiture of goods, and imprisonment

[1] P. 287.

before trial; and (3) justifiable homicide, which entitled a man to be acquitted. The large number of cases of homicide which, without belonging to the very worst class of all, were neither justifiable nor cases of misfortune or self-defence, were distinguished by no particular name, but were capital felonies, though not called murders.

The next step in the history of the later definition consists in the adoption of the expression "malice aforethought" as the characteristic specific distinction of murder as distinguished from other kinds of homicide. The forms of the special findings of the jury in the cases to which I have already referred show how it came about. They show that in order to entitle a man to a pardon on the ground of his having committed homicide *se defendendo*, it was necessary for the jury to find that he did it "in self-defence and not by felony or of "malice aforethought;" and as the special finding is required by the Statute of Gloucester, which abolished the writ "de "odio et atia," I think it highly probable that "malice afore-"thought," the absence of which juries had to find specially is the equivalent of the "odium et atia" the presence of which in the accuser—not in the accused—had to be found specially before the accused had a right to the writ "de ponendo in "ballium."

The next incident to be mentioned is a note in the Year-book, 21 Edw. 3, p. 17B. (A.D. 1348). It is in these words:—[1] "Note—That a man was convicted of having killed "another in self-defence, and, notwithstanding, his chattels "were forfeited, though his life is safe. The reason is, that "at common law a man was hanged in this case as much "as if he had done it feloniously, and, although by the sta-"tute (Marlbridge, 52 Hen. 3, c. 25) the king has spared "his life, his goods remain under the common law." This is a remarkable passage, as it shows that in the course of the eighty-one years, between the Statute of Marlbridge (1267) and 21 Edw. 3 (1348), the old law had been

[1] "Nota q̄ un home fut trove culp̄ q̄ il avoit occis un autre se defend. et "cela nient obstant ses chateux fuf forfaits, coūt q̄. sa vie sera sauve; et la "cause fut parce qu'al comon ley home fut pendu in cet cas auxi avant si come "il eut ce fait felonisement; et coment q̄ le Roy ne p̄ le statut ait relesse sa "vie ses chateux demeurent al comon ley."

CH. XXVI.

completely forgotten. The note cited is obviously founded upon a mistake as to the meaning of the Statute of Marlbridge. The words "Murdrum de cetero non adjudicetur coram justi-"ciariis ubi infortunium tantummodo adjudicetur" must have been construed, "Killing by misadventure shall not be "held before the justices to be murder," in ignorance of the fact that "murder" meant the fine on the township. The recital of the statute of 1340 abolishing Englishry shows how natural the mistake was. It seems, however, that this mistake had the practical result of attaching the forfeiture of goods as a consequence to a verdict of "se defendendo."

It is remarkable that the belief in the recent existence of such a monstrous state of the law as that a man should be hung for killing another in self-defence, should have found ready acceptance with an official reporter as the author of the Year-book in question was. [1]Coke, however, accepts his view without hesitation.

We come next to a remarkable entry in the [2]Parliament Roll for 1389 (13 Rich. 2). At this period the royal power was at a lower ebb than it ever fell to again till the civil wars. The Commons petition the king against the abuse of charters of pardon for murder, treason, and rape which "ount "este trop legerement grauntz devant ces heures a graunt con-"fort de toutz male fesors." They pray that no such pardons may be granted, and that if any archbishop or duke asks for such a charter he may forfeit to the king £1,000, a bishop or earl 1,000 marcs, an abbot, prior, baron or banneret 500 marcs, a clerk, knight bachelor, or person of less estate 200 marcs and be imprisoned for a year. Every pardon so granted to be void, and the person who has solicited the pardon to be liable to the penalty as soon as the offender is convicted. The petition implies that it was then usual to solicit and to grant pardons for the gravest offences before trial, which pardons could be pleaded at the trial.

The king's reply is, "Le roy voet sauver sa [3]liberte et

[1] Coke, *Second Institute*, upon Stat. de Marlbridge.

[2] 3 *Rot. Parr.* 268*a*.

[3] Here "Liberty" is used in its true sense of franchise or special power. Somewhere, I think in Clarendon, it is said that the king of England is "as "free and absolute" as any king in the world, and this was the real meaning

" regalie comes ses progenitours ount faitz devaunt ces heures," and it then goes on to give a modified assent to the petition of the Commons, " Null chartre de pardon desore soit alowe " devant q̄conq̄ justice pur murdre, mort d'ōme occis par " agait assaut ou malice purpense, treson ou rape de " femme si mesme la murdre ou mort d'ōme occis par agait " assaut ou malice purpense, treson, ou rape de femme ne " soient especifiez en meme la chartre. Et si chartre de mort " d'ōme soit alegge devant q̄conq̄ justicez, en quele chartre " ne soit especifie q̄ celuy de qi mort ascun tiel soit arraigne " fuist mourdrez ou occis par agaite, assaut, ou malice purpense " enquereront les justices par bone enqueste de visne ou le " mort fuist occis, s'il fuist mourdrez, ou occis par agaite, as- " saute, ou malice purpense. Et s'ils trovent q'il fuist mourdrez, " [1] ou occis par agait, assaut, ou malice purpense, soit la chartre " disalowe, et soit fait entre solonc ceo q̄ la ley demaunde." It is also provided that when any person solicits such a pardon, the chamberlain, or vice-chamberlain, who endorses the bill is to put upon it the name of that person. The pardon is to pass both the Privy Seal and the Great Seal, "except in cases "where the chancellor can grant it by his office without " speaking to the king "—words which obviously refer to the pardons of course, already referred to in cases of self-defence, misfortune, and insanity. Somewhat lighter penalties than those suggested by the Commons are imposed upon persons soliciting pardons in such cases. This appears in the Statute Book as 13 Rich. 2, s. 2, c. 1. The penalties imposed upon persons soliciting pardons were repealed three years afterwards by 16 Rich. 2, c. 6 (1392), but the rest of the statute is still in force. It has been little, if at all, noticed by the writers on the subject; for instance, Coke passes it over, and so do Hale and Foster. It seems to me to form the first statutory recognition of the expression " malice aforethought," which as I have shown had been previously employed by juries in finding special verdicts of *se defendendo*. It may, indeed, be

of the phrase "free monarchy," which eminent persons in our own time employed, in order to give an attractive appearance to monarchical government.

[1] This is almost identical with the definition of "assassinat" in the Code Pénal, art. 296: "Tout meurtre commis avec premeditation ou guet-à-pens " est qualifie assassinat."

CH. XXVI. regarded as an indirect new statutory definition of murder, and may be compared to the indirect statutory definition of seditious libel by 60 Geo. 3, and 1 Geo. 4, c. 8, already commented upon.

The next stage in the history of this definition consists in the statutes which by degrees excluded the crime of murder from benefit of clergy. They were 12 Hen. 7, c. 7 (1496) which applied to petty treason, 4 Hen. 8, c. 2 (1512), 23 Hen. 8, c. 1, ss. 3 and 4 (1531), and finally 1 Edw. 6, c. 12, s. 10 (1547), the details of which have [1] already been noticed. In these acts the expressions used are "wilful prepensed murders," "prepensedly murder" (13 Hen. 7), "murder upon malice prepensed" (4 Hen. 8), "wilful murder of malice prepensed" (23 Hen. 8), and "murder of malice prepensed" (1 Edw. 6). Up to this time it appears from what has been already said that though there may be said to have been a legal definition of murder as distinguished from other forms of homicide it was a distinction which made hardly any difference, for all homicide, unless it was justifiable, *se defendendo* or by misadventure, was felonious and so punishable with death, and was also within benefit of clergy whether it did or did not amount to murder. Thus the only distinction between murder and what we should now call manslaughter, consisted in the fact that murder by waylaying, assault, or malice prepense was not within the terms of any general pardon.

Two acts may here be mentioned which have a place in the history of the law of homicide. In 1530 the offence of poisoning was made high treason by 22 Hen. 8, c. 9. [2] This was on the occasion of the poisoning, by one Rouse, of a number of poor people entertained by Fisher, the Bishop of Rochester. The operative words of the statute are, "Every wilful murder of any person—hereafter to be committed or done by means or way of poisoning—shall be "deemed to be high treason." The offenders were to be excluded from clergy and boiled to death. In 1547 all new treasons enacted by Henry VIII. were repealed by 1 Edw.

[1] Vol. I. p. 464.
[2] Froude's *History*, i. p. 301. Mr. Froude quotes the statute verbatim.

6, c. 12, which provided (s. 13) that all wilful killing by poisoning shall be adjudged wilful murder of malice prepensed. In his famous judgment in [1] R. *v.* Mawgridge, to which I shall refer more particularly hereafter, Holt says, that this act was passed because "poison did not come under the "ancient definition of Bracton which is said to be 'manu-"'hominum perpetrata,' or of the statute 13 Rich. 2, s. 2, "c. 1" (the statute forbidding pardons, already referred to as giving the first statutory definition of murder). This, I think, is a mistake, as the act of Henry VIII. speaks of "murders by poisoning," and "wilful murder by way of poisoning," as offences which might then be committed. The act of Edward VI. must, I think, have been passed in order to put poisoning back into the category of offences from which the act of Henry VIII. had removed it. It must also be remembered that poisoning was in 1530 a clergyable felony. Murderers (not being clerks in holy orders) were first excluded from clergy in the following year by 23 Hen. 8, c. 1. The act of 1 Edw. 6, c. 12, took away benefit of clergy in all cases of "murder of malice prepensed," so that the only difference it made as to poisoning was to do away with the punishment of boiling alive, and to establish as a matter of law what one would think was plain as a matter of fact, namely, that killing by poison involved malice aforethought.

We have thus arrived at the point at which homicide was finally divided into two main branches, namely, murder which is unlawful killing with malice aforethought, and homicide in general, which is unlawful killing without malice aforethought, the one offence being within, the other without, benefit of clergy. The subsequent history of the definition consists mainly, though not entirely, of the process by which a definite meaning was put upon the words "malice aforethought." One point, however, suggests itself on which I am sorry to be unable to throw any light. If the law as to clergy was carried out rigidly in regard to homicide its severity must have been frightful. For instance, two men on a sudden quarrel, fight with their fists, one kills the other. If the man who killed the other was married to a widow he would be

[1] Kelyng, 173.

hanged. So every woman who killed any one otherwise than by accident or *se defendendo* would be hanged. This extraordinary severity was followed by a scandalous laxity which lasted till the reign of George IV. When all persons were entitled to benefit of clergy for every kind of manslaughter the utmost punishment that could be inflicted on a man who, upon receiving a blow with a fist, laid his assailant dead with a pistol, was a year's imprisonment and branding on the brawn of the thumb.

In the end of the sixteenth and the beginning of the seventeenth centuries the criminal law was for the first time made the subject of special treatises which to a great extent altered both its form and its substance, and I will now proceed to give an account of the most important of these writings.

The first is Staundforde's *Pleas of the Crown*. Staundforde was a judge in the Court of Common Pleas in the reign of Queen Elizabeth, and [1] published his work on the Pleas of the Crown in the latter part of the seventeenth century. The part of his work which relates to homicide is little more than a commentary upon Bracton. He quotes at full length the passages to which I have referred, and appends to them references to a variety of decisions, and some few statutes, most of which I have already noticed. His account of the change in the definition of murder, is expressed with some quaintness, but as I think with perfect correctness. After stating the modern definition to be killing with malice prepense, he adds: [2] "Le nomme de murder ne fuist unque "chaunge, mes le ley ceo reteignoit continuelment par le "haynoustie del crime a mitter difference inter homicide par "chaunce medley et homicide perpetre per voye de murder." Staundforde seems to have thought that the words "malice "prepense" required no explanation. He contrasts murder with chance medley, and so recognises two kinds only of voluntary homicide, namely, voluntary homicide with malice prepense, and voluntary homicide upon a sudden quarrel.

[1] My edition is dated 1607, but I do not think it can be the first.
[2] Staundforde, 19A. Staundforde's French is already very piebald, though it is not so bad as law French became in another century.

The subsequent history of the definition shows what a superficial view of the subject this is, and what important distinctions it altogether fails to notice.

The principal part of Staundforde's commentary upon Bracton consists of authorities which show how far Bracton's distinction between inevitable and evitable necessity had been reduced to a certainty. He specifies as cases of inevitable necessity killing in order to arrest, and the cases mentioned in the two statutes above referred to, namely, 21 Edw. 1, "de malefactoribus in parcis," &c., and 24 Hen. 8, c. 5, as to killing robbers and burglars. As cases of avoidable necessity he reckons all cases of killing in self-defence other than those protected by the statute of Henry VIII., even if the act was necessary to save the life of the person killing. In such cases, says Staundforde, the person slaying, though entitled to purchase a pardon as of course, forfeited his goods. He thinks that this was so whether they fled for it or not, and referring to the cases in the Year-books, in which it was found that they did fly for it, he says: "Doyomus penser que "lenquere del fugam fecit fust come surplusage." He also says that [1] in killing by misadventure the goods of the slayer are forfeited.

Between the publication of Staundforde's work and that of Lambard, the next writer to be noticed, an act was passed which shows clearly that at that time the words "malice prepense" in the statutes excluding murder from clergy were construed in their popular sense. This was the act called the Statute of Stabbing, 2 Jas. 1, c. 8 (A.D. 1604), said to have been passed on the occasion of frays then common between Englishmen and the Scotchmen who resorted to the court of James I. The preamble says that the act is passed "To the end that stabbing "and killing men on the sudden, done and committed by "many inhuman and wicked persons in the time of their "rage, drunkenness, hidden displeasure, or other passion of "mind" may be restrained. "Every person . . . . which ". . . . shall stab or thrust any person or persons that hath "not then any weapon drawn, or that hath not then first

[1] Fo. 16, ch. 8.

CH. XXVI.

"stricken the party, which shall so stab or thrust so as the "person so stabbed or thrust shall thereof die within the "space of six months then next following, although it cannot "be proved that the same was done of malice forethought, " . . . . shall be excluded from the benefit of his clergy, and "suffer death as in case of wilful murder."

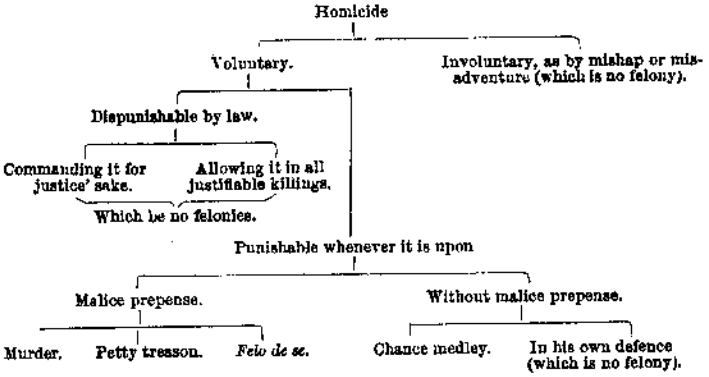
The obvious natural meaning of this act is that as the law stood in 1603 it was considered that a person who killed another "on the sudden," even without provocation or on any slight provocation, was guilty of manslaughter only; but however this may be, it was most unskilfully drawn, and had to be explained away. It assumes that no provocation except drawing a weapon or actual striking could be sufficient provocation to reduce killing by a stab from murder to manslaughter. This produced so harsh a result that the judges would not apply it. [1] The following are instances: A man is assaulted by thieves in his own house, the thieves having no weapon drawn nor having struck him. He stabs one. This is within the express words of the act, but was held to be justifiable homicide. An officer pushed abruptly and violently into a gentleman's chamber early in the morning to arrest him, not telling his business. The gentleman, not knowing he was an officer, stabbed him with a sword. This was held to be manslaughter at common law, though it was within the words of the statute, and the same was held as to a person stabbed by mistake under the supposition that she was a thief. The strongest case of all is that of a man stabbing an adulterer. This was held not to be within the act, but it was not determined till long after the statute of stabbing was passed that to kill an adulterer was manslaughter and not murder. At last, in 1666, [2] it was agreed by all the judges that this statute "was only a declaration of the common law, and made to "prevent the inconveniences of juries, who were apt to believe "that to be a provocation to extenuate a murder which in "law was not." The grounds of this resolution are not given, but I do not think that any better ground could have been

[1] All these cases are cited in Foster, p. 299.

[2] Kelyng, p. 88 (ed. of 1873), p. 55 of old editions. See too Foster, p. 298, and 1 Hale, p. 456.

given than that the meaning attached by Coke and other writers and judges of the seventeenth century to the words "malice prepense" in the statutes of Edward VI. and Henry VIII. was such as to supersede the necessity for the Statute of Stabbing. This is by no means the only instance in which the development of the common law by judicial decisions and by text writers has superseded statutes intended to enlarge its scope, so that the statute resembles an ancient sea-wall superseded by the receding of the sea in front of it.[1]

The next writer on the subject important enough to be noticed was Lambard, whose work was published in 1610. His account of homicide is far simpler, more consecutive and natural than Coke's, and though not free from an element of fiction, has much less of it than was afterwards introduced into the subject. He [2] gives the following tabular view of homicide:—



This table is not quite a complete statement of the [3] contents of Lambard's work on this subject, as it does not show that to kill involuntarily was in Lambard's time punishable

[1] Foster is very indignant against this unlucky statute, and points out with malignant satisfaction a number of points which had arisen or might arise upon it. He says: "If the outrages at which the statute was levelled had "been prosecuted with due rigour, and proper severity, upon the foot of "common law, I doubt not an end would have been put to them without "encumbering our books with a special act for that purpose, and a variety of "questions touching the true extent of it. This observation will hold with "regard to many of our penal statutes, made upon special and pressing "occasions, and savouring rankly of the times." He adds, "The judges "have wisely holden a strict hand over this statute."—Pp. 300-301.

[2] Pp. 224-225.

[3] Cf. pp. 254-255, with the table.

CH. XXVI.

by forfeiture of goods if the act causing death was lawful, and that it might amount to a felony, apparently either murder or manslaughter, if the act was unlawful or felonious. The leading distinction between voluntary and involuntary is taken from Bracton, and Lambard seems to have understood by those words intentional and unintentional. He does not appear to have asked himself the further question what particular intention he meant, but the contents of his work seem to imply that he meant an intention to inflict bodily harm of some sort on some person.

Lambard is, I think, the first writer who gives an account of the meaning of malice aforethought, showing that the unsatisfactory character of the phrase was beginning to be understood. He does not attach any artificial meaning to the phrase itself, but assumes that it bears its natural and obvious sense of premeditation. He then states the cases of what was afterwards called implied malice, in a way which involves some fiction, but much less than was afterwards imported into the subject. He [1] says, "Many times the law doth by "the sequel judge of that malice which lurked before within "the party, and doth accordingly make imputation of it. "And therefore if one (suddenly and without any outward "show of present quarrel or offence) draw his weapon and "therewith kill another that standeth by him, the law judgeth "it to have proceeded of former malice, meditated within "his own mind, however it be kept secret from the sight of "other men. . . . And it hath been adjudged murder when "a man hath drawn his weapon, and killed either a known "officer, or one that had and showed sufficient warrant to "arrest him for debt only. . . . Again, it is better for "a rule that wheresoever a man goeth about an unlawful act "as to beat a man or to disseize him of his lands, &c., and do "(in that attempt) kill him, it is murder, because the law "presupposeth that he carrieth that malicious mind with him "that he will achieve his purpose though it be with the death "of him against whom it is directed. And therefore if a thief "do kill a man whom he never saw before and whom he "intended to rob only, it is murder in the judgment of law,

[1] P. 205.

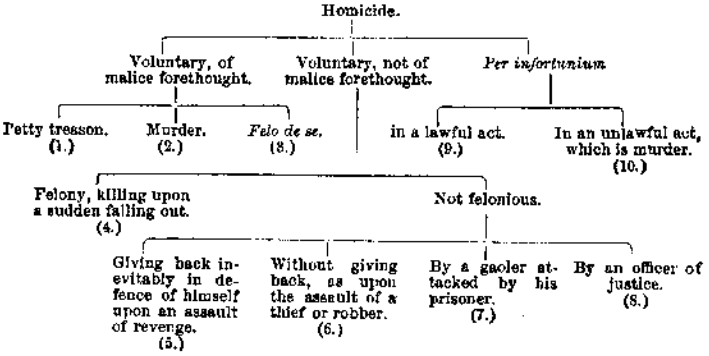
"which implyeth a former malicious disposition in him rather "to kill the man than not to have his money from him."

Of these three cases it may be observed that the first (sudden killing without apparent provocation) is rational enough as Lambard puts it. If A. suddenly but obviously intentionally kills B. without any apparent motive, it is no doubt reasonable to suppose that he had some motive which was not apparent, but Lambard's statement is incomplete, for it takes no notice of the case of sudden killing in which there really is no antecedent malice, as, for instance, killing upon a slight provocation or in mere wantonness. It is impossible not to ask why a man should in such a case be in any better position than one who kills another suddenly for some unknown cause; and it is also not obvious why a fiction should be employed in order to put him in the same position. Probably the word "prepense" in the statute of Edward VI. was felt to be a difficulty. The difficulty might have been avoided by the reflection that the motive must, in the nature of things, precede the act caused by it, and that the statute says nothing as to the length of time during which the premeditation must last. This was pointed out long afterwards, but not till the attempt to evade the law had made it hopelessly confused.

As to the case of killing officers of justice, Lambard merely states the rule of law, that such a killing was held to be murder without attempting to reconcile it to the words "malice prepense." It might have been reduced to a case of sudden killing without provocation, which he does deal with. Execution of the due process of law ought not to be regarded as a provocation. The third case of the thief killing when he intended only to rob, is well explained by Lambard, if the killing is supposed to be by intentional dangerous violence, but not so well if it is supposed to be not only the unintentional, but also the improbable effect of minor violence. The law can hardly be justified in "presupposing" that a thief "carrieth that malicious mind that he will achieve "his purpose though it be with the death of him against "whom it is directed," from the fact that he trips a man up in order to rob him and happens to kill him.

CH. XXVI.

I now come to Coke's *Third Institute*, a work which, not by reason of its own merits, but because of the reputation of its author, may be regarded as the second source of the criminal law, Bracton being regarded as the first. Coke's account of homicide is to the last degree unsystematic and ill-arranged. It begins with petty treason, goes on to murder, and then passes to homicide, though petty treason is only a species of murder (as is well and clearly pointed out by [1] Lambard), and murder a species of homicide. The disorderly character of the author's mind is well illustrated by the circumstance that Coke gives, under the head of petty treason, an account of the trial of peers by their peers, and that between petty treason and murder he interposes, amongst other things, heresy and witchcraft. The chapter on homicide, however, contains [2] one passage which aims at treating the subject systematically, and which may be exhibited in a tabular form as follows:—

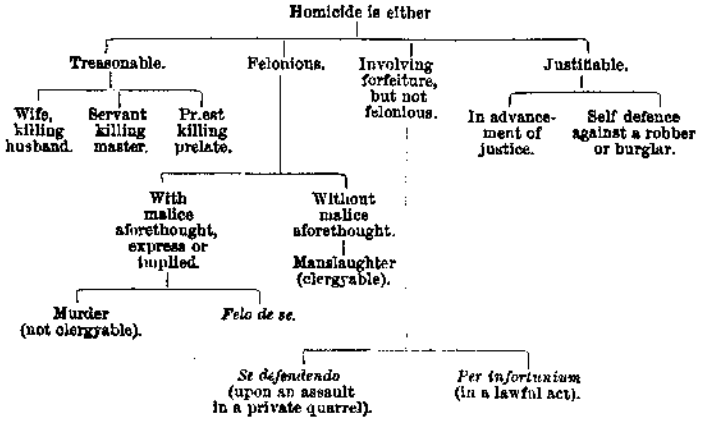


The intricacy and clumsiness of this arrangement are self-evident. It mixes up distinctions which are merely technical (felonious and not felonious) with distinctions which exist in the nature of things (voluntary and accidental), and in a technical point of view it is so clumsy that it puts some murders under head 2, and others under head 10. Besides, the circumstances which distinguish 6, 7, and 8, are distinctions without any difference. The following would have been an

[1] Pp. 244-246.

[2] P. 54.

intelligible way of classifying the law of homicide as it stood in Coke's time :—



This division of the subject is no doubt technical, but it is at least consistent, as it shows the relation to each other of the different technical rules which then prevailed. It differs little from the scheme given by Lambard. It classifies the subject according to the consequences then attached by law to different kinds of killing, distinguishing those which were regarded as being treason, felony, punishable by forfeiture of goods only, and free from all legal penalties. It is, however, very far from taking in all kinds of homicide, or from giving a rule by which they could be classified. For instance, it omits nearly all cases of killing by omission. A man who carelessly goes to sleep and leaves the ventilating doors of a mine shut when they should be open and so causes an explosion and death, cannot properly be said to kill a person by misadventure; and though he might under our modern law be said to kill him feloniously without malice aforethought, this would not be true according to Coke's classification, for he confines manslaughter of that kind to killing "upon a sudden falling out." The truth is that this case, like some others, is omitted, and it shows how imperfectly the matter had been considered in Coke's time. On most of these heads Coke adds little or nothing to what has already been referred to as having been stated by earlier

CH. XXVI.

writers. The great point in which he differs from Staundforde is in giving an account of malice aforethought, which has been the source of much of the obscurity and intricacy in which the subject has been involved. "[1] Malice prepense," says Coke, "is when one compasseth to kill, wound, or beat "another, and doth it *sedato animo*. This is said in law "to be malice forethought prepensed—*malitia præcogitata*." [2] It is implied in three cases, (1) "If one kills another without any provocation on the part of him that is slain." (2) "If a magistrate, or known officer, or any other that hath lawful "warrant, and in doing or offering to do his office, or to execute "his warrant, is slain, this is murder by malice implied by law." (3) "In respect of the person killing. If A. assault B. to rob "him, and in resisting A. killeth B., this is murder by malice im-"plied, albeit he" (A.) "never saw or knew him" (B.) "before. If "a prisoner by the duress of the gaoler cometh to an untimely "death, this is murder in the gaoler, and the law implieth "malice in respect of the cruelty. . . . If the sheriff, or other "officer, where he ought to hang the party attainted accord-"ing to his judgment and his charge rule against the law, "and of his own wrong burn or behead him, or *e converso*, the "law in this case implies malice in him."

This positive definition must be completed by reference to a negative definition given in the chapter on homicide.[3] "Some manslaughters be voluntary, and not of malice fore-"thought upon some sudden falling out. *Delinquens per iram* "*provocatus puniri debet mitius*. Another, for distinction's "sake, is called manslaughter. There is no difference between "murder and manslaughter, but that the one is upon malice "forethought, and the other upon a sudden occasion, and "therefore is called chance medley."

This is practically the root of the branch of the law as to malice aforethought, which has given rise to so many decisions.

It contains little which is not contained in Lambard, but Coke writes with an air of authority to which Lambard made no pretension, and his writings have in fact had extraordinary influence on every part of the law. It is therefore necessary to consider what he says carefully.

[1] *3rd Institute*, p. 50. [2] *Ib.* p. 51. [3] *Ib.* p. 55.

The positive part of his definition of "malice prepensed, "is where one compasseth to kill, wound or beat another, and "doth it *sedato animo*."

This definition gives an unnatural meaning to the word "malice," a word which naturally means ill-will in general, and refers not to the intention, but to the motives of the person who feels it. However, the definition appears to have been forgotten as soon as it was given, for the first case of implied malice is where "one killeth another without any "provocation." This obviously means killing another intentionally without provocation, for where a man kills another accidentally without provocation there is no malice expressed or implied. But if the killing is intentional the malice is by the definition express. Moreover, the mind may be just as sedate in executing an intention suddenly conceived, as in executing an intention of long standing. Why then does Coke call it a case of implied malice? Simply because having defined express malice in an unnatural sense, he used the word in its natural sense as soon as he came to speak of implied malice.

The other cases of implied malice are open to the same or similar remarks. The first is "If a magistrate or known "officer, or any other that hath lawful warrant, and in doing "or offering to do his office, or execute his warrant, is slain, "this is murder by malice implied in law." The third, "If "A. assault B. to rob him, and in resisting A. killeth B., this "is murder by malice implied, albeit he never saw or knew "him before." Each of these is a case in which "one "compasseth" (goes about, takes a step towards) "to kill, "wound, or beat another," and each is a case in which a man may act with a sedate mind, so that Coke's definition of malice in fact actually covers the three cases of malice implied by law. If Coke had contented himself with saying that malice meant an intention to inflict bodily injury not justified or excused, or mitigated by law, and that prepensed meant only that the intention must be formed before the injury was inflicted, he would have said very nearly what he did actually say, without employing any fiction whatever; and if he had added that the word likewise included reckless

CH. XXVI.

indifference as to whether bodily injury was caused or not, he would have made his statement complete, and have spared the necessity for an infinite number of later decisions. It is the more remarkable that he failed to do so, because in another part of the *Third Institute* he all but says it. In commenting on 5 Hen. 4, c. 5, which makes it felony to "cut out the tongue or put out the eyes of any of the king's "lieges with malice prepensed," he says, "Malice prepensed, "that is, voluntary and of set purpose, though it be done "upon a sudden occasion; for if it be voluntary the law "implyeth malice." No fiction would have been necessary in order to make such a statement, for malice means nothing but wickedness, though by always affecting to explain it by the word [1] *malitia* in Latin, Coke constantly tries to make it look mysterious. As far as wickedness goes it is difficult to suggest any distinction worth taking between an intention to inflict bodily injury, and reckless indifference whether it is inflicted or not.

It is remarkable that up to this point there is no recognition, so far as I know, of several of the most important distinctions connected with the modern law of homicide. Of these I will mention two. The first is the rule that a difference in the degree of bodily violence intended to be inflicted may make the difference between murder and manslaughter. As the law now stands, if a man stabs another with intent to do him grievous bodily harm, and in fact kills him, he is guilty of murder. If he intentionally strikes him a blow with his fist or with a small stick with no intention to inflict any great harm, and happens to kill him, he is guilty of manslaughter. I have found no trace of any such distinction in Coke or his predecessors. The view taken by Coke is

[1] "*Malitia*" is thus defined in Facciolati's *Lexicon*: "*malizia, furberia,* "*κακια, κακουργια, calliditas, fraus.*" He gives these examples: "Virtutis "contraria est vitiositas, sic enim malo quum malitiam appellare eam quam "Græci *κακιαν* appellant, nam malitia certi cujusdam vitii nomen est; "vitiositas omnium."—*Cic. de Nat. Deor.* iii. 30. "Est enim malitia versuta "et falsa nocendi ratio," pro *Ros. Com.* c. 16. These and other instances seem to imply that *malitia* in Cicero's time was a somewhat narrower word than our "wickedness." I do not think, however, that Coke can have had this in his mind. It will be found that he always writes Latin when he is not quite sure of his own meaning.

expressed as follows: [1] "Homicide by misadventure is when "a man doth an act that is not unlawful, which without any "evil intent tendeth to a man's death."

"*Unlawful.*—If the act be unlawful it is murder. As if "A. meaning to steal a deer in the park of B., shooteth at the "deer and by the glance of the arrow killeth a boy that is hidden "in a bush, this is murder, for the act was unlawful, although "A. had no intent to hurt the boy and knew not of him. "But if B., the owner of the park, had shot at his own deer, "and without any ill intent had killed the boy by the glance "of his arrow, this had been homicide by misadventure and "no felony. So if one shoot at any wild fowl upon a tree, "and the arrow killeth any reasonable creature afar off with-"out any evil intent in him, this is *per infortunium*, for it was "not unlawful to shoot at the wild fowl; but if he had shot "at a cock or hen, or any tame fowl of another man's, and "the arrow by mischance had killed a man, this had been "murder, for the act was unlawful."

This astonishing doctrine has so far prevailed as to have been recognised as part of the law of England by many subsequent writers, although in a modified shape given to it long afterwards by Sir Michael Foster, who limits it to cases where the unlawful act amounts to felony. It has been repeated so often that I amongst others have not only [2] accepted it, though with regret, but have acted upon it.

[3] The case in which I did so was not one which set its possible cruelty in a specially strong light. I must, however, say upon careful search into Coke's authority that I believe the passage just quoted from the *Third Institute* to be entirely unwarranted by the authorities which he quotes. Coke refers in the margin to four such authorities, no one of which supports him. The first is the [4] passage in Bracton already observed upon, in which Bracton says, that if a man unintentionally kills another in doing an unlawful act, "hoc

[1] *3rd Institute*, p. 56. [2] See my *Digest*, art. 223, p. 144.

[3] At Lincoln, in the winter assize of 1880, two men and a woman were tried for murder before me. They had conspired together to rob a man. The girl brought him to the appointed place, the men threw him down and robbed him. He had a weak heart and died. The three prisoners were convicted of murder and sentenced to death, but were not executed.

[4] Vol. ii. p. 276, fo. 120*b*, which Coke misquotes as 136*b*.

CH. XXVI.

"imputatur ei." He does not say that such an act amounted to murder, and it would not fall under the definition of murder which he gives, nor does he say that such an offence was in his day punishable with death. As I have already said, he says that the punishment of homicide in his day was various (pœna homicidii commissi facto variatur). As to the punishment given in this particular class of cases he is silent. The rest of Coke's authorities are three passages from the Year-books. The first is found not in the Year-books themselves but in FitzHerbert, *Corone*, 354, and is from the iter of Northampton in the third Edward III. This entry says that a jury found that a man killed a child by misadventure, having thrown a stone which fell on the child, whereupon the justices remanded him to wait for the king's pardon, and refused to let him out of prison on mainprise, but directed the sheriff to treat him humanely. This has obviously nothing to do with the matter. The first case referred to in the Year-books is 2 Hen. 4, 18. The only case I can find to which this can possibly refer is No. 6 in 2 Hen. 4, p. 18, which is a well-known authority as to the liability of a man whose fire burns the goods of another. In the course of the argument Thyrning says that if a man kills another by misadventure the slayer forfeits his goods and must get his pardon. The Year-book of 11 Hen. 7, p. 23*a*, which is the other authority cited, says that if two men fight with sword and buckler by consent and one kills the other it is felony, unless they fight by the king's command; also [1] that it is felony to kill a man by beating him, though without the intention of killing him. This, no doubt, says that to kill a man by an illegal act of personal violence is felony, though the act is not intended to kill, and it may be that the word "felony" means murder and not manslaughter, as the last remark seems to refer to instances of premeditated violence; but be this as it may, it is a long way from the proposition for which Coke cites it.

The other rule to which I referred is as to the effect of provocation in reducing what would otherwise be murder

[1] Such seems to be the meaning of the words, "Si on veut bāt aūt, et nemy "luy occit, unc̄ s'il luy occit p̄ s̄ batī, il sera dit felony car s̄ pm act ne fuit "soufferable."

to manslaughter. This rule is not to be found in terms either in Coke or in the earlier writers, but the law as to what was called homicide by chance medley came very near to it, and in fact must have included most of the cases of what we should describe as provocation. Coke mentions the absence of provocation for sudden killing as raising a presumption of malice prepense. But he does no more than mention it. In his reports (Part xii. fo. 87, vol. vi. p. 315, edition of 1826) he gives very shortly two cases of provocation, one of which certainly did not involve any falling out; but he does not seem to have seen the importance of these cases when he wrote the *Third Institute*, for he does not refer to them. The decisions seem to have been in 1612.

The established distinction between murder and manslaughter was, as I have already shown, that the one was killing with premeditated malice in the popular sense of the words, and the other killing upon a sudden falling out. It is obvious that this is a most imperfect account of the subject. As the whole doctrine of implied malice shows there were many kinds of homicide which could not properly be referred to either class, and the descriptions given by Coke, Lambard, and Staundforde, of manslaughter by chance medley, nearly all turn upon the details of fights with deadly weapons, which were no doubt the common occasions of death in the sixteenth and seventeenth centuries. The old law on this subject is adjusted at every point to a state of things in which men habitually carried deadly weapons and used them on very slight occasions. In substance it was to this effect: If two men quarrel and one attacks the other with a deadly weapon, it is the duty of the person so attacked to fly as far as it is physically possible for him to do so, whether he is in the right or in the wrong. If his enemy follows him up and tries to kill him, and if solely in order to avoid instant death he defends himself and kills his enemy, he is not to forfeit life and land like a felon, but he is to forfeit his goods and to purchase his pardon, and to be imprisoned till trial, no doubt because the presumption was that both parties were to blame in a quarrel. If the person attacked does not run away but resists, and in the fight either is killed, the offence is

CH. XXVI. manslaughter—a clergyable felony, punishable with forfeiture of goods, burning in the hand, and imprisonment for a year.

This again is an intelligible law in a time when the use of deadly weapons was common, but it is obviously not intended to apply to the forms of manslaughter, which are common in our own day. When the common mischief to be guarded against is the occurrence of set fights with deadly weapons, it is natural to lay down rules which treat each party as being pretty much on a level. When the mischief is the taking of inordinate vengeance for comparatively trifling injuries (as for instance, returning a box on the ear by a pistol-shot or a deadly stab) the question is what degree of provocation is to mitigate the legal denomination of the homicide caused by it. The contrast between the earlier and the later form of the law on this subject thus marks the gradual progress of a change in the national manners.

The next step in the history of the law of homicide is constituted by the elaborate examination of the subject [1] contained in Hale's *Pleas of the Crown*. It is no doubt a full account of the law as it then stood, but it has considerable defects. It disposes first of the subject of suicide, and then proceeds to "homicide and its several kinds, and first of "those considerations that are applicable as well to murder "as manslaughter." By this latter phrase Hale means to refer to such topics as those which I have already discussed under the heads of persons capable of being killed, and acts amounting to killing; but he goes incidentally into matters which belong to the general subject of excuse, such as the age of responsibility. Coming next to homicide in general he says that it is of "three kinds: (1) Purely voluntary, viz., "murder and manslaughter; (2) purely involuntary, as that "other kind of homicide *per infortunium*; (3) mixt, partly "voluntary and partly involuntary, or in a kind necessary; "and this again of two kinds, viz., inducing a forfeiture as "*se defendendo*, or not inducing a forfeiture as (1) in defence "of a man's house; (2) defence of his person against an

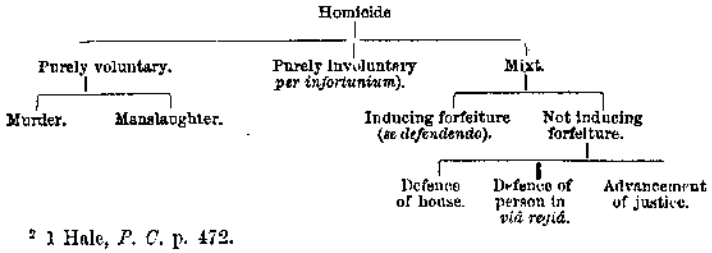
[1] Chaps. xxxiii.-xlii. both inclusive, vol. i. pp. 424-503.

"assault in *vid regiâ;* (3) in advancement of execution "of justice." [1]

This distribution of the subject appears to me to be open to several fundamental objections. In the first place, it is difficult to see what Hale meant by the word voluntary, which lies at the root of the whole system. It cannot have meant intentional, because all the cases put under the awkward head of "mixed" are cases of intentional homicide; nor can it have meant "voluntary" in the strict sense of accompanied or caused by an act of the will, for that again would apply to nearly every imaginable case of homicide. It has indeed no distinct meaning. If it had had one the head of "mixed" could not have occurred, and Hale could not have described the execution of a criminal as a case of homicide partly voluntary and partly involuntary, done in the advancement of justice. Again, the expression "mixed" is altogether unmeaning. How can "voluntary" and "involuntary" be mixed? If to kill a man in self-defence is partly voluntary and partly involuntary the same may be said of every case in which there is a strong motive for killing a man, and then all cases of murder and most cases of manslaughter ought to be put under the head of "mixed." Besides, the distribution of the subject does not agree with the exposition itself. Manslaughter, according to the distribution of the subject, is "purely voluntary" homicide. But in the [2] exposition several cases are given of manslaughter by negligence under the head of "involuntary homicide."

The confusion indicated by these fundamental defects in Hale's plan of the subject makes itself felt in the heaviness, obscurity, and superabundant detail of his exposition of the

[1] In a tabular form the passage stands thus:—



[2] 1 Hale, *P. C.* p. 472.

CH. XXVI.

law relating to it. After discussing the distribution of the subject he introduces a chapter (xxxiv.) "concerning command-"ing, counselling, or abetting of murder or manslaughter," although he admits that it would be "more proper under the "title of principal and accessories."

In his exposition of malice aforethought (chapters xxxvi., xxxvii.) he repeats Coke almost literally, though with the addition of a good many cases which are either unnoticed by Coke or were decided after his time. He takes no notice of the defects already pointed out in Coke's view of the subject, and seems to have been quite unconscious of them. Hale brings out, however, much more clearly and fully than Coke, the position of provocation in the general legal theory of homicide. Coke says that malice is implied in three cases, "first, in respect of the manner of the deed. As if one "killeth another without any provocation on the part of him "that was slain, the law implieth malice." This is all that he has to say on the subject. Hale [1] gives six illustrations, showing what did and what did not amount to such a provocation as Coke refers to in passing. They are the following :—

1. A. jostles B. to take the wall of him, or whips out of the track the horse on which B. is riding. This is provocation in A. (Lambe's case, 17 Chas. 1, 1641 or 1642.)

2. Insulting language is not such a provocation as will reduce murder to manslaughter, but "if A. gives indecent "language to B. and B. thereupon strikes A. but not mortally; "and then A. strikes B. and then B. kills A., that this is but "again manslaughter, for the second stroke made a new pro-"vocation," in the opinion of Hale himself and some others. ([2] Lord Morley's case, A.D. 1666.)

3. A. demands a debt of B. or serves him with a writ. This is no provocation.

4. A. makes faces at B. This is no provocation. (Brain's case, 42 Eliz., A.D. 1600.)

5. A. takes the wall of B. without jostling. This is no provocation.

6. A. and B. quarrelling, A. tells B. to pluck a pin out of

[1] 1 Hale, *P. C.* pp. 455-457.
[2] 6 *State Trials*, p. 769, and Kelyng, p. 85, ed. 1873 (53, old editions).

A.'s sleeve, which B. doth accordingly, and then A. strikes B., whereof he dies. This is no provocation (1) because A. consented; (2) because it appeared to be a deliberate artifice in A. to take occasion to kill B.

It is very remarkable that in treating of provocation Hale does not mention the provocation given by adultery. He does so, however, in [1] another part of his work, where he quotes, out of its proper place, a decision on the subject given in 1672. The [2] report is very short, and is in these words: "John Manning was indicted in Surrey for murder, "for the killing of a man, and upon not guilty pleaded, the "jury at the assizes found that the said Manning found the "person killed committing adultery with his wife, in the very "act, and flung a joint-stool at him, and with the same killed "him; and resolved by the whole court that this was but "manslaughter; and Manning had his clergy at the bar, and "was burned in the hand. The court directed the executioner "to burn him gently, because there could be no greater "provocation than this."

These cases give the most important part of our modern law on the subject of provocation, and are a curious instance of the gradual and casual manner in which a large part of the law came into existence.

First, *malice prepense* is half accidentally made the test of murder. It is then defined to mean a deliberate premeditated design to kill or hurt. This being found too narrow a definition, it is enlarged by the remark that killing without apparent provocation raises a presumption in fact of concealed motive. This being still too narrow, the presumption, in fact, becomes a presumption of law applying to all cases of unprovoked killing, even if, in fact, premeditation is disproved. This raises the question, what is such a provocation as will repel the legal presumption of malice arising from a sudden killing? This question the judges decide as cases occur.

The dates given show that the most important branches of the present law as to provocation are founded upon decisions

[1] 1 *P. C.* p. 486. [2] Sir T. Raymond, p. 212.

CH. XXVI.

given between 1642 and 1672, though one case on the subject was decided in 1600, and two others in 1612.

Under the second head of implied malice, which is when a minister of justice is killed in the execution of his office, Hale states a [1] string of cases, which, I think, may all be reduced to one principle. The mere execution by a legal officer of legal process in the manner authorised by law is no provocation to the person upon whom it is executed, and if he kills the officer, knowing, or having the means of knowing him to be an officer in the execution of his duty, he is guilty of murder. If, however, the officer exceeds his duty, or if the offender has not proper notice of his character, or of the nature of the act in which he is engaged, the arrest may be in the nature of a provocation, which will generally, though not always, reduce the offence to manslaughter. There are various detailed subordinate rules on this subject to which it would be foreign to my purpose to refer. This branch of the law is often treated in such a way as to include the whole law as to the use of force in executing legal process, and [2] Hale enters to a considerable extent into this subject, though in a fragmentary, disconnected way.

On manslaughter, in the modern sense of the word, [3] Hale has little to say, in addition to what he had already said, in distinguishing it from murder. When, however, he comes to killing *per infortunium* (chap. xxxix.), he points out cases in which the offence of manslaughter is committed by the neglect of proper precautions. [4] For instance, if a man lets fall a stone and kills another, after warning given, it is *infortunium*. If he gives no warning, it is manslaughter.

The subject of killing *per infortunium* is treated of by [5] Hale in an extremely confused manner, the confusion being caused by the circumstance that he had, as I have already shown, no distinct idea as to the principles of the subject. The greater part of the chapter relates as much to manslaughter as to killing *per infortunium*. I may, however, mention some points. In Hale's time it was still

[1] 1 Hale, *P. C.* pp. 456-465. [2] *Ib.* pp. 457-465, 481, 489-496.
[3] See chap. xxxviii. [4] P. 472. [5] Chap. xxxix.

necessary for the jury to find the facts specially if they acquitted a man of murder or manslaughter, on the ground that he had killed *per infortunium* or *se defendendo*, and such a finding still involved forfeiture, besides which the court might give judgment upon it that the prisoner was guilty of manslaughter. Hale does not repeat Coke's monstrous and unwarranted assertion that all killing by an unlawful act is murder. He seems, on the contrary, to think that unless the act was intended to inflict bodily injury of some kind, the case would be manslaughter. It may be gathered from this chapter, though it is not laid down pointedly and emphatically, and with a due sense of the importance of the proposition, that to kill another, intentionally or not, by an act unlawful in itself, is always manslaughter.

After dealing with killing *per infortunium*, Hale [1] passes to killing *ex necessitate* or *se defendendo*, and here again he mentions a variety of cases of manslaughter, as, for instance, when a man upon a sudden fray does not fly far enough before he defends himself. [2] "The flight to gain the advan-"tage of *se defendendo* to the party killing must not be a "feigned flight, or a flight to gain advantage of breath, as "fighting cocks retire to gain advantage, but it must be a "flight from the danger as far as the party can." If not, the offence is manslaughter.

Hale enters more fully, I think, than any previous writer into the cases in which force may be used for the defence of the property or person of the person using the force, and of others; and here, again, any excess of force, or abuse of the power given by law makes the killing unlawful, and so manslaughter. To take one instance out of many, he [3] says, "If "A., pretending a title to the goods of B., takes them away "from B. as a trespasser, B. may justify the beating of A.; "but if he beat him so that he dies, it is neither justifiable "nor within the privilege of *se defendendo*, but it is man-"slaughter."

After dwelling at length upon these topics, Hale concludes his discussion of the subject of homicide by a [4] chapter which has great constitutional interest. The subject is "taking away

[1] Chap. xl. [2] P. 483. [3] P. 485. [4] Chap. xlii.

CH. XXVI. "the life of man in the course of law or in execution of "justice." This chapter contains passages on a most curious subject, to which Hale for the first time gave prominence, though Coke to some extent refers to it. This is the criminal responsibility of persons who execute justice in an irregular way, or without lawful authority. The effect of what he says seems to be that it is not murder but "a great misprision" to pass capital sentences, and so to procure the execution of the persons on whom they are passed, in an irregular way; as, for instance, by acting under a commission of gaol delivery after it has been allowed to expire for want of due adjournment, or by giving judgment of death against a felon not within his jurisdiction by one who had the franchise of infangthef. He moreover quotes without dissent Coke's opinion that "the exercise of martial law in point of death "in time of peace is declared murder." This would imply that such a commission had no colour of law, and was a mere usurpation of power.

As to the forfeitures for killing *se defendendo* or *per infortunium*,[1] Hale repeats in substance, though with a good deal of additional detail, the statements of the earlier authors already noticed.

A few scattered passages in Hale show that the distinction which is now familiar between killing by an act intended or likely to do grievous injury, which is murder, and killing by an act intended or likely to do slight injury, which is manslaughter, was beginning to attract attention in his time. The most important of them[2] is as follows: "There was a "special verdict found at Newgate, viz., A. sitting drinking "in an alehouse, B., a woman, called him a son of a whore. "A. takes up a broomstaff and at a distance throws it at her, "which, hitting her upon the head, killed her. Whether this "were murder or manslaughter was the question in P. 26, "Car. 2" (Easter term, 1675); "it was propounded to all the "judges at Sergeants' Inn. Two questions were named. "1. Whether bare words, or words of this nature, would "amount to such a provocation as would extenuate the fact "into manslaughter. 2. Admitting it would not, in case

[1] Chap. xli. [2] P. 456.

"there had been a striking with such an instrument as "necessarily would have caused death, as stabbing with a "knife, or pistolling, yet whether this striking that was so "improbable to cause death will not alter the case; the "judges were not unanimous in it; and in respect that the "consequence of a resolution on either side was great, it was "advised the king should be moved to pardon him, which was "accordingly done."

I have given a full account of Hale's treatise (for it is nothing less) on homicide because it constitutes the principal part of our existing law, although I think it ill-arranged, and although it has been to a considerable degree altered by subsequent legislation, and to some extent by subsequent text-writers. Its great defect is its total want of unity and simplicity. The three leading questions, as I have already shown, are these:—

1. What is homicide?

2. When is homicide punishable and when is it not punishable?

3. By what test are the kinds of homicide punishable in different ways to be distinguished?

Hale had, I think, glimpses of this view of the subject, but they were no more than glimpses, and he did not steadily adhere to any way of looking at the matter. One result of this is that in order to ascertain what he meant by manslaughter, it is necessary to look at every part of what he says on every branch of the subject. Homicide, which is nearly murder, but not quite, is manslaughter; and of such manslaughters there are four separate kinds, as there are four reasons for which an act which is nearly murder may fall short of it; homicide, which is nearly homicide *se defendendo*, but not quite, is manslaughter. A particular kind of homicide *per infortunium*, is manslaughter. There are thus seven different kinds of manslaughter besides what is called, by way of pre-eminence, manslaughter, which makes eight, and manslaughter under the Statute of Stabbing, which makes nine. It must, however, be admitted that if Hale had grasped the general principles of the subject and had preserved their relation to each other, he could hardly have

CH. XXVI. given a complete account of the law in a systematic shape without omitting to notice an immense number of technical details which were far more numerous then than they are at present.

In the interval between Hale and Foster ([1] who died in 1763, and published his *Discourses* in 1762) there were a variety of decisions on the law relating to homicide which are both more elaborate and better reported than those of earlier times. Three of these deserve special attention as they form definite and important points in the history of the law. They are the cases of [2] R. *v.* Plummer (1701), [3] R. *v.* Mawgridge (1707), and [4] R. *v.* Oneby (1727). The case of R. *v.* Plummer forms the foundation of a celebrated but unfortunate dictum of Sir M. Foster's. Each of the other two turns on the question of provocation, and incidentally on the true meaning of the expression malice aforethought.

Plummer, Harding, and six other persons were attempting illegally to export wool when they were stopped by Beverton and others lawfully authorised to prevent the exportation of wool. Upon this one of the six persons unknown fired a gun which shot Harding dead. The question was whether Plummer was guilty of murder. The facts were found by a special verdict which did not find anything more as to the firing of the gun than that the unknown person fired it. Holt, C. J., delivered a judgment, in which he laid down many rules as to the degrees in which joint wrong-doers are answerable for each other's acts, and gave reasons why, upon the findings of the jury, it could not be said that [5] Plummer was responsible for the act of the unknown person. He laid down, however, among other things, a doctrine as to acts done with a felonious intent which has maintained its place in the law. "The "design of doing any act makes it deliberate; and if the fact

[1] See preface to third edition, p. vii., and date of first edition, given in the preface to it reprinted in the third edition.
[2] Kelyng, p. 155 (old ed. 109).
[3] Kelyng, p. 166 (old editions, 119). The case is reported by Lord Holt and appended to Kelyng's reports. Kelyng died many years before his reports were published.
[4] Lord Raymond, 1485.
[5] As to these see my *Digest*, art. 88, pp. 23-24.

"be deliberate though no hurt to any person can be foreseen, "yet if the intent be felonious, and the fact designed, if committed, would be felony, and in pursuit thereof a person is "killed by accident, it will be murder in him and all his "accomplices. As for the purpose—divers persons design to "commit a burglary, and some of them are set to watch in a "lane to hinder any from going to the house to interrupt them "if any comes in their way, and those that are to keep watch "kill him, those that he sent to rob the house will be guilty "of that murder though they do not commit the burglary. "So if two men have a design to steal a hen and one shoots "at the hen for that purpose, and a man be killed, it is "murder in both, because the design was felonious. So is "Lord Coke (*Third Inst.* 56) surely to be understood with that "difference; but without this difference none of the books "quoted in the margin [1] do warrant that opinion nor, in-"deed, can I say that I find any to warrant my opinion, "but only the reason is submitted to the judgment of "those judges that may at any time hereafter have that "point judicially brought before them." It will be seen from this that the rule which appears to us so harsh as to be almost ridiculous, was originally suggested in an *obiter dictum* of Holt's by way of a mild and equitable restriction upon a harsher *obiter dictum* of Coke's, Holt's dictum resting avowedly on no authority, and Coke's professing to be founded on authorities which in fact do not support it.

Mawgridge's case, in a few words, was this: Cope and Mawgridge quarrelled in Cope's room, and Cope desired Mawgridge to leave it. Mawgridge thereupon threw a bottle of wine at Cope, and hit him on the head, and drew his sword. Cope rose and threw another bottle at Mawgridge. Mawgridge gave Cope a mortal wound with his sword. This was, upon a special verdict, adjudged to be murder, and Holt took occasion to deliver a judgment which contains a history of the law relating to murder, and an elaborate discussion as to the meaning of malice aforethought, and the nature of the provocation necessary to repel the presumption of it which arises from a sudden intentional killing. Of Holt's history

[1] Nor do they warrant it with "that difference" or at all.

CH. XXVI. of the offence I will say only that it notices more or less fully most of the matters which I have already detailed. After stating it, Holt proceeds to state what is the true meaning of malice as follows:—

"[1] Some have been led into mistake by not well consider-
"ing what the passion of malice is; they have construed it
"to be a rancour of mind lodged in the person killing for
"some considerable time before the commission of the fact,
"which is a mistake arising from not well distinguishing
"between hatred and malice. Envy, hatred, and malice are
"three distinct passions of the mind.

"1. Envy, properly, is a repining or being grieved at the
"happiness and prosperity of another. '[2] Invidus alterius
"rebus macrescit opimis.'

"2. Hatred, which is odium, is, as [3] Tully says, 'ira in-
"veterata,' a rancour fixed and settled in the mind of one
"towards another, which admits of several degrees. It may
"arrive to so high a degree, and may carry a man so far as to
"risk the hurt of him, though not to perpetrate it himself.

"3. Malice is a design formed of doing mischief to
"another 'cum quis datâ opera male agit.' He that designs
"and uses the means to do ill is malicious. [4] 2 *Inst.* 42,—*He
"that doth a cruel act voluntarily doth it of malice prepensed.*"
He then quotes Coke on the statute of 5 Hen. 4, c. 5, as to cutting out tongues and putting out eyes. I think that the words italicised define malice aforethought shortly, correctly, and happily. If the words were "cruel, or cruelly reckless," I think the definition would be as complete as so short a definition can be. If fully understood and applied I believe it would practically solve nearly all questions as to the distinction between murder and manslaughter, for on the one hand it shows that the words "aforethought," "prepense," "deliberate," in the established definition have no real meaning, inasmuch as the state of mind which causes the act must of necessity precede it. On the other, it

[1] Kelyng, p. 174.
[2] Horat. *Epist.* i. ii. 57.
[3] Quoted in Facciolati as in pro Balbo. 13, but the reference is wrong.
[4] This reference is wrong. I suppose *Third Inst.* 62, which relates to the statute 5 Hen. 4, c. 5, is intended.

would exclude the monstrous doctrine which Coke put forward and which Hale and Foster (in a slightly mitigated form) repeat, that malice is always implied from an unlawful act which occasions death.

Having discussed the subject of malice, Holt proceeds to discuss the question of provocation. [1] He considers, I think, every, or nearly every, case then decided, and brings out a result which is still law, though in some few particulars it might, I think, require modification. In particular his [2] view as to the provocation supposed to be given to the world at large by a wrongful arrest was dissented from by [3] Foster, who seems to me to refute Holt's theory fully.

This part of the judgment shows that at the time when it was delivered, manslaughter was more frequently distinguished from murder by the degree of provocation which the offender had received than by the circumstance that it was an incident in a fray upon a sudden falling out. The superficial view that when one man kills another it must be either upon waylaying and premeditation or upon a sudden falling out, has been superseded by the broader and deeper view that the moral character of homicide must be judged of principally by the extent to which the circumstances of the case show, on the one hand, brutal ferocity, whether called into action suddenly or otherwise, or on the other, inability to control natural anger excited by a serious cause. As to Mawgridge himself he was most justly held to have committed murder. [4] "This miscreant was in the actual "violation of all the laws of hospitality." On being asked to leave a room in which he was a guest, he threw a bottle at the head of his host, and followed up this murderous act by a deadly stab with his sword. The fact that after the first bottle was thrown Cope threw another was justly regarded as immaterial to Mawgridge's guilt as it was a [5] justifiable act of self-defence.

[1] Kelyng, pp. 178-186. [2] See pp. 185-186.
[3] Pp. 315-318. See Lord Blackburn's letter on the case of R. *v.* Allen, printed in my *Digest*, pp. 372-374. Practically this letter may be regarded as equivalent to a judgment. [4] Holt's words, p. 182.
[5] The throwing of the bottle by Captain Cope was justifiable and lawful, p. 176.

CH. XXVI.

The decision in Mawgridge's case seems to have been regarded as an extension of the law, for in the argument in Oneby's case the counsel said that it "carried murder further "than it had ever been carried before." It was, however, followed and possibly carried a little further still in the [1] case of Oneby, a major in the army, who appears to have been much such another brutal ruffian as Mawgridge. Sitting in a tavern with one Gower he took extreme offence at a harmless joke (if such it could be called) of Gower, who offered to stake half-pence when the party were playing for half-crowns. After a few words on this trifle Oneby threw a bottle at the head of Gower with great force, and Gower "tossed a glass "or candlestick at Oneby." Neither hit the other. They all sat together for an hour. Gower offered to be reconciled, but Oneby said, "No, damn you, I'll have your blood." Gower and the rest after a time left the room. Oneby remained, and called Gower back, saying, "Young man, I have "something to say to you." Gower returned. A clashing of swords was heard. Gower was mortally wounded, and Oneby was wounded slightly in three places. Gower, "being "asked upon his death-bed whether he had received his "wounds in a manner among swordsmen called fair, said 'I "'believe I did.'"

This also was most properly held to be murder, Oneby's whole conduct having shown a bloodthirsty determination to kill or desperately injure Gower. In giving judgment upon it Lord Raymond entered at great length into the law regarding malice and provocation. His language was certainly not so happy as Holt's, but was much to the same effect. [2] "In common acceptation malice is took to be a settled anger "(which requires some length of time) in one person against "another, and a desire of revenge. But in the legal accepta- "tion [3] it imports a wickedness which includes a circumstance "attending an act that cuts off all excuse." He instances the phrase "mute of malice," which he says means not

[1] Lord Raymond, 1484; reported also in Strange and the *State Trials*.
[2] P. 1487.
[3] I do not know what this can possibly mean, except that malice means wickedness unexcused.

"revenge, but "refusing to submit to the course of justice "wickedly," *i.e.*, without any manner of excuse, or out of "frowardness of mind."

He proceeds to show that the whole conduct of Oneby showed brutal wickedness. [1] Oneby, who was an habitual duellist, was greatly surprised at this decision and committed suicide in order to avoid being hanged.

Probably both Mawgridge and he would have escaped under the law as it stood in Coke's time, as the cases might have been regarded as frays upon a sudden falling out. I know of no better definition of malice aforethought than the one given in Mawgridge's case, and I have frequently used it in directing juries.

I come now to the last writer on the subject whose views it is necessary to refer to at any length. This is Sir Michael Foster, whose report and discourses on different branches of the crown law were published in 1762, though they had been written for a considerable length of time. His discourse on homicide, though not in form as systematic as the works of Hale and the predecessors of Coke, is arranged with admirable perspicuity, deals with all the leading branches of the subject, and may, I think, be regarded as having completely settled all the fundamental questions relating to it, though there have been a great number of subsequent decisions. It begins thus:—

"I shall consider the law touching homicide under the "following distinctions:—

"It is either occasioned by accident, which human "prudence could not foresee or prevent,

"Or it is founded in justice,

"Or in necessity,

"Or it is owing to a sudden transport of passion, which "through the benignity of the law is imputed to human "infirmity;

[1] The report in 17 *State Trials*, p. 36, says that "as the prosecutor had "taken no steps towards bringing on the hearing of the special verdict, he" (Oneby) "grew pretty confident that it would be determined manslaughter, "and feed counsel to move the Court of King's Bench for a *concilium* to be "made for arguing the special verdict." As to Oneby's suicide, see pp. 55-56. Mawgridge escaped to Holland, where he stayed for two years, but was retaken and brought over to England, where he was hanged April 28, 1708.—*Ib.* p. 72.

CH. XXVI.

"Or it is founded in malice."

He shortly explains the sense in which he understands malice aforethought as meaning that [1] "the fact hath been "attended with such circumstances as are the ordinary "symptoms of a wicked, depraved, malignant spirit." [2] He adds, "Most, if not all the cases, which in our books are "ranged under the head of implied malice, will, if examined, "be found to turn upon this single point, that the fact has "been attended with such circumstances as carry in them the "plain indications of a heart regardless of social duty and "fatally bent upon mischief." The whole treatise is an attempt to work out this general idea, and to make the law as it was correspond as closely as possible to the moral sentiments to which, in Foster's opinion, it ought to conform.

Foster severely scrutinizes, and sets himself to explain away every harsh decision and every irrational rule, and so does all he can to make the law amiable and equitable. He frequently speaks in cordial praise of the system which he administered, but he had far too much historical knowledge and far too strong a sense of the gradual development of the system to give it blind or unqualified approbation. In reference to benefit of clergy he observes, [3] "Whenever I "speak of the benignity of the law, and its condescension "to human infirmity in the case of manslaughter, I would "be always understood to speak of the law in its present "state."

I think that to a very considerable extent he effected his object, though in some particular instances he failed to do so, as I will now proceed to show. I must observe that a large proportion of the matters dealt with by Foster have been already noticed by me in their place; and without recurring to them I shall notice those points only in which he either recorded or effected alterations in the law.

With regard to accidental, or, as it might more properly be called, unintentional homicide, Foster distinguishes, as did all his predecessors from Bracton downwards, between unintentional homicide in a lawful and in an unlawful act.

[1] Foster, p. 256. [2] *Ib.* p. 257. [3] *Ib.* p. 305.

Coke, it must be remembered, had laid it down in broad and unqualified terms that unintentional homicide in an unlawful act is murder—a monstrous doctrine, and, as I have shown, one in which Coke's assertion rested upon little or no authority. To some extent it had, as has already been shown, been modified by Hale and Holt, and Foster repeats Hale in a more definite, but as it seems to me an entirely arbitrary form. Where a person unintentionally kills another by an unlawful act: [1] "The case will amount to felony, either murder or man-"slaughter as circumstances may vary the nature of it. If it "be done in the prosecution of a felonious intention it will be "murder, but if the intent went no further than to commit "a bare trespass manslaughter, though I confess Lord Coke "(*Third Institute*, 56) seemeth to think otherwise. . . . I do "not intend to enter into a long detail of cases falling "within this rule. . . . I will content myself with a few "plain instances. . . . A. shooteth at the poultry of B. and "by accident killeth a man; if his intention was to steal the "poultry, which must be collected from circumstances, it will "be murder by reason of the felonious intent; but if it was "done wantonly and without that intention, it will be barely "manslaughter." Cruel and, indeed, monstrous as such an illustration may appear to us, it is put forward by Foster as a mitigation of the views of Coke, and such no doubt it is. It certainly is less objectionable to say that unintentional homicide committed in the prosecution of a felonious design is murder, than to say that unintentional homicide committed by any unlawful act is murder. Foster's own illustration, however, shows clearly that the one rule is less bad than the other, principally because it is narrower. The only authority quoted for it by Foster is the dictum, or rather suggestion of Holt, in R. *v.* Plummer already referred to.

This is, I think, the only blot upon Foster's treatise on the subject, and in extenuation it must not be forgotten that for fifty-four years after Foster's death all felonies except petty larcency were in theory capital crimes; so that to treat as a capital offence the act of shooting at a fowl with intent to steal and accidentally killing a man would not appear to

[1] Foster, p. 258.

CH. XXVI.

Foster in the same light in which it appears to us. The rest of the chapter goes through many cases in which death may be caused unintentionally by unlawful personal violence, and establishes the principle which has ever since been accepted, that, on the one hand, murder is divided from manslaughter by the presence, in the infliction of the injury, of "the heart "regardless of social duty and deliberately bent upon mischief," and on the other hand, that manslaughter is divided from killing *per infortunium* by the presence of a degree of carelessness sufficiently great to be described as culpable. The result of what he says may, I think, be thrown into the following proposition:—

Death caused by the unintentional infliction of personal injury is *per infortunium* if the act done was lawful and was done with due caution, or was accompanied only by slight negligence. If it was accompanied by culpable negligence, the act is manslaughter. If it was accompanied by circumstances showing a heart regardless of social duty and fatally bent upon mischief, or if the intent is felonious, it is murder.

Foster's views on *Homicide founded in Justice*, and on *Homicide founded in Necessity*, add little to what had been said by others, but he [1] goes into some curious particulars upon the verdict of the jury in cases of justifiable and excusable homicide. As I have already said, the ancient law was that in cases where homicide was proved to be strictly justifiable the jury might acquit, but that in cases of homicide *per infortunium* and *se defendendo* they were to give a special verdict, and the prisoner was to be pardoned as of course, the reason being that the party forfeited his goods at common law. Foster expresses considerable doubt as to this, and (as I have already said) he certainly points out several mistakes upon the subject made by early writers, but I do not think he shows—I am not sure that he meant to show—that the practice of forfeiture did not in fact exist for a long period of time. However this may be, [2] he incidentally uses language which implies that in his time these special verdicts had fallen into disuse, the judges having "taken general verdicts of acquittal in plain cases of death

[1] Foster, chap. iv. p. 279. [2] *Ib.* pp. 288-289.

"*per infortunium*" and also it seems in cases of *se defendendo*. He adds this remarkable observation: "And if it deserveth "the name of a deviation it is far short of what is constantly "practised at an Admiralty sessions under the 28 Hen. 8, "with regard to offences not ousted of clergy by particular "statutes which, had they been committed on land, would have "been entitled to clergy. In these cases the jury is constantly "directed to acquit the prisoner; because the marine law "doth not allow of clergy in any case, and therefore in an "indictment for murder on the high sea, if the fact cometh "out upon evidence to be no more than manslaughter; "supposing it to have been committed at land, the prisoner is "constantly acquitted."

The law upon this subject may thus be considered as having fallen into desuetude in the course of the eighteenth century. It was finally abolished in 1828 by 9 Geo. 4, c. 31, s. 10, which provides that no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune, or in his own defence, or in any other manner without felony. This section was repealed and re-enacted by 24 & 25 Vic. c. 100, s. 7.

One incident of the old law as to death *per infortunium* was that the thing by which death was caused was forfeited to the king as a deodand. The law of deodands is as old as Bracton,[1] who says that upon an inquest on persons killed *per infortunium* the boats from which they were drowned and other things which caused their death are to be deodands for the king, unless the accident happened in salt water "nec "sunt deodanda ex infortunio in mare." [2] Hale gives a minute account of the law of deodands in his time. The law seems to have been framed under a sort of impression that the thing which caused deaths ought to be punished; for, as a general rule, a thing was not a deodand unless it could be said "movere "ad mortem." A beast which killed a man, a tree which fell upon him, the wheel of a water-mill under which he was carried and which killed him, were deodands. If a man was thrown from his horse against a trunk, the horse was a deodand but not the trunk. It seemed to be the better

[1] Bracton, ii. 284-286.

[2] Hale, *P. C.* i. 419-424.

CH. XXVI.

opinion that, if a man watering his horse fell and was drowned, the horse was not a deodand unless he had thrown his master. If a man "getting up a cart by the wheel to gather plums" fell and was killed, the wheel was a deodand; but if a boy under fourteen fell from a cart or horse, it was no deodand, "because he was not of discretion to look for himself," and so the cart or horse could not be said to be to blame. If, however, a cart ran over a boy, or a tree fell upon him, or a bull gored him, it was a deodand, because (apparently) it went out of its way to kill him. Hale, however, says that in such a case it shall be imputed to the neglect of the keeper of the goods,—a rationalizing explanation. I suppose that deodands were not in use at sea, because the local customs of England did not extend to the high seas. Deodands retained their legal existence till 1846, when they were abolished by 9 & 10 Vic. c. 62.

I do not think that any writer subsequent to Foster has added much to the subject of the law of homicide. [1] In Blackstone's *Commentaries* there is a chapter on homicide which has all the merits peculiar to its author, both in style and arrangement, but it adds nothing to what had been said by earlier authors. From Blackstone to our own days the matter has been handled exclusively by writers of books of practice—East, Russell, Archbold, Roscoe, and some others—who repeat each other and abstract an immense number of reported cases, but add practically nothing to the history or to the theory of the subject. One change only has been made by statute in the law on the subject, which, though of the greatest importance, has passed almost unnoticed. I refer to the act which altered the punishment of manslaughter. Manslaughter was originally a clergyable felony, punishable under the statutes already referred to with burning in the hand and imprisonment for not exceeding a year. That this punishment should have been considered adequate for the more aggravated class of manslaughter is surprising, as, for instance, for cases in which a slight blow was revenged by a deadly stab, or in which life was taken in a mutual combat conducted with circumstances of extreme brutality, and

[1] Blackstone, iv. 176, ch. xiv.

probably the consciousness of this may have been connected with the harsh constructions which were put by the judges on the phrase "malice aforethought." It may be hard to say that a man who kills another by means neither likely nor intended to kill in an attempt to commit a robbery, is to be regarded as a murderer, but it must be owned that for such an offence burning in the hand and a year's imprisonment would be a very inadequate sentence. The law, however, remained unaltered upon this point till 1822, when, by 3 Geo. 4, c. 38, manslaughter was made punishable by transportation for life or for any less term, or by imprisonment with or without hard labour for three years as a maximum, or by fine. This enactment was repealed and re-enacted by 9 Geo. 4, c. 31, s. 9, which was similarly dealt with by 24 & 25 Vic. c. 100, s. 5, which is still in force. The maximum term of imprisonment is, however, lowered to two years.

Of the modern decisions connected with the law of homicide, I shall, upon the present occasion, say only that the principles of the law are all stated more or less distinctly in the authorities which I have examined in the historical review just concluded. The numerous decisions of more modern times consist almost entirely of illustrations of them and of cases in which they have been applied to combinations of facts marked by some special peculiarity. I have reduced the law upon the subject to the form of propositions, which will be found in [1] my *Digest*, in which also will be found an account of the vast mass of cases collected in *Russell on Crimes*, showing how all of them find their place under the various propositions into which I have condensed the law.

The Criminal Code Commission of 1878-79 closely follows the arrangement of the subject contained in my *Digest*, and proposes a definition of murder and manslaughter which substantially corresponds with the one contained in the *Digest*, those parts only of the definition being omitted in which the present law is founded upon the *dicta* of Holt and Foster, intended to mitigate the rigour of Coke's unauthorised statement that unintentional killing by an

[1] Chaps. xxiii. xxiv., p. 138-155, and see particularly note xiii. and xiv. pp. 350-366.

unlawful act is murder. I cannot express my view of the actual state of the common law and of the alterations which it requires better than by placing side by side the statement of it contained in my *Digest*, and the articles which were proposed to be enacted by the Criminal Code Commission, and by making some observations on the points of agreement and difference between them.

Both my *Digest* and the Criminal Code begin by affixing a definite meaning to the expression "Unlawful Homicide" by specifying the cases in which homicide is not an offence punishable by law. In this preliminary matter little, I think, need be said, as the present law seems fairly satisfactory. The following extracts state the common law definition of murder and manslaughter as it now is, and the provisions which the Criminal Code Commissioners proposed to substitute for it:—

Digest, Art. 228.

"Manslaughter is unlawful homicide without malice aforethought.

"Murder is unlawful homicide with malice aforethought.

"Malice aforethought means any one or more of the following states of mind preceding or co-existing with the act or omission by which death is caused, and it may exist where that act is unpremeditated.

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

"(*b*) Knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

"(*c*) An intent to commit any felony whatever.

"(*d*) An intent to oppose by force any officer of justice on his way to or returning from the execution of the duty of arresting, keeping in custody, or imprisoning any person whom he is lawfully entitled to arrest, keep in custody, or imprison, or the duty of keeping the peace, or dispersing an unlawful

Draft Code.

"174. Culpable homicide is murder in each of the following cases:

"(*a*) If the offender means to cause the death of the person killed.

"(*b*) If the offender means to cause to the person killed any bodily injury which is known to the offender to be likely to cause death, and if the offender, whether he does or does not mean to cause death, is reckless whether death ensues or not.

"(*c*) If the offender means to cause death, or such bodily injury as aforesaid, to one person, so that if that person be killed the offender would be guilty of murder, and by accident or mistake the offender kills another person, though he does not mean to hurt the person killed.

"(*d*) If the offender, for any unlawful object, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one.

"175. Culpable homicide is also murder in each of the following cases, whether the offender means or not death to ensue, or knows or not that death is likely to ensue:

Digest, Art. 228.

"assembly, provided that the "offender has notice that the person "killed is such an officer so em- "ployed.

"The expression 'officer of jus- "tice' in this clause includes every "person who has a legal right to do "any of the acts mentioned, whether "he is an officer or a private person.

"Notice may be given, either by "words, by the production of a war- "rant or other legal authority, by the "known official character of the per- "son killed, or by the circumstances "of the case.

"This article is subject to the pro- "visions contained in Articles 214-226 "both inclusive, as to the effect of "provocation."

Draft Code.

"(*a*) If he means to inflict grievous "bodily injury for the purpose of "facilitating the commission of any "of the offences hereinafter men- "tioned, or the flight of the offender "upon the commission or attempted "commission thereof, and death en- "sues from his violence.

"(*b*) If he administers any stupe- "fying thing for either of the pur- "poses aforesaid, and death ensues "from the effect thereof.

"(*c*) If he by any means wilfully "stops the breath of any person for "either of the purposes aforesaid, "and death ensues from such stopping "of the breath.

"The following are the offences "hereinbefore in this section referred "to: piracy, and offences deemed to "be piracy; escape or rescue from "prison or lawful custody; resisting "lawful apprehension; murder; "rape; forcible abduction; robbery; "burglary; arson.

"177. Culpable homicide not "amounting to murder is man- "slaughter."

The following extracts state the common law as it now stands as to provocation, and the alterations which the Commissioners proposed to make in it:—

Digest, Arts. 224-226, pp. 147-150.

"224. Homicide, which would "otherwise be murder, is not murder "but manslaughter if the act by "which death is caused is done in the "heat of passion caused by provoca- "tion as hereinafter defined, unless "the provocation was sought or "voluntarily provoked by the offender "as an excuse for killing or doing "bodily harm. The following acts "may, subject to the provisions con- "tained in Article 225, amount to "provocation:—

"(*a*) An assault and battery of such "a nature as to inflict actual bodily "harm or great insult is a provocation "to the person assaulted.

"(*b*) If two persons quarrel and "fight upon equal terms, and upon the "spot, whether with deadly weapons "or otherwise, each gives provocation

Draft Code.

"176. *Provocation.* — Culpable "homicide, which would otherwise "be murder, may be reduced to "manslaughter if the person who "causes death does so in the heat of "passion caused by sudden provoca- "tion.

"Any wrongful act or insult of "such a nature as to be sufficient to "deprive an ordinary person of the "power of self-control may be provo- "cation, if the offender acts upon it "on the sudden and before there has "been time for his passion to cool.

"Whether any particular wrongful "act or insult, whatever may be its "nature, amounts to provocation, and "whether the person provoked was "actually deprived of the power of "self-control by the provocation "which he received, shall be ques-

CH. XXVI. *Digest*, Arts. 224-226, pp. 147-150. *Draft Code.*

"to the other, whichever is right in "the quarrel and whichever strikes "the first blow.

"(*c*) An unlawful imprisonment is "a provocation to the person impri- "soned, but not to the bystanders, "though an unlawful imprisonment "may amount to such a breach of the "peace as to entitle a bystander to "prevent it by the use of force suf- "ficient for that purpose. An arrest "made by officers of justice whose "character as such is known, but "who are acting under a warrant so "irregular as to make the arrest illegal, "is provocation to the person illegally "arrested, but not to the bystanders.

"tions of fact: Provided that no "one shall be deemed to give "provocation to another only by "doing that which he had a legal "right to do, or by doing anything "which the offender incited him to "do in order to provide the offender "with an excuse for killing or doing "bodily harm to any person:

"Provided also, that an arrest shall "not necessarily reduce the offence "from murder to manslaughter be- "cause the arrest was illegal, but if "the illegality was known to the "offender it may be evidence of pro- "vocation."

"(*d*) The sight of the act of adultery committed with his wife is provocation "to the husband of the adulteress on the part both of the adulterer and of the "adulteress.

"(*e*) The sight of the act of sodomy committed on a man's son is provocation "to the father on the part of the person committing the offence.

"(*f*) Neither words, nor gestures, nor injuries to property, nor breaches of "contract, amount to provocation within this article, except (perhaps) words "expressing an intention to inflict actual bodily injury, accompanied by some "act which shows that such injury is intended; but words used at the time "of an assault—slight in itself—may be taken into account in estimating the "degree of provocation given by a blow.

"(*g*) The employment of lawful force against the person of another is not a "provocation to the person against whom it is employed.

"225. Provocation does not extenuate the guilt of homicide unless the "person provoked is, at the time when he does the act, deprived of the power "of self-control by the provocation which he has received, and in deciding the "question whether this was or was not the case regard must be had to the nature "of the act by which the offender causes death, to the time which elapsed "between the provocation and the act which caused death, to the offender's "conduct during the interval, and to all other circumstances tending to show "the state of his mind.

"226. Provocation to a person by an actual assault, or by a mutual combat, "or by a false imprisonment, is, in some cases, provocation to those who are "with that person at the time, and to his friends who, in the case of a mutual "combat, take part in the fight for his defence. But it is uncertain how far "this principle extends."

The following points relating to these two definitions of murder are observable:—

Each assumes the preliminary definition of culpable or unlawful homicide. Each recognises murder as a species of unlawful homicide, distinguished from manslaughter by the existence in the offender at the time of the offence of a given state of mind. My definition of course contains the expression "malice aforethought." It would be incorrect if it did not do so. I have done my best, however, to give the equivalent of that expression by a statement of the various

states of mind which have been held, by the various authorities referred to, to constitute it. It would, however, be on all accounts far better to substitute, as the Draft Code does, a definite enumeration of the states of mind intended to be taken as constituent elements of murder for a phrase which is never used except to mislead or to be explained away.

A comparison between my *Digest*, 223 (*a*) and (*b*), and the Draft Code, 174 (*a*), (*b*), (*c*) and (*d*), will show that the two exactly correspond, though the language of the Code is less compressed than that of the *Digest*, dealing separately with the cases in which an offender kills the person whom he means to kill or hurt, and the cases in which he kills some other person. This difference is mere matter of style. So far both the *Digest* and the Draft Code state, in language which I think it is impossible to misunderstand, the legal meaning of the phrase express malice.

My article 223 (*c*) and (*d*), corresponds to s. 175 of the Draft Code. This part of the *Digest* gives the meaning of the phrase implied malice, and the corresponding article of the Code shows the extent to which the commissioners proposed to contract the definition. It will be observed at once that the *Digest*, which represents the existing law, is here much wider, and so much more severe, than the enactments proposed by the Commission. For instance, the present law is, at all events, generally supposed to make it murder to kill a man accidentally by shooting at a domestic fowl with intent to steal it, or to kill a man unintentionally by violence used in order to rob him, which violence was neither likely nor intended to kill. Under the Draft Code such offences would be manslaughter. I am not sure that s. 175 (*a*) of the Draft Code adds anything of importance to the provisions of s. 174. Clauses (*b*) and (*c*) of s. 175 were introduced on account of the extreme danger involved in the use of stupefying drugs, or attempts to prevent outcries in order to commit certain crimes. The offences defined would undoubtedly be murder by the existing law. Some years ago, at Fordingbridge, a man attempted to ravish a young woman, and pushed her shawl into her mouth to prevent her from crying out. She

died, and he was hanged, though it is obvious that he could not have intended to kill her, as by doing so he frustrated his own object. I am not sure that it is worth while to provide by express words for such cases, as I think that a jury would feel no difficulty in finding that in such a case as the Fordingbridge murder the offender either knew, or ought to have known, that his act was likely to cause death, in which case it would be murder under 174 (*c*). I think, in short, that s. 174 reproduces in plain language that part of the existing law which would be in harmony with the common standard of moral feeling: it describes in perfectly unambiguous language all the worst and most dangerous cases of homicide.

As I have already stated, I am strongly of opinion that capital punishments should be retained, and that they should be extended to some cases in which offenders are not at present liable to them; but I am also of opinion that no definition which can ever be framed will include all murders for which the offender ought to be put to death, and exclude all those for which secondary punishment would be sufficient. The most careful definition will cover crimes involving many different degrees both of moral guilt and of public danger; moreover, those murders which involve the greatest public danger may involve far less moral guilt than others which involve little public danger. It must also be remembered that the definition of murder is, and must necessarily be, complicated. There must be an act causing death; an intention accompanying the act, and death resulting as a fact. The motive prompting the act ought not, I think, to be embodied in the definition, because the attempt to do so must infallibly lead to inextricable confusion, and probably to legal fictions like those from which our own law has not yet worked itself clear, but it must always affect the moral guilt of the offence itself. It is impossible not to recognise a difference in guilt between the man who deliberately poisons another in order to rob him and a man who shoots another in a duel in which he risks his own life upon equal terms, and to which the person killed has provoked him by cruel injuries, for which the law gives no remedy. Each, however, kills intentionally and unlawfully.

These considerations appear to me to show that murder, however accurately defined, must always admit of degrees of guilt; and it seems to me to follow that some discretion in regard to punishment ought also to be provided in this as in nearly every case. The discretion does, in fact, exist at present, and is exercised by the Home Secretary, though upon every conviction for murder sentence of death is passed by the judge. For many obvious reasons I think it ought to be exercised by the judge.

It is a matter of considerable difficulty to enumerate all the circumstances which affect the guilt of such an offence as murder; but after much consideration and observation I have made a collection of such cases which I think is nearly, it is difficult to say that it would be altogether, complete. They are as follows:—

1. The absence of a positive intention to kill, or to inflict an injury known to the offender to be likely to kill, is perhaps the commonest case for the commutation of a sentence under the existing law. The instance to which I have already referred, of three persons who combined to rob a man, and who killed him by violence which was fatal because he had disease of the heart, but would not have been fatal if he had been in ordinary health, is a good illustration. If murder were redefined as suggested in the Code, these cases would no longer fall within the definition of murder.

2. Cases in which the offender has received provocation from the deceased not falling within the line laid down by the existing law on the subject. A man who kills his wife because she boasts of her unfaithfulness to him, and expresses her determination to continue it, is felt to be much in the same position as a man who revenges a blow by a pistol-shot. Cases of this kind would be met by the alterations proposed to be made by the Code in the law relating to provocation.

3. There are many cases in which a man's mind is more or less affected by disease, but in which it cannot be said that he is entitled to be altogether acquitted on the ground of insanity. I have given my reasons at length elsewhere for thinking that in these cases insanity should operate, if at

all, in mitigation of punishment, and that a verdict of "Guilty, "but his power of self-control was affected by insanity," should be permitted. Many cases of child-murder would come under this category.

4. Cases in which the deceased person consented to his own death; as, for instance, A. and B. agree to poison themselves together. A. provides poison, of which both drink; B. dies, and A. recovers.

5. Cases in which the motives of the offender are compassion, despair, or the like. A mother, deserted by her husband and unable to provide for her child, drowns it. A physician administers deadly poison to a person dying of hydrophobia, in order to shorten his agonies.

6. Cases in which a woman kills her new-born child under the distress of mind and fear of shame caused by child-birth. I believe that no one has been executed for such an offence for about forty years.

7. Cases where the offender is extremely young. I have known several cases of deliberate murders by children; but I do not think that any one would, as a rule, be hanged in these days at a very early age.

If murder were redefined in the manner suggested by the Code, and if the judge had power to pass a sentence of penal servitude, say for not less than twenty years, I think the law would be satisfactory, and might be strictly carried out. I would on no account leave to the jury either the question whether the circumstances of mitigation existed, except in the case of insanity, or the question whether the sentence should be mitigated. There is no subject on which the impression of a knot of unknown and irresponsible persons, who have to decide at a moment's notice without reflection, is less to be trusted than the question whether or not the punishment of death should be inflicted in a given case.

If the judge had the power of mitigating the sentence, I think his power would hardly ever be abused in the direction of over severity, and if it was it might be corrected by the Home Secretary, as at present. On the other hand, a judge would probably not be more likely to err from over leniency than the Secretary of State. From long experience I can

affirm that the cases in which capital punishment will, and those in which it will not, be inflicted can be distinguished almost at a glance by an experienced person, and I have little doubt that the effect of such a limited discretion as I suggest would be that the sentence of death would rarely be passed without being carried out, and this would be highly desirable on grounds too obvious to mention.

As an authority in favour of this view, I may observe that the Capital Punishment Commissioners of 1866 unanimously recommended as follows:—"There is one point upon which "the witnesses whom we have examined are almost unani- "mous, viz., that the power of directing sentence of death to "be recorded should be restored to the judges." The effect of this would be to give the judges the power of directing that sentence of death should not be carried out. Obviously it would be better, if they are to have this power, that they should also have the power of passing sentence of penal servitude. I may add that, by the Indian Penal Code, the sentence for murder may be transportation for life.

Upon the question of provocation, I think that a comparison of the statement of the law in the *Digest*, and the proposed enactment of the *Code* speaks for itself. It would be a great improvement in the law to have a clear, definite rule upon the subject, for there is at present nothing which can properly be called by that name. The whole law of provocation rests, as I have shown, upon an avowed fiction—the fiction of implied malice. Malice is implied when a man suddenly kills another without provocation. What is the provocation which will rebut the legal presumption of malice in cases of sudden killing? The answer is to be collected from a long string of cases, most of them decided by single judges; though some in early times, and especially in the early part of the sixteenth century, were decided by the full court upon special verdicts. The result is given in my *Digest*, and though full of valuable materials for a more general rule, it is as incomplete as it is elaborate.

I now proceed to compare the French and German law upon this subject with our own.

The French law is by far the more elaborate of the two,

CH. XXVI. and is contained in the following articles of the *Code Pénal* :—

"295. L'homicide commis volontairement est qualifié "meurtre.

"296. Tout meurtre commis avec prémeditation, ou de "guet-apens est qualifié assassinat.

"297. La prémeditation consiste dans le dessein formé "avant l'action, d'attenter à la personne d'un individu deter- "miné, ou même de celui qui sera trouvé ou rencontré, quand "même ce dessein serait dependant de quelque circonstance ou "de quelque condition.

"298. Le guet-apens consiste à attendre plus ou moins de "temps dans un ou divers lieux un individu, soit pour lui "donner la mort, soit pour exercer sur lui des actes de "violence.

"299. Est qualifié parricide le meurtre des pères ou mères "légitimes naturels ou adoptifs ou de tout autre ascendant "légitime.

"300. Est qualifié infanticide le meurtre d'un enfant "nouveau-né.

"301. Est qualifié empoisonnement tout attentat à la vie "d'une personne, par l'effet de substances qui peuvent donner "la mort plus ou moins promptement, de quelque manière "que ces substances aient été employées ou administrées, et "quelles qu'en aient été les suites.

"302. Tout coupable d'assassinat de parricide, d'infanticide, "et d'empoisonnement sera puni de mort . . . .

"303. Seront punis comme coupable d'assassinat tous mal- "faiteurs quelle que soit leur dénomination, qui, pour l'execu- "tion de leurs crimes, emploient des tortures ou commettent "des actes de barbarie.

"304. Le meurtre emportera la peiné de mort lorsqu'il aura "précédé, accompagné, ou suivi un autre crime. Le meurtre "emportera également la peine de mort lorsqu'il aura eu "pour objet soit de préparer, faciliter ou exécuter un délit, "soit de favoriser la fuite ou d'assurer l'impunité des "auteurs ou complices de ce délit. En tout autre cas, le "coupable de meurtre sera puni des travaux forcés à "perpétuité.

309. (After providing for the punishment of "Tout indi- "vidu qui volontairement aura fait des blessures ou porté des "coups")—"Si les coups portés ou les blessures faites volon- "tairement mais sans intention de donner la mort l'ont pourtant "occasionée le coupable sera puni de la peiné de travaux "forcés à temps" (*i.e.* from five to twenty years, article 19.)

"310. Lors qu'il y aura eu préméditation ou guet-apens la "peiné sera si la mort s'en est suivie celle des travaux forces "a perpétuité.

"319. Quiconque par maladresse, imprudence, inattention, "negligence ou inobservation des règlements aura commis "involontairement un homicide, ou en aura involontairement "été la cause sera puni d'un emprisonnement de trois mois à "deux ans, et d'une amende de cinquante francs à six cents "francs.

"321. Le meurtre ainsi que les blessures et les coups sont "excusables s'ils ont été provoqués par des coups ou des "violences graves envers les personnes.

"322. Les crimes et délits mentionnés au précédent article "sont également excusables s'ils ont été commis en repoussant "pendant [1] le jour l'escalade ou l'infraction des clôtures murs "ou entrée d'une maison on d'un appartement habité ou de "leur dépendances.

"323. Le parricide n'est jamais excusable.

"324. Le meurtre commis par l'époux sur l'épouse, ou par "celle ci sur son époux n'est pas excusable si la vie de "l'époux ou de l'épouse qui a commis le meurtre n'a pas été "mise en peril dans le moment même ou le meurtre a eu "lieu.

"Néanmoins dans le cas d'adultère . . . . le meurtre commis "par l'époux sur son épouse ainsi que sur le complice à "l'instant où il les surprend en flagrant délit dans la maison "conjugale est excusable.

"326. Lorsque le fait d'excuse sera prouvé s'il s'agit d'un "crime emportant la peine de mort ou celle des travaux "forcés à perpétuité, ou celle de la déportation, la peine sera "reduite à un emprisonnement d'un an à cinq ans.

[1] By art. 329 if these acts are done by night or by robbers, the inmates are considered as acting in self-defence if they kill them.

CH. XXVI.

"327. Il n'y a ni crime ni délit, lorsque l'homicide, les "blessures et les coups etaient ordonnés par la loi, et com- "mandés par l'autorité légitime.

"328. Il n'y a ni crime ni délit lorsque l'homicide, les "blessures et les coups etaient commandés par la necessité "actuelle de la legitime defense de soi même ou d'autrui."

[1] The extreme neatness and precision of these provisions may easily blind a careless reader to the numerous and refined distinctions which they involve, and which French writers on the subject have pointed out at great length and with abundant reflections. I will refer to such of them as are in themselves most important, and most curious in relation to our own law, whether by resemblance or contrast.

The first point to be noticed in regard to the whole body of law in question is that it is arranged and conceived of in a totally different way from that in which it would be convenient to arrange our own law.

The series of Articles (291—304) which define common crimes, all involve and depend upon the definition of "meurtre," which must be carefully distinguished both from our "murder," and from our "manslaughter." "Meurtre," is "l'homicide commis volontairement." The mere form of the words would include the causing of death by a wound intentionally given, though not intended to kill,[2] and for many years this interpretation was put upon them by the Cour de Cassation. Its view, or, to use the French expression, its "jurisprudence," was, however, overruled by the legislature, which in 1832 added a special provision to article 309, punishing the causing of death unintentionally by injuries intentionally inflicted. The proper definition therefore of

[1] The following remarks are all founded upon the commentary of MM. Hélie and Adolphe on the Penal Code, vol. iii. pp. 385-551, and vol. iv. pp. 93-198, edition of 1863. The same subject is treated more concisely but substantially to the same effect in M. Hélie's *Pratique Criminelle*, ii. pp. 297-352.

[2] Adolphe and Hélie, iii. p. 399. "La cour de cassation avait jugé par "des arrêts nombreux que 'le veritable esprit des lois est que celui qui a volon- "'tairement fait des blessures ou porte des coups se rend coupable des suites "'qu'ils peuvent avoir ; de sorte que si les blessures ou ces coups donnent la "'mort ils constituent le meurtre.' Cette cour avait même ajouté à la rigueur "de la jurisprudence en déclarant indifférents et non écrits ces mots dont "plusieurs jurés avaient fait suivre leurs reponses, 'Mais sans intention de "'donner la mort.'"

meurtre is "killing with intent to kill," and as the word *meurtre* enters into the definition of assassination, parricide, and infanticide, an intention to kill and not merely to hurt is a part of the definition of each of these crimes.

This at once draws a broad line between French and English law, for there are many cases in which a man may be guilty of murder though he had no intention to kill; in particular the cases in which the intention was to inflict grievous bodily harm, and the cases in which a man is reckless as to the destruction of life. I think that in this the law of England is much to be preferred to the law of France, and that it is a mistake to make the intention to kill the test by which the worst forms of criminal homicide are distinguished from those which are less heinous. The two elements to be considered in distinguishing between the more and the less heinous forms of an offence are public danger and moral guilt, and to these must be added a third which is specially important in cases of homicide, namely, the shock which the offence gives to the public feeling and imagination. When public attention is strongly directed to a crime, and the public imagination is greatly shocked by it, it is of great importance that the punishment should be exemplary and calculated to impress the imagination of the public as much as the crime, and in the opposite direction. The criminal is triumphant and victorious over his enemy and over the law which protects him until he himself has suffered a full equivalent for what he has inflicted, in other words, in the case of homicide, till he has been put to a shameful death, and from this he ought to be excused only on grounds capable of being understood by the commonest and most vulgar minds.

I now proceed to examine the French and English definitions of homicide in the light of these remarks. In the first place, then, is the presence of an intention to kill as distinguished from an intention to inflict grievous bodily harm, accompanied by recklessness whether death follows or not, or by a determination to run the risk of killing in order to obtain an unlawful object, a test of the greater or less public danger of unlawful homicide? It seems to me that the question answers itself by the terms in which it is stated.

CH. XXVI.

There is no difference at all between the public danger of violence known to be dangerous to life inflicted with these intents. The habitual use of deadly violence for any unlawful purpose, is if anything more dangerous to the public than its habitual use for the express purpose of killing. The crime of a man who stabs another to gratify his vengeance, not caring whether he kills him or not, appears to me to be rather more dangerous as a precedent than that of a man who for some other motive stabs his enemy in order to kill, because the state of mind in which the stab is given is reached at an earlier stage, and is more likely to be entertained; indeed the matter speaks for itself. The danger to the public consists in the wilful infliction of deadly violence, and is not affected by the intention with which it is inflicted.

If it is impossible to distinguish between the public danger attendant upon these classes of homicide, can any distinction be made between the moral guilt of homicide accompanied with the various intentions referred to? Is there anything to choose morally between the man who violently stabs another in the chest with the definite intention of killing him, and the man who stabs another in the chest with no definite intention at all as to his victim's life or death, but with a feeling of indifference whether he lives or dies? It seems to me that there is nothing to choose between the two men, and that cases may be put in which reckless indifference to the fate of a person intentionally subjected to deadly injury is, if possible, morally worse than an actual intent to kill. For instance, the master of a ship, by a long series of brutal cruelties intended not to kill but to inflict prolonged and exquisite torture which may or may not end in death, does actually kill his victim. This shows more cold blooded, disgusting cruelty than if he had killed by a single blow intended to kill. Or, again, a man wishing to cheat an insurance office, and so to obtain a small sum of money, sets fire to his own dwelling-house well knowing that six people—all of whom are burnt to death—are sleeping above the room which he sets on fire. Morally, this seems to me a murder quite as horrible as poisoning a person in order

to inherit from him. Whether cruelty shows itself in that most hateful of all forms, delight in the infliction of pain, or in callous indifference to the destruction of life, it is in my opinion equally revolting and abominable, and the question whether the wretch who feels it wishes that his victim should live in order that his murderer may enjoy his sufferings; or that he should die in order that his murderer may inherit from him; or is indifferent whether he lives or dies so long as the murderer gains some object of his own by the deadly violence inflicted, seems to me to be irrelevant to his guilt. The distinction is one which I think is founded on no moral difference at all, and if embodied in the law would, I think, lead to distinctions revolting to common sense.

The punishment of *meurtre* by French law is by art. 304, *travaux forcés* for life absolutely, subject to the law as to circumstances of extenuation; but in a variety of cases it may be punished by death. The cases are these:—

Meurtre aggravated by premeditation or waylaying becomes *assassinat*. If it is committed on a natural or adoptive father or mother it becomes parricide. If it is committed on a newborn child (which has been interpreted to mean a child less than three days old), apparently by any one, whether the parent of the child or not, it becomes infanticide. All these offences are punished with death. *Meurtre* is also punishable with death, if it has "preceded, accompanied, or followed "another *crime*" (which may be roughly translated felony), or if it has had for its object the preparation, facilitation, or execution of a *délit* (which may be roughly translated a misdemeanour), or in order to favour the flight or secure the impunity of the authors or accomplices of a *délit*. Upon all these circumstances of aggravation some observations occur.

The premeditation which turns *meurtre* into *assassinat* is defined as a preconceived design, conditional or absolute, "d'attenter à la personne," of a person determinate or indeterminate. There can be no *meurtre* without an intention to kill, but a man might have a formed design to make an attack on the person of another without a formed design to kill him, and [1] it does not seem to be perfectly clear whether

[1] Adolphe et Hélie, iii. pp. 439-440.

if A. premeditated the beating, but not the death, of B., and then intentionally beat him to death, A. would be guilty of *assassinat* or not. This is a refinement of little practical importance. It seems to me that the French Code attaches far too much importance to premeditation in reference to the guilt of *meurtre*. As much cruelty, as much indifference to the life of others, a disposition at least as dangerous to society, probably even more dangerous, is shown by sudden as by premeditated murders. The following cases appear to me to set this in a clear light. [1] A., passing along the road, sees a boy sitting on a bridge over a deep river and, out of mere wanton barbarity, pushes him into it and so drowns him. A man makes advances to a girl who repels him. He deliberately but instantly cuts her throat. A man civilly asked to pay a just debt pretends to get the money, loads a rifle and blows out his creditor's brains. In none of these cases is there premeditation unless the word is used in a sense as unnatural, as "aforethought" in "malice aforethought," but each represents even more diabolical cruelty and ferocity than that which is involved in murders premeditated in the natural sense of the word.

The definition of *guet-apens* seems defective, and indeed the object of the introduction of the word into the French law is not apparent. It is scarcely possible to put a case of waylaying without premeditation, and the [2] definition has the strange peculiarity that it includes waiting for a man and excludes pursuing him. If three persons wait at a given point till their victim arrives and then stab him, they are guilty of *guet-apens*. If they hear he is at a certain place, drive up to him in a carriage, and then rush out and stab him, there is no *guet-apens*. [3] The word seems to be regarded as surplusage by the courts.

With respect to parricide or infanticide, the result of the French law is that mere intentional killing without premeditation makes the offence capital. It is singular that

[1] This was suggested to me by a real case. It is like the fabulous stories about French nobles shooting tilers to see them roll off the roof.

[2] "Le *guet-apens* consiste à attendre plus ou moins de temps dans un ou "plusieurs lieux."—Art. 298.

[3] Adolphe et Hélie, iii. p. 435; Hélie, *Pratique Criminelle*, ii. p. 303.

there never was any special punishment for parricide in English law. Petty treason, which was the nearest approach to it, did not include the murder of a parent by a child. In France a person convicted of parricide is [1] "conduit sur le "lieu d'exécution en chemise, nu-pieds, et la tête couverte "d'un voile noir." [2] Till 1832 the right hand of the offender was cut off before his execution. The retention of the black veil and the rest seems to our English taste puerile.

With regard to infanticide it is worthy of remark that by French law it is regarded as a specially aggravated form of *meurtre*, which is a curious contrast to the view which with reference to the practical administration of the law may be said to be taken of it in this country.

The article which punishes with death the administration of poison with intent to kill is remarkable not only as showing the detestation which the crime inspires, but because it is difficult to imagine any case which would fall within the definition, and which would not, if the person poisoned survived, fall under article 2, according to which "toute "tentative de *crime* qui aura été manifestée par un com- "mencement d'exécution si elle n'a été suspendu ou si elle "n'a manque son effet que par des circonstances indépend- "antes de la volonté de son auteur est considérée comme le "crime même."

The article which treats as assassins "tous malfaiteurs "quelle que soit leur denomination, qui, pour l'exécution de "leurs crimes, emploient des tortures ou commettent des actes "de barbarie," is singularly indefinite. It stood in the original draft, "Seront punis comme coupables d'assassinat les *garrot-* "*teurs* les *chauffeurs* et autre malfaiteurs," &c., and it had reference to the cruelties committed by bands of criminals after the earlier stages of the Revolution.

The provision that a *meurtre* which has preceded, accompanied, or followed another crime is to be punished with death has a good deal of similarity to our rule that an intention to commit a felony, if it accompanies an act which causes death, constitutes malice, but the definition

[1] *Code Pénal*, art. 13. [2] Adolphe et Hélie, iii. p 417.

CH. XXVI.

of *meurtre* which includes an intention to kill greatly narrows the application of the section. It would not extend, for instance, to the case of a person who, being resisted in committing a robbery, killed the person whom he meant to rob by the most brutal violence, unless it was shown that he had an actual intention to kill, and not merely an intention to inflict such injury, whether it ended fatally or not, as might be necessary for his immediate purpose. This seems to me to err quite as much by being too narrow as our own rule does by being too wide. A man who, in order to rob or ravish or escape the consequences of such a crime, uses deadly violence, careless whether he kills or not, appears to me to be upon the whole as great a criminal as can be met with, and if the punishment of death is retained for any one he ought to die.

[1] There is a curiosity in this section which deserves notice. When it was enacted, there was a controversy whether the mere coincidence of a *meurtre* with an offence or its definite connection with the offence as a means of execution or escape should be taken as the test of the application of the punishment of death. The test was finally settled by taking one test in the case of *crimes* and the other in the case of *délits*.

The French law contains no general term answering to our "manslaughter." Every one "qui volontairement aura "fait des blessures ou porté des coups," and has thereby unintentionally caused death, comes under article 309, manslaughter by negligence would be met by article 319, and the case of manslaughter which but for provocation would be murder is provided for by articles 321-324. Several cases which with us would be manslaughter appear to be omitted. For instance, a man administers poison not with intent to kill (which would bring the offence under article 301) but with intent to annoy, or even with intent to excite passion. Death results. This is not "empoisonnement" under article 301, nor do I see how it can be said to come under the article about blows and wounds unintentionally causing death, nor does it seem to be properly described by any of the terms employed in the article on negligence. Many other cases of the same

[1] Adolphe et Hélie, iii. p. 541, &c.

kind might be put. A man out of mere wantonness gives a false alarm of fire at a theatre. There is a rush to the doors and many persons are smothered. The offender has neither struck nor wounded any one, but he has undoubtedly caused by an unlawful act the death of many.

I may conclude this comparison between the laws of England and France relating to homicide by reference to their provisions as to the nature and effect of provocation.

Meurtre as well as striking and wounding are excusable if they are provoked either "par des coups ou des violences "graves envers les personnes," or by an attempt to break into a dwelling-house by day. They are also excusable in the case of a husband who detects his wife and her adulterer "en "flagrant délit dans la maison conjugale." This definition of provocation is narrower than the one given by the law of England, but there are some curious refinements in the French law. Parricide is never excusable, nor is *meurtre* committed by a husband on his wife or by a wife on her husband, unless the life of the offender was at the moment of the *meurtre* in actual danger—I suppose from the person killed. This provision seems to imply that even if a son's life is in actual danger from his father's violence he, the son, is not "excusable" if he intentionally kills his father unless, indeed, his act is found to be legitimate self-defence. He must, in other words, be punished with death unless the jury find extenuating circumstances. To our English notions this appears extremely hard.

The German law upon this subject is much simpler than the French law and seems to me singularly defective, but it is unnecessary to criticize it minutely, because I have already anticipated the greater part of my remarks upon it in connection with the law of France. The provisions on the subject are as follows:—

Art. 211. Whoever intentionally kills a human being is, if he execute the homicide with premeditation, punished with death for *mord*.

212. Whoever intentionally kills a human being is, if he executes the homicide without premeditation,

CH. XXVI.

punished for *todtschlag* with [1] *zuchthaus* for not less than five years.

213. If the manslayer were provoked without any fault of his own by ill usage (*misshandlung*), or serious insult applied by the person killed to himself or to one of his relations (*angehörigen*), or if there are other extenuating circumstances he may be imprisoned for not less than six months.

214. Whoever being engaged in any punishable enterprise intentionally kills any person in order to remove a hindrance which he encounters in his enterprise, or to withdraw himself from being arrested in the act, is punished by *zuchthaus* for not less than ten years or for life.

215. *Todtschlag* of an ancestor is punishable with *zuchthaus* for not less than ten years or for life.

216. If any one is induced to kill a person by the express and earnest request of the person killed, the offender must be imprisoned for not less than three years.

217. A mother who intentionally kills her illegitimate child at or soon after birth is punished with *zuchthaus* for not less than three years.

If there are extenuating circumstances they may be imprisoned for not less than two years.

226. A person who causes death by a bodily injury [not intended to cause death] must be punished with not less than three years' *zuchthaus*, or three years' imprisonment.

229. Whoever intentionally administers poison or any other substance noxious to health to another in order to injure his health, is punished with *zuchthaus* up to ten years.

If grievous bodily harm (*schwere Körper-Verletzung*) is caused by the act, the *zuchthaus* must be for not less than five years. If death is caused the *zuchthaus* must be for not less than ten years, and may be for life.

The causing of bodily harm by negligence is punishable by two years' imprisonment as a maximum, or fine up to 900 marks, but no express provision is made as to causing death by such means.

[1] *Zuchthaus* is the severer form of confinement, answering roughly to our penal servitude.

These provisions seem to me even more defective and objectionable than those of the French law. I cannot understand on what principle a man who is guilty of the premeditated murder of the seducer of his wife or daughter is to be punished with greater severity than a man who, because a husband forbids him to frequent his wife's company, immediately knocks down the husband and despatches him by repeated stabs with a knife; or why a robber who carries arms to subdue resistance, and deliberately kills a man who resists when he tries to rob him, or an officer of justice who tries to apprehend him, is to be considered in any other light than that of a criminal of the worst kind. It also seems extremely strange that a person who kills by the administration of poison not intended to kill should be liable to a severer punishment than a man who kills intentionally without premeditation. A man in order to annoy another or in order to keep him out of the way for a week, gives him a dose of laudanum which happens to cause his death: he must be sent to the *zuchthaus* for ten years, and is liable to be sent there for life. A man seeing a person, on whose death he would inherit a large fortune, standing near a cliff, instantly pushes him over it in order to kill, and does actually kill him: he must be sent to the *zuchthaus* for five years, and cannot be sent there for more than fifteen. It seems to me that the promptitude with which so horrible an act is done aggravates the offender's guilt. Premeditation would at least have excluded a readiness and presence of mind which in such a transaction are infamous.

There are two matters connected with the law of homicide which I have hitherto passed over, because they seem to require separate notice. These are the law relating to duelling and the law relating to suicide.

Duelling has never been made the subject of any special legislation in England. It has always been treated according to circumstances, upon the principles applicable to fighting, wounding, or homicide generally. The result has been this:— If two persons quarrelled, and one challenged the other verbally or otherwise to fight, the challenger committed the offence of inciting to the commission of a crime. This was punished

CH. XXVI.

in many instances by the Star Chamber, and may be regarded as one of the instances in which that tribunal legislated (for in reality it was legislation) wisely and beneficially against (to use Lord Bacon's language) "Middle acts towards "crimes not actually committed or perpetrated." If the parties went a step further and actually fought, without killing or maiming each other, each was guilty of an affray or fight, and also of an assault and battery, for it is well-established law that a mutual consent to an unlawful act, such as a fight, does not take away its criminal character. Wounding which did not cause death, or amount to maiming was in early times (as I shall show more particularly in the next chapter) no more than an assault, whatever was the intention with which the wounds were inflicted. Hence, a duel which did not end in death was only a misdemeanour, till the passing of Lord Ellenborough's Act, 43 Geo. 3, c. 58, passed in 1803, to be noticed hereafter. A duel which did end fatally might be either murder or manslaughter, according to the following distinctions:—If the duel was on a sudden falling out, if the parties fought in hot blood and on the spot and one was killed, the offence was only manslaughter, however aggravated the case might be. A strong instance of this is supplied by the [1] case of Walters tried at the Old Bailey, in 1688, for the murder of Pymm. The parties upon a sudden quarrel fought with swords, and Walters ran Pymm through the body. After doing so he dashed his head on the ground with oaths. The jurors who tried the case wished to find this murder on account of the brutality of Walters, but both the judges said it was only manslaughter. It is remarkable that the statute of stabbing, above referred to, would not apply to duels with swords, for it is confined to cases in which a man "that hath not then any weapon drawn" is stabbed.

If a fatal duel took place when the parties were in cool blood, it was held to be murder, and of this there has never been any doubt whatever in this country, though juries not unfrequently acquitted in such cases if they sympathised with the prisoner. I have known several persons, of high

[1] 12 *State Trials*, 113.

standing and reputation in the world, who had been tried for murder and acquitted because they killed their antagonists in duels fairly and had received grievous provocation. The law, however, has never admitted of any doubt upon the subject. [1] Coke and Hale both treat deliberate fatal duels as ordinary murders, and in this they have been followed by numerous later authorities. Amongst the latest and most emphatic are those of [2] Barronet and [3] Barthelemy. They arose out of a duel between Frenchmen in England. The Court of Queen's Bench refused to bail even the seconds of the man who was killed.

The only difference made by law between duelling and other cases of homicide is that the law is, if anything, more strict as to accessories in duelling than it is in other cases. Not only is the second of the person who kills the other guilty of murder, but it has been held [4] in modern times that the second of the man killed is also guilty of murder. Hale doubted whether this was not over severe. He puts the case of A. and B. principals, C. second to A., and D. second to B. A. kills B. A. and C., he says, are clearly principals in the murder, "but D. is not a principal because he was of the part "of him that was killed; and yet I know that some have held "that D. is a principal as well as C., because it is a compact, "and rely much upon the book of 22 Edw. 3, *Corone*, p. 262, "before mentioned, but, as I think, the law was strained too "far in that case, and so it is much more in making D. a "principal in the death of B. that was his friend; though it

[1] *Third Institute*, c. 72, fol. 157. 1 Hale, *P. C.* pp. 452-453.
[2] Dearsley, 51. [3] Dearsley, 60.
[4] In 1843, in the case of R. *v.* Cuddy (1 Car. and Kir. 210), who was second to Colonel Fawcett in a duel in which Colonel Fawcett was killed by his brother-in-law, Lieutenant Monro. The judges were Williams, J., and Rolfe, B. (afterwards Lord Cranworth). The passage in Hale is in 1 *P. C.* 443. The case referred to in FitzHerbert is in these words:—"Deux fueront "arr de mort dun A.; et troue fuit que ils fueront a trouers et debate et "lun voile quar parcuss. laut. oue son cote et laut luy en m̄ le man̄, et cestz "A. vient parentr eux pur eux departr et par enter eux il fuit occis. p que ils "fuerr ambideux pend pur ce que chn̄ deux fuit en volunte dan̄ occis. aut. "issint ne puit dit infort." The sense is plain, but I cannot construe "quar parcuss." nor "m̄ le man̄." The general meaning is that one tried to strike the other with the knife, that the other got hold of it, and that A. was killed in trying to part them. As the case is stated, it seems very hard to hang the man who did not draw the knife, but probably when he "m̄ le man̄" (whatever that precisely means), he got the knife from his adversary, and in trying to stab him killed A.

CH. XXVI.

" be, I confess, a great misdemeanour, yet I think it is not " murder." In the report of R. *v.* Cuddy, Williams, J., is said, after laying down the principle that " where two persons " go out to fight a deliberate duel, and death ensues, all per- " sons who are present on the occasion encouraging or pro- " moting that death will be guilty of abetting the principal " offender," to have referred to Hale's doubt, and to have added, " If this doubt were correct, it might be suggested on " the same principle, that Colonel Fawcett was guilty of " suicide. Such a course is straining the principles of law " till they become revolting to common sense." I think this must be misunderstood by the reporter for two reasons. First, there is no connection between the proposition that the second of the man who is killed is not a principal in his murder and the proposition that the man who is killed is himself guilty of suicide. Each might be as true, or either might consistently with the truth of the other be false. Secondly, I see nothing opposed to common sense in saying that a man killed in a duel is guilty of suicide. He consents to take his chance of being killed, and intentionally enables his adversary to kill him. If he was wounded and survived, I do not see how he could defend himself against a charge of being an accessory before the fact, or principal in the second degree, in the offence of the man who shot him with intent to kill or do grievous bodily harm.

The question whether a surgeon present at a duel would be guilty of murder if either party was killed would be one of some difficulty, but it will probably never be raised. The principles on which the question whether presence on such an occasion involves guilt or not are stated [1] by Vaughan, J., in R. *v.* Young, and they were elaborately considered in some of the judgments delivered in the recent case of [2] R. *v.* Coney, which settled the law as to prize fighting.

The law of France upon this subject is extremely singular. It is stated by [3] M. Hélie as follows:—" La jurisprudence a " pendant longtemps admis et déclaré que les Articles 295 et

[1] 8 *C. and P.* p. 644 (1838). This case arose out of a duel between Messrs. Elliot and Mirfin, fought on Wimbledon Common, August 22, 1838.
[2] *L. R.* 8 Q.B.D. p. 541 (1882). [3] *Pratique Criminelle*, ii. 300.

" 304 [they relate to the definition of *meurtre*] ne peuvent " être appliqués à celui qui dans les chances reciproques d'un " duel a donné la mort à son adversaire sans deloyauté ni " perfidie." He refers to decisions to this effect of the Court of Cassation down to 1828. " Mais cette interprétation, qui " s'appuyait sur la texte du Code et l'esprit de toute la légis- " lation, a été renversé par un nouvel arrêt qui déclare au " contraire que les dispositions des Articles 295 et 304 sont " absolues et ne comportent aucune exceptions; qu'en con- " séquence elles s'appliquent à l'homicide commis dans un " duel." The decisions to this effect were given in 1837. They have been much criticised, but " la jurisprudence a néanmoins " continuée à marcher dans la nouvelle voie où elle était entrée, " et il est aujourd'hui de règle que l'homicide ou les blessures " survenus dans un duel sont passibles de l'application des " Article 295 et suivants du Code Pénal."

Art. 295 is " L'homicide commis volontairement est qualifié " meurtre." To an English lawyer it is equally surprising that there should ever have been any doubt that this definition included killing in a duel, and that the Court of Cassation, after deciding for eighteen years that it did not, should have afterwards continued for forty-five years to hold that it does.

The German *Strafgesetzbuch* has [1] an elaborate series of provisions about duels.

Sending or receiving a challenge to a duel with deadly weapons is punished by imprisonment in a fortress for not more than six months, unless the parties voluntarily give up the duel before it begins. If the challenge is to fight till one of the parties is killed, the imprisonment must be for two months, and may be for two years. Fighting a duel is punished by imprisonment in a fortress for from three months to five years. If one party is killed, the imprisonment must be for two years, or if the duel was of such a character that one of the two must have been killed, for three years. If death or injury is caused [2] by means of an intentional violation of the agreed or customary rules of the duel, the offence

[1] Articles 201-210.

[2] " Mittels vorsätzlicher Uebertretung der vereinbarten oder hergebrachten " Regeln des Zweikampfs."

CH. XXVI. is to be treated according to the ordinary rules as to wounding and killing. [1] "Challenge-bearers, who seriously try to "prevent the duel, seconds, as well as witnesses brought to the duel, physicians, and surgeons are free from punishment."

The effect which these provisions produce on an English reader is that the authors of the *Strafgesetzbuch* can hardly have disapproved of duels, and that it would have been more consistent with their real views to pass measures regulating the terms under which they were to be fought, than to impose punishments for duelling so light as to be sure not to deter. The following passage explains the view taken of the subject [2] by German lawyers:—"The offence of duelling "presents itself neither as a breach of the public peace, nor "as an usurpation by private violence of the public administration of justice, but as a punishable gambling with life "and limb. The existence of duelling is an unanswerable "reproach to the treatment by modern legislation of insults "to honour, which treatment does not satisfy our modern "sense of honour, which is exaggerated because it is thoroughly "subjective. In a systematic view of the subject, duelling "occupies in offences against life and limb the same place as "gambling in offences relating to property."

Suicide is by the law of England regarded as a murder committed by a man on himself, and the distinctions between murder and manslaughter apply to this (so far as they are applicable) as well as to the killing of others. There is, however, [3] authority for saying that there is no such offence as self-manslaughter, and the true definition of murder of one's self seems to be [4] where a man kills himself intentionally, to which Hale would add, "or accidentally," by an act amounting to felony, as in the case where A., striking at B. with a knife, intending to kill B., misses B. and kills himself. [5] Suicide is held to be murder so fully, that every one who aids or abets suicide is guilty of murder. If, for instance, two lovers try to drown themselves together, and one is drowned and the other escapes, the survivor is guilty of murder.

[1] Art. 209. [2] Das Deutsche Reichsstrafrecht, vonVon Liszt, Berlin, 1881.
[3] R. *v.* Burgess, *L. and C.* p. 258.
[4] For authorities, see my *Digest*, Art. 227, p. 151.
Hale, *P. C.* 412-413.

The history of the law relating to suicide has only one step.

In Bracton's time, a person who committed suicide [1] in order to avoid conviction for a crime, forfeited his lands. Other suicides forfeited their goods only. This distinction was forgotten before the time of [2] Staundforde. The law in other respects remained unaltered till 1870, when forfeitures for felony were abolished by 33 & 34 Vic. c. 23.

A custom formerly prevailed of burying persons against whom a coroner's jury had found a verdict of *felo de se* at cross roads, with a stake driven through the body. I know of no legal authority for this custom. It is not mentioned by any of the authors cited as a consequence of such a verdict, nor does Blackstone refer to it. Probably, like the custom of gibbeting, which certainly existed long before the statute 25 Geo. 2, c. 37, it originated, without any legal warrant, in circumstances now forgotten. It was, however, abolished in 1823 by 4 Geo. 4, c. 52, which enacted that thenceforth it should not be lawful for any coroner to issue his warrant for the interment of a *felo de se* "in any public "highway." He was to order the body to be privately buried in a churchyard, or other burial-ground, "without any "stake being driven through the body," between nine and twelve at night, and without any religious rites. This has been further altered by 45 & 46 Vic. c. 19 (1882), which provides that the body of a suicide may be buried in any way authorized by 43 & 44 Vic. c. 41, *i.e.*, either silently or with such Christian and orderly religious service at the grave as the person having charge of the body thinks fit. The act is so worded as to lead any ordinary reader to suppose that till it passed suicides were buried at a cross road with a stake through their bodies.

The French law upon this subject is remarkable. It is stated

[1] "Si quis reus fuerit alicujus criminis, ita quod captus fuerit pro morte "hominis vel cum furto manifesto, et cum utlagatus fuerit, vel in aliquo scelere "et maleficio deprehensus et metu criminis imminentis mortem ibi consciverit "hæredem non habebit. Si quis autem tædio vitæ vel impatientia doloris "alicujus seipsum interfecerit, nunquam habere poterit, et talis non amittit "hæreditatem sed tantum bona ejus mobilia confiscentur."—Bracton, ii. 506.

[2] Staundforde, 19 D.; and see Lambard, p. 247, Coke, *Third Institute*, 54, and 1 Hale, *P. C.* 411 *et seq.*

CH. XXVI.

as follows by [1] M. Hélie :—" La loi n'a point incriminé le " suicide. Le fait de complicité est-il punissable ? La négative " est évidente, puisqu'il n'y a pas de participation criminelle " à un fait qui ne constitue en lui-même ni crime ni délit. " L'agent qui a provoqué un tiers à suicide, qui l'a aidé " dans ses préparatifs, qui lui a fourni ses instruments ou les " armes, commet un acte immoral, mais est à l'abri de la " répression. Mais si cet agent, pour obéir à la voix de l'in- " sensé qui veut mourir, a prêté son bras et tenu l'arme de- " structive, s'il a consommé l'homicide, est-ce encore là un " acte de complicité, ne devient-il pas coupable d'homicide " volontaire ? La [2] jurisprudence a répondu ' qu'il n'y a de " ' suicide proprement dit, que lorsqu'une personne se donne " ' elle-même la mort, que l'action par laquelle une personne " ' donne volontairement la mort a autrui constitué un homicide " ' et non un acte de complicité de suicide.' Et dans une espèce, " où deux personnes ayant voulu se donner à la fois la mort, " l'une aurait survécu ' que le consentement de la victime " ' d'une voie de fait homicide ne saurait legitimer cet acte : " ' qu'il ne peut resulter une exception à ce principe, de la " ' circonstance que l'auteur du fait consenti de meurtre a " ' voulu en même temps attenter à sa propre vie ; que la " ' criminalité de l'acte resulte du concours de la volonté et " ' du fait qui en a été la conséquence.' "

M. Hélie's personal opinion appears to be that this view of the law is strained. It no doubt suggests the conclusion that the Court of Cassation thought that the Penal Code was too favourable to suicide.

The only article in the German *Strafgesetzbuch* which throws any light on the view taken of suicide by the German law is Article 216, which, in providing for the punishment of various cases of homicide, says :—" If a person is induced to " kill another by the express and serious request of the per- " son killed, he must be imprisoned for not less than three " years " (and by Article 16 not more than five). No mention is made of suicide proper.

[1] *Pratique Criminelle*, ii. 299.

[2] In French law "jurisprudence" answers to the expression "the autho- " rities," as used by English lawyers, and means principally the result of decided cases. "Espèce" is exactly our "case."

The Draft Penal Code proposed to make the abetment of suicide a special offence, subject to penal servitude for life as a maximum punishment. The attempt to commit suicide was to be punishable by two years' imprisonment and hard labour. The definition of homicide ("Homicide is the killing "of a human being by another") excluded suicide.

The abetment of suicide may, under circumstances, be as great a moral offence as the abetment of murder. Suppose, for instance, the heir to a large property were to persuade the owner of it to kill himself by making him believe that a dog by which he had been bitten was mad, and that his choice was between suicide and a death of torture; or suppose the seducer of a girl on her becoming pregnant goaded her into suicide in order to rid himself of an incumbrance,—such a person ought, I think, to be subjected to punishment of extreme severity. The difference between such offenders and accessories before the fact to murder is that their conduct involves much less public danger, though it may involve equal moral guilt. Suicide is the only offence which under no circumstances can produce alarm. It would, I think, be a pity if parliament were to enact any measure tending to alter the feeling with which it is and ought to be regarded. As an instance of popular feeling on the subject, I may mention a case I once tried at Norwich, in which a man—I think drunk at the time—tried to poison himself in a public house. When called on for his defence, he burst out with all the appearance of indignant innocence:—"I try to kill myself! I cannot "answer for what I might do when drunk, but I was all "through Central India with Sir Hugh Rose in 1857, I was "in so many general actions, and so many times under fire, "and can any one believe that if I knew what I was about "I could go and do a dirty, cowardly act like that?" He was acquitted.

CHAPTER XXVII.

OFFENCES AGAINST THE PERSON OTHER THAN HOMICIDE.

CH. XXVII.

I NOW come to the offences against the person other than homicide, which are punished by the law of England.

Before the Conquest such offences formed an elaborate and extensive branch of the law, but the offences were treated rather as torts than as crimes. [1] Some of the laws set forth with the utmost minuteness and particularity the compensation to be made for every sort of bodily injury. After the Conquest the offence of wounding seems to have been regarded as a crime rather than as a civil injury, but the notices of it are extremely scanty. Bracton gives an [2] elaborate definition of a maim. He mentions one kind of maim, castration, for which the [3] punishment was sometimes capital, sometimes perpetual exile and forfeiture of goods. He also mentions the appeal "de pace et plagis" of breach of the peace and wounding, but there is nothing to show that in his day such offences were punished otherwise than upon an appeal or private accusation.

As I have already observed, the rule "voluntas pro facto" was considered at one time to apply to the case of attempts

[1] Æthelbirht, 32-72, 1 Thorpe, pp. 13-21; Alfred, 44-77, 1 Thorpe, pp. 93-101. There are less elaborate provisions in the other laws.

[2] "Mahemium vero dici poterit ubi aliquis in aliquâ parte sui corporis "effectus sit inutilis ad pugnandum, et maxime per illum quem appellat, ut "si ossa extrahuntur a capite, et skerda" (scurf) "magna levetur ut præ-"dictum est. Item si os frangatur, vel pes, vel manus, vel digitus, vel articulus "pedis, vel manus, vel aliud membrum abscindatur, vel per plagam factam "contracti sunt nervi, et membrum aliquod, vel quod digiti curvi reddantur, "vel si oculus effossus fuerit, vel aliud fiat in corpore hominis per quod minus "habilis et utilis reddatur ad se defendendum," &c.—Bracton, ii. p. 468; *De Cor.* cxxiv. 3, fo. 145*b*.

[3] Fo. 144*b* and fo. 155, p. 146.

to murder, but this did not last long, and till late in the seventeenth century the most violent crimes against the person were treated as misdemeanours punishable with fine and imprisonment. Thus [1] Lambard mentions "grievous "fine" as the punishment "if any person have maimed "another of any member whereby he is less able to fight, as "by putting out his eye, striking off his hand, finger, or foot, "beating out his fore teeth, or breaking his skull." Fine also is the punishment "if any have committed unlawful assault, "beating, wounding, or such like trespasses against the body "of any man." The only statutes relating to personal injuries during all this period were of the narrowest and most special kind. I may mention as illustrations 5 Hen. 4, c. 5 (1418), which made it felony to cut out the tongue or put out the eyes of any person by malice prepense; and 37 Hen. 8, c. 6, s. 5 (1545), which, in dealing with many other subjects, incidentally enacts that every one who shall "cut or cause to "be cut off the ear or ears of any of the king's subjects, "otherwise than by the authority of the law, chance medley, "sudden affray, or adventure," should pay treble damages and be fined £10; and 5 & 6 Edw. 6, c. 4, s. 3, which punishes striking with a weapon in churches or churchyards.

The extraordinary lenity of the English criminal law towards the most atrocious acts of personal violence forms a remarkable contrast to its extraordinary severity with regard to offences against property. I am not prepared to suggest any explanation of the fact, but several instances may be referred to which illustrate it.

[2] In 1573, one Peter Birchet, "who had the name of a "Puritan, but was disordered in his senses, stabbed [3] Hawkins, "an officer in the queen's navy, in the Strand, through the "right arm into the body, about the arm-hole, and said he "took him for Mr. Hatton, captain of the Guards, and one of "the Privy Chamber, whom he was moved to kill by the "Spirit of God, by which he shall do God and his country "acceptable service, because he was an enemy of God's

[1] P. 429.

[2] Neal's *History of the Puritans*, i. p. 247.

[3] Probably the famous Sir John Hawkins. He was made Treasurer and Comptroller of the Navy in 1573. See article "Hawkins," in *Cyclopædia Britannica*.

CH. XXVII.

" and a maintainer of papistry. In which opinion he per-
" sisted without any signs of repentance, till, for fear of
" being burnt for heresy, he recanted before Dr. Sandys,
" Bishop of London, and the rest of the Commissioners. The
" Queen asked her two chief justices and attorney-general
" what corporal punishment the villain might undergo for his
" offence: it was proposed to put him to death as a felon,
" because a premeditated attempt with an intention of killing
" had been so punished by [1]King Edward II., though the party
" wounded did not die; but the judges did not apprehend
" this to be law. It was then moved that the Queen, by
" virtue of her prerogative, should put him to death by mar-
" tial law; and, accordingly, a warrant was made out under
" the Great Seal for his execution, though the fact was com-
" mitted in time of peace. This made some of the council
" hesitate, apprehending it might prove a very bad precedent.
" At length the poor creature put an end to the dispute him-
" self, for, on the 10th November, in the afternoon, he killed
" his keeper, Longworth, with one blow, striking him with a
" billet on the hinder part of the head as he was looking upon
" a book in the prison. For this crime he was next day
" indicted and arraigned at the King's Bench, where he con-
" fessed the fact, saying that Longworth, in his imagination,
" was Hatton. There he received judgment for murder, and
" the next day, November 12th, had his right hand first cut
" off at the place in the Strand where he struck Hawkins,
" and was then immediately hanged on a gibbet erected pur-
" posely between eight and nine of the clock in the morning,
" and continued hanging there three days. The poor man
" talked very wildly, and was by fits downright mad, so that if
" he had been shut up in Bedlam after his first attempt, as he
" might have been, all further mischief would have been pre-
" vented." This story is remarkable on account of the light which it throws on the absence of any legal provision for the most desperate attempts to murder, on the indifference felt at the time to madness as an excuse for crime, and on the extreme promptitude with which in certain cases punishment might be made to follow offences.

[1] See Vol. II. p. 223.

Several instances of the indifference with which crimes of violence not extending to the infliction of death were regarded, occur in the Life of Lord Herbert of Cherbury. His father [1] he says, was "barbarously assaulted by many men in the "churchyard at Lanervil, at what time he would have appre- "hended a man who denied to appear to justice; for defend- "ing himself against them all by the help only of one John "ap Howell Corbet, he chased his adversaries, until a villain "coming behind him, did over the shoulders of others wound "him on the head behind with a forest-bill until he fell down, "though recovering himself again, notwithstanding his skull "was cut through to the pia mater of his brain, he saw his "adversaries fly away, and after walked home to his house at "Llyssyn, where, after he was cured, he offered a single com- "bat to the chief of the family by whose procurement it was "thought the mischief was committed." Lord Herbert him- self, according to his own account, fought a regular battle in Scotland Yard, with a Sir John Ayres, who accused him of having seduced Lady Ayres. [2] As a matter of course, Sir John Ayres and four armed men were shamefully defeated by Lord Herbert and one "little Shropshire boy," with a little assist- ance from bystanders, though Lord Herbert was taken by surprise, thrown from his horse, and had his sword broken within a foot of the hilt. The matter was brought before the Council, who ordered Lord Herbert not to challenge Sir John Ayres, "nor to receive any message from him in the way of "fighting." As for Sir John, he appears not to have been punished in any way except that his father disinherited him,

[1] *Life of Lord Herbert of Cherbury*, p. 4. The incident probably happened late in the sixteenth century. Lord Herbert gives no dates.

[2] *Life of Lord Herbert*, pp. 150-166. Falstaff's exploits on Gadshill, as related by himself, are nothing to Lord Herbert's, yet he probably was a man of courage, and was certainly a remarkable person in other ways. It is, however, to say the least, extraordinary that he should have been able and willing to fight twelve robbers at once. "Taking a sword in one hand and a "little target in the other, I did in my shirt" (he had been roused from his sleep by hearing them talking) "run down the stairs, open the doors suddenly, "and charged ten or twelve of them with such fury that they ran away, some "throwing away their halberts, others hurting their fellows to make them go "faster in a narrow way they were to pass, in which disordered manner I "drove them to the middle of the street by the Exchange, where, finding my "bare feet hurt by the stones I trod on, I thought fit to return home and "leave them to their flight."—Pp. 225-226.

and his wife sent a letter saying "that her husband did lie "falsely" in attacking her character, "and most falsely of all "did he lie" in saying that she had confessed her guilt to him.

The case of [1] Giles, tried by Jeffreys in 1679, for a determined attempt to murder Arnold (already referred to) sets the defects of the law as it then stood in the strongest light. Giles and several others waylaid Arnold, and did their very utmost to assassinate him, giving him many stabs with a sword, one of which in his left side was seven inches deep, and numerous cuts with knives. Upon conviction Giles was sentenced to fine, imprisonment, and pillory.

By a variety of acts of parliament this great defect in the law was gradually filled up. These enactments were of an occasional, limited kind, but by degrees they came to form the most elaborate and complete body of law upon the subject which exists in any country. It would be tedious and useless to give their history at length, but I will state enough of it to show its nature and its leading points.

The first act of the kind was the Coventry Act, 22 & 23 Chas. 2, c. 1. It recites that on the 21st December, 1670, "a "violent and inhuman attempt was made upon the person of "Sir John Coventry . . . and upon the person of his "servant William Wylkes, by a considerable number of armed "men." It then proceeds to outlaw the persons indicted for the offence, which seems to have been charged as robbery, and it goes on to enact that it shall be felony without benefit of clergy, "of malice, forethought, and by lying in wait," to "unlawfully cut out or disable the tongue, put out an eye, "slit the nose, or cut off or disable any limb or member of "any subject of his Majesty with intention in so doing to "maim or disfigure in any of the manners before mentioned "such his Majesty's subject." So narrowly was this act construed that in the well known case of [2] R. *v.* Coke and Woodburn, the prisoner took the point that his intent was to murder and not to disfigure. He was convicted because the chief justice told the jury that he must be convicted if they thought he meant to disfigure in order to kill. In precisely the same spirit, after Guiscard's attempt on the life of Harley,

[1] 7 *St. Tr.* 1129. [2] 16 *Ib.* 53.

an act was passed (9 Anne, c. 16) reciting Guiscard's offence in the preamble, and making it felony without benefit of clergy to "unlawfully attempt to kill, or unlawfully assault and "strike, or wound any person, being one of the most honour- "able Privy Council of her Majesty, her heirs or successors, "when in the execution of his office of a privy counsellor in "council or in any committee of council."

In 1722, the depredations and acts of violence of deer-stealers, known as the Waltham Blacks, led to the passing an act (9 Geo. 1, c. 22) known as the Black Act, which amongst many other provisions as to offences committed or likely to be committed by gangs of deer-stealers made it felony to "wilfully "and maliciously shoot at any person, in any dwelling-house "or other place." In later acts special provisions were made [1] for the punishment of wounding with intent to hinder the exportation of corn, [2] for wounding seamen pursuing their lawful occupations, and some others.

The first act approaching to generality on this subject was 43 Geo. 3, c. 58, passed in 1803, known from its author as Lord Ellenborough's Act. The first section of this act may be regarded as the germ of much subsequent legislation, as it punishes many of the worst forms of bodily violence. It continued in force till 1828, when it was repealed and re-enacted with additions by 9 Geo. 4, c. 31. This act repealed, so far as related to England, all the earlier acts relating to personal violence. It was itself repealed and re-enacted in an extended form as regards both England and Ireland in 1861 by 24 & 25 Vic. c. 100, which is still in force.

I will now proceed to offer some remarks upon this statute, which is as elaborate and complete as the early law upon the subject was crude and imperfect.

In consists in all of 79 sections. The first ten relate to murder and manslaughter. They do not define these offences, but provide for their trial and punishment. I need add nothing as to their provisions to what has already been said in the chapter on homicide.

Sections 11, 12, 13, 14, and 15 relate to attempts to commit

[1] 11 Geo. 2, c. 22.

[2] 33 Geo. 2, c. 67, s. 2.

CH. XXVII.

murder, and punish specifically each of seven different ways of attempting to commit murder, namely (1) administering poison; (2) wounding; (3) destroying or damaging buildings with gunpowder or other explosive substances; (4) attempting to administer poison; (5) shooting at any person; (6) attempting by drawing a trigger or otherwise to discharge loaded arms at any person; (7) attempting to drown, suffocate, or strangle any person with intent, in any one of these seven cases, to commit murder. Section 15 punishes all attempts to commit murder in any manner other than the seven specifically mentioned. In reading these sections it is impossible not to ask why the offence of attempting to commit murder should not be punished by a single simple section instead of five sections, one of which is extremely complicated?

Upon grounds of expediency the only possible answer is that nothing can be more clumsy.

The historical explanation is this. Originally, an attempt to commit murder, by whatever means it was made, was only a common law misdemeanour.

The first alteration of any importance in this was made in 1803, by 43 Geo. 3, c. 58, which made it a capital felony to shoot at any person, or to present and try to fire a loaded gun at any person, or to cut or stab any person with intent to murder, rob, maim, disfigure or disable, or to do grievous bodily harm to any person, or to resist a lawful apprehension or detainer, or to administer poison with intent to murder; subject, however, to a proviso that in cases in which if death had followed, the offender would not have been guilty of murder he should not be guilty of felony under the statute.

The statute converted into capital felonies all desperate attacks upon the person, including the worst kinds of attempts to commit murder, but under its provisions all attempts to commit murder which did not involve the infliction of actual bodily harm of a serious kind or an attempt to inflict it, by shooting or the administration of poison, continued to be misdemeanours. The act for instance did not extend to the case of a man who, with intent to murder, pushed another

over a cliff, or threw him overboard from a ship, if his life was saved.

By 9 Geo. 4, c. 31, s. 11, the provisions of the act of George III. were re-enacted, so far as attempts to murder were concerned, and attempts to "drown, suffocate, or strangle" were put on the same footing as attempts to murder by shooting, stabbing, or poisoning; and by s. 12, shooting, attempting to shoot, and wounding with intent to resist apprehension, maim, disfigure, disable, or do grievous bodily harm which, if death had ensued would have been murder, were made capital. The act of George III. was thus re-enacted, but its provisions were divided into two parts. By 7 Will. 4, and 1 Vic. c. 85, capital punishment in cases of attempting to murder was confined to attempts by poisoning, stabbing, cutting and wounding, with that intent. The provision as to wounding included wounding by fire-arms.

Attempts to murder by attempting to administer poison, or by attempting to shoot, or to drown or strangle, were no longer to be capital. And some other modes of attempting to commit murder were made felonies punishable with secondary punishment. Wounding with intent to disfigure, disable, or do grievous bodily harm, which had been a capital felony under 9 Geo. 4, c. 31, became a felony punishable with secondary punishment.

In 1861, all attempts to murder, whether by the actual infliction of bodily injury or the actual administration of poison, or by attempts to inflict bodily injury, or to administer poison, were taken out of the list of capital crimes. But this was done, not by throwing the older provisions into one section, but by re-enacting each of them with some variations and amplifications of language shown by decided cases to be required, and subjecting each offence to secondary instead of capital punishment.

In a few words, the language of sections 11 and 14 of the act of 1861 preserves the memory of the attempts made in 1828 and 1837 to divide the crime of attempting to commit murder into two classes, one punishable by death, the other by secondary punishment, the distinction between the two consisting in the actual infliction of bodily harm or its absence.

CH. XXVII.

Every other section of the act of 1861 has a history of its own. Section 12, which punishes attempts to murder by blowing up buildings with gunpowder, &c., is a re-enactment of 9 & 10 Vic. c. 25, passed in 1846. This act simply provided for an omission from the older law, and as it did so after capital punishments had ceased to be common, the offence was never capital. Till 1846 it must have been simply a misdemeanour at common law.

Section 13, which punishes setting fire to a ship with intent to commit murder, came to be enacted as follows:—

By 7 & 8 Geo. 4, c. 30, s. 9, it was a capital felony to set fire to any ship, whether with or without an intent to murder.

By 7 Will. 4, and 1 Vic. c. 89, s. 4, it was enacted that it should be a capital crime to set fire, to cast away, or in anywise destroy any ship with intent to murder, or whereby any person's life should be endangered. Section 13 of the act of 1861 does away in this case with the punishment of death, but re-enacts the greater part of the offence according to the definition given in the earlier act.

I know of no better illustration in the whole statute book of the way in which every line of it has its own special history than is afforded by these sections.

Shortly, their history is this, the very grossest and worst class of offences against the person were, till 1803, treated with that capricious lenity which was as characteristic of the common law as its equally capricious severity. In that year an act was passed which converted into capital crimes a considerable number of such acts, and especially a considerable number of attempts to commit murder.

In 1828 and 1837, by two successive statutes, attempts to commit murder were divided into two classes—the first punished capitally, and the second not so punished—the first class consisting of such offences as involved actual bodily injury, and the other class consisting of offences which involved only an unsuccessful attempt to inflict such injuries. In 1861 the distinction was maintained, but the difference removed, the gap which the old common law had left being at the same time clumsily filled up.

It would be possible, and indeed not very difficult, to relate in this manner the history of every section of the act, and of a large number of the phrases which incidentally occur in it, but it would answer no good purpose and would be extremely wearisome. I may, however, notice a few sections which possess some degree of interest.

Section 18, which relates to serious wounds inflicted, not with intent to murder, but with intent to maim, disfigure, or disable, or to do grievous bodily harm, is a remarkable section. [1] Its language is laborious and condensed in the highest degree, and creates twenty-four separate offences as it forbids every combination of any one of four actions with any one of six intentions. The history of the section is as follows:—

The Coventry Act made it felony to cut with intent to disfigure. The Black Act made it felony to shoot at any one. The act of 1803 made it felony to shoot or to try to shoot at any one, or to cut or stab with intent to rob, maim, disfigure, disable, or resist lawful apprehension, under such circumstances that if death had ensued the offence would have been murder. This was re-enacted by 9 Geo. 4, c. 31, s. 12, and by 7 Will. 4, and 1 Vic. c. 85, s. 4, which substituted secondary for capital punishment in such cases, and this last section with some small additions was re-enacted by the section in question, which thus represents four previous enactments and various cases decided upon them.

I pass over many sections punishing particular acts of

[1] "Whosoever shall unlawfully and maliciously, by any means whatsoever, "wound or cause any grievous bodily harm to any person, or shoot at any "person, or by drawing a trigger, or in any other manner attempt to discharge "any kind of loaded arms at any person, with intent, in any of the cases "aforesaid, to maim, disfigure, or disable any person, or to do some other "grievous bodily harm to any person, or with intent to resist or prevent the "lawful apprehension or detainer of any person, shall," &c.

This forbids four acts, viz.:—

1. Wounding.
2. Causing grievous bodily harm.
3. Shooting at any person.
4. Trying to fire loaded arms at any person.

Done with any one of six intents, viz.:

1. An intent to maim.
2. An intent to disfigure.
3. An intent to disable.
4. An intent to do some other grievous bodily harm.
5. An intent to resist lawful apprehension.
6. An intent to resist lawful detainer.

violence to the person, and in particular the whole series of offences relating to the abduction of women, rape, and other such crimes. Their history possesses no special interest and does not illustrate either our political or our social history. I may, however, refer shortly to s. 60, which punishes the endeavour to conceal the birth of a child by a secret disposition of its body. This section is re-enacted from 9 Geo. 4, c. 31, s. 14, which was itself founded upon 43 Geo. 3, c. 58, s. 4. This enactment repealed 21 Jas. 1, c. 27, passed in 1623. The act of James recited that "Many lewd women that "have been delivered of bastard children, to avoid their shame "and to escape punishment, do secretly bury, or conceal the "death of their children, and after, if the child be found "dead, the said women do allege that the child was born "dead. Whereas it falleth out sometimes (although hardly "it is to be proved) that the said child or children were "murdered by the said women." It then enacted (in very involved language) that if any woman were shown to have been delivered of a bastard child and to have concealed its birth, she should "suffer death, as in cases of "murder," unless she could prove by one witness that the child had been born dead. This act was at first temporary, but was afterwards almost accidentally (as it seems) made permanent by 3 Chas. 1, c. 4, s. 10, and 16 Chas. 1, c. 4. The earlier acts upon the subject authorised a conviction for concealment of birth only in cases where the mother of the child was tried for murder, but the crime is now a substantive one, and may be committed by any person whatever.

The history of our law upon personal injuries is certainly not creditable to the legislature, and the result at which we have at present arrived is extremely clumsy, but I think its substance is greatly superior to the corresponding provisions of the French and German codes, besides being much more complete.

One leading distinction between the English and French law upon the subject is that the English law looks almost entirely to the intention with which the wounds were given or injuries inflicted, the French law almost exclusively to the

result, which seems to be a far less satisfactory test both of the moral guilt and of the public danger of an act of violence. It must, however, be recollected that the most serious of all the offences defined by the English law on this subject, namely, injuries inflicted with intent to murder, would, under French law, be dealt with as "tentatives," to commit either *assassinat* or *meurtre*, and would subject the offender upon conviction to the punishment inflicted for those offences.

The provisions of the French law as to bodily injuries not amounting to a *tentative d'assassinat* or *de meurtre* are stated in Articles 309-313 of the Penal Code. They establish a sort of scale for the punishment of "tout individu qui "volontairement aura fait des blessures, ou porté des coups, "ou commis tout autre violence ou voie de fait," as follows:—

If the result is		The punishment is
(*a*) Illness, or incapacity to work for more than twenty days	=	Imprisonment for two to five years, and fine of 16-2,000 francs.
(*b*) Mutilation, amputation, or loss of the use of a member, blindness, loss of an eye, or other permanent infirmity	=	*Reclusion*, *i.e.* imprisonment with hard labour from 5-10 years.
(*c*) Death	=	*Travaux forcés*, 5-20 years.

If there is premeditation or *guet-apens*, the punishment in case (*a*) is *reclusion*; in case (*b*) *travaux forcés*, 5-20 years; in case (*c*) *travaux forcés* for life.

Similar remarks apply as to the German law relating to attempts. Its provisions as to the intentional and negligent infliction of bodily injury are as follows:—

Art. 223. Whoever intentionally ill treats the body of another, or injures his health, is punished with imprisonment up to three years, for the infliction of bodily harm (*Korperverletzung*).

223*a*. If the injury is inflicted by means of a weapon, particularly a knife, or some other dangerous instrument, or by means of a treacherous attack, or by several persons in common, or by any treatment (*Behandlung*) endangering life, the imprisonment must be for not less than two months.

CH. XXVII.

224. If the bodily injury has for its result that the injured person loses or is permanently injured to a serious extent as to any important member of the body, or if the sight of one eye or both eyes, or his hearing, or his power of speech, or his virility, or if he falls ill, or is crippled, or goes mad, the punishment is *Zuchthaus* up to five years, or imprisonment for not less than one year.

225. If the before-mentioned consequences were intended and happened, the *Zuchthaus* must be from two to ten years.

CHAPTER XXVIII.

HISTORY OF THE LAW RELATING TO THEFT AND SIMILAR OFFENCES.

NEXT to the crimes that affect the State at large and the persons of individuals, come those which affect the properties and proprietary rights of individuals. These are the crimes which are most commonly committed, and for which the most elaborate provision has been made by legislation. The common feature of all of them is that the criminal seeks to deprive the lawful owner of his property. Before relating the history of these offences as defined by the law of England, it will be well to make some observations upon the divisions into which the subject falls apart from technicalities, and when considered solely in reference to those relations of life which are recognised and regulated by law, but are founded on human nature.

Offences relating to property fall into two principal classes, namely, fraudulent offences which consist in its misappropriation, and mischievous offences which consist in its destruction or injury. Theft is the typical fraudulent offence, and arson the typical mischievous offence.

The fraudulent offences may be further classified under four principal heads, namely, fraudulent misappropriations of property; forgery; offences connected with the coin; offences connected with trade. In each of these cases the object of the offender usually is the fraudulent acquisition of the property of another. In the case of forgery this object is attained by tampering with documents; in the case of coinage, offences by tampering with the coin; but each has

CH. XXVIII.

the same object in view, namely, the fraudulent acquisition of property. Indeed if there were no special laws against forgery and coinage offences they would nearly all be punishable as cases of obtaining property by false pretences. Coinage offences have sometimes been regarded as offences against the State, and some of them were, down to the present century, regarded as a species of high treason, but this seems to me to be a classification upon a false principle. Such crimes have no special tendency to disturb the public peace, and have no other effect than that of defrauding particular people.

The offences relating to trade are of a special kind, and will be separately considered hereafter.

The present chapter, then, has for its subject offences consisting in the fraudulent misappropriation of property. No branch of the law is more intricate, and few are more technical. In order to understand it fully it is necessary to mention one well-known general principle as to property and proprietary rights. A thing is the property of a man when the man is enabled by law to deal with the thing at his pleasure in every way in which the law permits him to deal with it, and to exclude all other persons from dealing with it in any way whatever except by his consent. Hence property is a general name for a number of different rights, or legal powers which may be exercised over things, each of which rights taken separately may be regarded as the property of the person who is entitled to it. If I am the tenant in fee-simple of a freehold house it is my absolute property, and I may do with it whatever my interest or caprice may suggest, unless the law forbids me. But if I let it to a tenant the full property is in neither of us. The right to occupy on the terms of the lease is his property. The right to receive the rent and to resume the full property of the house at the end of the term are my property. So in the case of chattels. A cargo of wheat may, at the same time, be the property of A., be pledged to B., and be subject to a lien of C.'s. The strongest of all cases of divided ownership is that of trustee and *cestui que* trust. The trustee has the full legal interest, but he holds it solely for the benefit of other persons whose

power over the subject-matter differs in various ways according to the nature of the trust. All proprietary rights, however, have one feature in common: they must exist in relation to some thing, and though in strictness the rights rather than the thing to which they relate form the property of the different persons who are entitled to them, the word property is commonly applied to the thing and not to the rights thus connected with it.

The following are the principal legal relations which can exist between a person and a thing:—

1. The person may be the absolute owner of the thing, no one else having any sort of interest in or power over it.

2. Two or more persons may be the joint owners of a thing, each being entitled either to the whole or to undivided shares of it.

3. There may be a general and a special property in a thing, one person having special rights over it and another being the owner for all other purposes subject to those rights. A pledgee, a bailee, a person entitled to a lien, has a special property in the thing pledged, bailed, or subject to the lien.

4. One or more persons may be the legal owners of a thing as trustees, the beneficial interest being in others according to the nature of the trust.

Besides these modifications of ownership there must be taken into account various modifications of the actual power which a man may have over a thing. These are possession and custody or charge. A moveable thing is said to be in the possession of a man when he is so situated in respect to it that he can act as its owner, and that it may be presumed that he will do so in case of need.

If one person gives to another the possession of a thing on terms that he shall use it for some special purpose and return it on demand, the person to whom such possession is given is said to have the custody or charge of the thing. The word charge is sometimes used, at least by lawyers, to indicate a less permanent and slighter connection with the thing than the word custody, though the two cannot be clearly distinguished. Wine in a cellar, of which the butler has the key, would be said to be in the butler's custody. A drinking-cup

CH. XXVIII. set before a guest at an inn for his use during his meal is said to be in his charge.

Possession may be either connected with or separated from ownership in any of its degrees, but a custody or charge can exist only where some one other than the custodian is possessor.

Few words known to the law have caused more discussion than the words "possession" and "custody." I pass over, for the present, the questions connected with them, but I shall have to notice them to some extent in their proper place.

The transfer of property from one person to another may take place lawfully by inheritance, by gift or contract, by an act of the law, and in a few cases by the act of a wrongdoer. A thief, for instance, can change the property in stolen coin by paying it as the price of goods to a *bonâ fide* vendor. It follows that, except in the case just mentioned, the misappropriation of property operates not by transferring proprietary rights, but by transferring the power of actual enjoyment of those rights, *i.e.* by dealing with the possession or custody of the thing to which they are attached—and this, it will be seen, is a matter of great importance in reference to the group of crimes under consideration.

The expression "fraudulent misappropriation of property" obviously involves three elements: fraud, property capable of being misappropriated, and misappropriation in its various forms. [1]Fraud, as I have observed elsewhere, involves, speaking generally, the idea of injury wilfully effected or intended to be effected either by deceit or secretly, though it is not inconsistent with open force. It is, however, essential to fraud that the fraudulent person's conduct should not merely be wrongful, but should be intentionally and knowingly wrongful. Fraud is inconsistent with a claim of right made in good faith to do the act complained of. A man who takes possession of property which he really believes to be his own does not take it fraudulently, however unfounded his claim may be. This, if not the only, is nearly the only case in which ignorance of the law affects the legal character of acts done under its influence.

The next element of the crime of wrongful misappropriation is property capable of being misappropriated. If we

[1] Vol. II. pp. 121, 122.

consider the various classes into which property may be divided some of the leading principles upon this subject become self-evident. All property at bottom consists of legal rights, but, as has been already said, the word is commonly applied to the things with which certain classes of rights are associated, and if the word is used in this sense property may be divided into two great classes, namely, immoveable and moveable property, and this distinction corresponds nearly, though not absolutely, with the further distinction between property held by title and property held by possession.

There are, however, immense masses of property, valuable in the highest degree, which fall under neither of these heads, and which consist of legal rights enforceable either against particular persons or against the world at large.

Of rights enforceable against particular persons, debts and other rights arising under contracts, and shares in mercantile undertakings, are the most striking illustrations.

Of rights enforceable against all persons indiscriminately. Patent rights, copyrights, and the right to trade marks are the only specimens which occur to me, but there may be others of the same kind.

In reference to the possibility of fraudulent misappropriation each of these kinds of property differs. Misappropriation, as I have already said, involves not a transfer of proprietary rights in the thing misappropriated, but a transfer of the power of making use of it. If you steal my horse my right to him remains unaffected, but you can use him for all purposes as if he were your own as long as I am unable to discover your crime.

Apply this consideration to each of the four classes of property mentioned.

It is obvious that it is physically impossible to misappropriate a right of action against the world at large, such as the copyright of a book or a patent to an invention, though it is possible to infringe and so to diminish or destroy its value. It is equally obvious that it is physically impossible to misappropriate a right of action against a particular person. No one can steal a debt, or a share in a partnership, or

CH. XXVIII

stock in the funds, but this ought to be coupled with the observation that there is no difficulty in misappropriating things which are valuable only as the symbols of debts or other liabilities, such as promissory notes, bonds, bank-notes, share and stock certificates.

As for immoveable and moveable property, both are obviously capable, in all cases, of being fraudulently misappropriated. The case of moveable property is simple. Such property is commonly held by possession and not by title, and the only advantages of it are those which the possessor has the means of enjoying. It can, therefore, in all cases be misappropriated by removing it from the place where its owner has control over it to some place where it is under the control of a person other than the owner.

Immoveable property is also capable of being misappropriated, though not by removal from place to place. If the heir-at-law of a dying man, knowing that he has been disinherited, secretly destroys his ancestor's will and takes possession of his estate to the exclusion of the devisee, he fraudulently misappropriates the estate as much as a man who picks another's pocket fraudulently misappropriates its contents. The alteration of landmarks, fraudulent inclosures, unlawful evictions by landlords of tenants, unlawful holding over by tenants against landlords, are all cases of the fraudulent misappropriation of immoveable property.

From these considerations a distinction must always exist between offences against moveable and immoveable property. It is in common cases nearly impossible to misappropriate land permanently otherwise than by certain definite means which are usually crimes in themselves. To destroy a will, to forge a deed, to personate a dead man, are crimes punishable with the severest secondary punishment. But land can hardly be made the subject of downright robbery. To drive a man out of his house and to keep forcible possession of his estate without any shadow of right is an offence which in quiet times in England it is almost impossible to commit. Misappropriation, whether of moveable or immoveable property, is possible only where the property misappropriated can be concealed or made away with, which is not

the case with land. The offence of forcible entry and detainer, an offence hardly ever committed in these days though formerly common, has no doubt a resemblance to robbery; but it is distinguished from it by the fact that in cases of forcible entry there is generally a claim of right, so that when the offence is committed it is rather a breach of the peace by the disorderly assertion of an alleged right than a case of misappropriation of property.

It should be observed that these remarks apply only to land, which, so long as its character as land is not destroyed, is immoveable. They have no application to things attached to or growing out of the land which retain their value when detached from it, such as timber or fences; nor do they apply to parts of the land which have a value, as minerals. To dig up and carry off coal, brick-earth, or stone, may be distinguishable, technically, from stealing anything else, but the distinction is purely technical.

Lastly, things which are not the property of any one, and *a fortiori* things which cannot be the subject of property, cannot be misappropriated fraudulently or otherwise. A perfectly wild animal in the possession of its natural freedom belongs to no one; but such animals when tamed or kept in confinement may be the subject of property, and their dead bodies usually belong to some one, and may therefore be misappropriated, and the same is true of things abandoned by the owner, as wreck. The dead body of of a human being is almost the only moveable object known to me which by our law is no one's property, and cannot, so long at all events as it exists as such, become the property of any one. I suppose, however, that anatomical specimens and the like are personal property.

I come now to consider the way in which fraudulent misappropriation may be effected, and for this purpose I shall confine my observations to the fraudulent misappropriation of moveable property.

All misappropriations of property may be brought under one of two general heads.

1. The property misappropriated may be physically removed—taken and carried away—from the place where it is

CH. XXVIII. in the owner's possession, or where, if it is not in his possession, he could take possession of it, to some place where it is in the possession of someone else. This may be done either against the will of the owner, whether secretly or by open force, or by the consent of the owner obtained by fraud.

2. The property, being lawfully in the possession or custody of some person other than the owner, may be withheld from the owner by the possessor or custodian, or may be given by him to some third person.

Under the first head are comprised the offences of theft, robbery, and obtaining property by false pretences. Under the second head are comprised a variety of offences which may be described collectively as criminal breach of trust.

The expression, "criminal breach of trust," is liable, owing to one of the leading peculiarities of the law of England, to be misunderstood, as it includes two totally different kinds of offences; namely, first, breach of confidence, as when a borrower makes away with something lent to him, and secondly the misbehaviour of a trustee, who is the full legal owner of the subject-matter of the trust for the benefit of some other person. The legal considerations, and also the legislative considerations which arise in connection with these two classes of offences, differ widely, and are of great importance. The want of a due recognition of this distinction has thrown great obscurity over the whole of the subject.

Speaking roughly, the history of our law on the subject is this:—

Theft and robbery in their coarsest form were for many centuries capital crimes. Cheating was a misdemeanour at common law. The special form of cheating called obtaining property by false pretences became a statutory misdemeanour in the eighteenth century.

Criminal breach of trust, using the expression in the first of the two senses mentioned above, was for many centuries only a civil injury, though one form of it (larceny by servants) was by fictions about possession held in some cases to be a felony. Many other forms of the offence have at different times, and especially in our own days, been made punishable by statute; but the law upon the subject is still incomplete.

Criminal breach of trust, in the second of the two senses above mentioned—misbehaviour of trustees having the full legal ownership of property—was first made criminal in the year 1857. Up to that time it was punishable only if the circumstances were such as to admit of its being treated as a contempt of the Court of Chancery.

I now proceed to give the history of the law upon the various points to which, in this analysis, I have directed attention.

The punishment of theft is provided for by many of the laws of the early English kings, but I have found no passage which shows that they regarded the word itself as requiring any [1] definition. Indeed, in common cases the word is plainer than any definition of it could be. Theft, according to these laws, seems to have been the crime of crimes. They are inexorable towards it. They assume everywhere that thieves are to be pursued, taken, and put to death there and then. Moreover, the precautions which they take against theft must have been burdensome in the extreme; indeed, if they were ever fully put in practice they must have been inconsistent with commerce and with travelling. A man was presumed to be [2] a thief if he travelled through a wood without shouting or blowing his horn, and [3] laws existed (which lasted down to the time of Bracton) on the subject of the warranty of chattels which must have made it dangerous to an extreme degree to buy anything from a stranger. As I have already said, the question when theft was first made a capital crime is obscure, but it is certain that at every period some thefts were punished with death, and that by Edward I.'s time, at least, the distinction between grand and petty larceny, which lasted till 1827, was fully established.

The first hint at anything like a definition of the offence of theft with which I am acquainted in English law is to be found in Glanville. The subject of the tenth book of his work is, "De debitis laicorum quæ debentur ex diversis

[1] The nearest approach to one is in the laws of Ine (No. 13). Thorpe, i. 111 (8vo. edition). "Thieves we call as far as vii. men, from vii. to xxxv. a 'hloth' (lot); after that it is a 'here' (host or army)."

[2] Vol. I. p. 61. [3] See *e.g.* laws of Æthelred, i. 9; Thorpe, i. 290.

CH. XXVIII. "contractibus, videlicet ex venditione, emptione, donatione, "mutuo, commodato, locato conducto, et de plegiis et vadiis, "sive mobilibus sive immobilibus, et de cartis debita conti- "nentibus." The words are remarkable because they show how full the mind of Glanville was of the Roman law. In the thirteenth chapter of the tenth book he deals with debts arising out of the contract of commodatum, and expresses a doubt as to what was to be the measure of damages, what the proof, and who the judge, if a person to whom a thing had been lent to be used at a fixed place for a fixed time, used it elsewhere and for a longer time. "A furto enim omnimodo "excusatur per hoc quod initium habuerit suæ detentionis per "dominum illius rei." This passage is [1] quoted by Coke as a statement of the later doctrine of the common law as to the necessity of an unlawful taking in larceny. The common law can hardly be said to have been in existence when Glanville wrote, but his statement is certainly singular. It seems to show that Glanville supposed that his statement embodied a doctrine of the civil law as then understood, as to the *actio furti*. If, however, this was his opinion, he was mistaken, for there are [2] many texts in the *Digest* which prove that the civil law was the contrary of what he asserts. It is indeed one of the great distinctions between the Roman and the English law of theft that though according to the [3] Roman law "furtum sine contrectatione non fiat," the "con- "trectatio" might, according to that law, take place after the thing stolen had come honestly into the thief's possession. Glanville's doctrine, then, was not taken from the civil law. Whence it came, or how far in his day it extended, I cannot say.

The next author on the subject is Bracton. His account

[1] Coke, *Third Institute*, p. 107. Coke gives what he regards as the equivalent of Glanville's statement. He makes him say, "Furtum non est ubi "initium habet detentionis per dominum rei." *Detentionis* should be *detentio* to make sense. The genitive is right in Glanville. The nominative to his "habuerit" is the person who is excused.

[2] *E.g.* "Si ego tibi poliendum vestimentum locavero, tu vero inscio aut "invito me commodaveris Titio, et Titio furtum factum sit et tibi competit "furti actio quia custodia rei ad te pertinet et mihi adversus te quia non "debueras rem commodare et id faciendo furtum admiseris." *Dig.* xlvii. 48, 4. So, "Si pignore creditor utatur furti tenetur. Eum qui quid utendum accessit "ipse alii commodaverit furti obligari responsum est." *Dig.* xlvii. 54, 1.

[3] *Dig.* xlvii. 87, 19.

of the law of theft [1] is as follows:—"Furtum est secundum "leges contrectatio rei alienæ fraudulenta, cum animo furandi, "invito illo domino cujus res illa fuerit. Est autem quasi "furtum rapina quæ idem est quantum ad nos quod robberia, "et est aliud genus contrectationis contra voluntatem domini "et similis pœna sequitur utrumque delictum et unde prædo "dicitur fur improbus; quis enim magis contrectat rem ali- "quam invito domino quam ille qui vi rapit?" He then goes on to distinguish theft into two classes,—*manifestum*, when the thief is taken in possession of the goods, and *non manifestum*, when he is suspected by common report, and there are heavy presumptions against him. The definition given in the [2] Roman law is very similar to this:—"Furtum est "contrectatio fraudulosa lucri faciendi gratiâ, vel ipsius rei "vel etiam usus ejus possessionisve quod lege naturali "prohibitum est admittere."

There are several important differences between these definitions. Bracton's definition includes the element of "invito domino," which is not expressed in the one given in the *Institutes*. [3] There is, however, much reason to think that it ought to have been inserted in the last-mentioned definition, for some of the Roman lawyers went so far as to doubt whether a robber was a thief if the goods of the owner were surrendered from fear—a doubt which perhaps suggested the concluding part of Bracton's definition.

The words "cum animo furandi," which are in Bracton, are not in the *Institutes* or the *Digest*, and they are no doubt tautologous, though if construed as excluding from the definition of theft the case of a taking under a claim of right they are by no means superfluous. They are in [4] the spirit of the Roman law, which in reference to this, as well as many other branches of the law, attached a full share of importance to the intention of the agent. [5] "Maleficia," says Paulus, "voluntas et propositum delinquentis distinguit."

So far Bracton differs from his model only in being more

[1] Bracton, ii. 508.
[2] *Institutes*, iv. 1, and *Dig.* xlvii. tit. ii. 1, 3. They repeat each other word for word. The passage in the *Digest* is from Paulus *Ad Edictum*.
[3] See passage referred to above, Vol. I. p. 35.
[4] See passages quoted, Vol. I. p. 33.
[5] *Dig.* xlvii. tit. ii. 53.

CH. XXVIII.

explicit, but he omits two elements of the Roman law definition which have never been included in our own. The first is contained in the words, "lucri faciendi gratiâ," the second in the words, "usus ejus possessionisve."

To this day it is part of the law of this country, as settled by very modern cases, that the motives which lead a man to commit theft are immaterial, and that the definition of the offence includes an intention to deprive the owner of his property permanently.

Bracton's division of thefts into *manifesta* and *non manifesta* is taken directly from the Roman law. It obviously has relation, not to the crime itself, but to the evidence by which the fact that it was committed is proved. It may have been of some importance in English law so long as the franchise of infangthief, which extended to thieves "taken in "the manner," or "handhabend and backberand," continued to exist, but it has been forgotten for ages. I should conjecture that it was not derived by the English from the Roman law, but that the existence of customs so similar, in times and places so remote from each other, was due to the circumstance that in a very rude state of society such a distinction was likely to present itself as a natural one.

It is remarkable that Bracton is silent upon the subject of the sort of goods which are capable of being stolen, as well as upon the manner in which fraudulent misappropriations of property may be made—indeed the quotations already given contain all that he says upon the theory of theft, though he has much to say as to the mode of prosecuting the offence by appeal.

[1] Britton adds nothing to Bracton on the theory of the law, indeed he does not give any definition of theft; but some of his observations on the course of appeals of larceny may throw indirectly some light upon a very obscure subject. When property was stolen, the person who lost it could proceed against the supposed thief either "by word of felony," in which case battle was waged and the appellee might, if defeated, be hanged; or "the sakeber" (the owner of the goods) "if he pleases, may bring an action for his goods as

[1] Britton, i. 55-59, also 115-122.

"lost; and then he shall not sue judgment of felony but of "trespass only." In [1] describing the form of the appeal Britton says that if the appellee "pleads that the horse was "his own, and that he took him as his own; [2] and as his "chattel lost out of his possession, and can prove it, the "appeal shall be changed from felony to the nature of a "trespass. In this case let it be awarded that the defendant "lose his horse for ever." These passages indicate that an appeal of larceny much resembled an action of trover, and might indeed be converted into one. When the moveable property of one man got into the hands of another, the owner's chance of recovering it was lost by a prosecution on indictment. It was only on a conviction on appeal that the property was restored, till the 21 Hen. 8, c. 11, gave the owner a writ of restitution in such cases. It was obviously therefore much more advantageous for the appellor to sue for trespass than "by words of felony," as in the latter case he might have to do battle. Hence it was the interest of every one concerned to extend the scope of the law of trespass and to restrain the scope of the law of larceny, and this may, I think, have been one reason why it was said to be essential to larceny that the taking, as opposed to the conversion, of the goods should be fraudulent, and why so many different classes of things should have been held not to be the subject of larceny. A man whose horse had been fraudulently carried off by some one to whom he had lent it, or whose timber had been felled and carried away, would be little inclined to quarrel with a view of the law which enabled him to recover the lost property, or damages for it, without risking his life in a trial by combat. Upon this last head the [3] following passage from Britton is significant:—"As to "pigeons, fish, bees, or other wild animals found in a wild

[1] Britton, i. p. 116.

[2] "Et cum soen chatel adirré," "lost him as his own." One MS. reads "ament" for "adirré," which makes better sense, "took him as his own." If the appellee could prove that the horse was his own, and that he lost him, it is difficult to say why he should not keep him after retaking him. If he admitted that the horse belonged to the appellor, but proved that when he (the appellee) took the horse he supposed him to be his own, he could be acquitted of the felony, but would of course have no claim to the horse. I take Mr. Nicholl's translation.

[3] Britton, i. p. 122.

CH. XXVIII. "condition, we ordain that no man have judgment of death "on account of them; but otherwise if they have been "feloniously stolen out of houses, or if they are tame beasts "out of parks." Obviously this is little more than another way of saying that such animals are not the subject of larceny, and that trespass is the proper remedy for an injury done in relation to them. I am inclined to think that at the early period when the law of theft was in process of formation these considerations may have had more to do with the narrow limitations put on it than scruples as to the infliction of capital punishment, for it is certain that the severity of the criminal law rather increased than diminished for many centuries, as felony after felony was excluded from the benefit of clergy.

A statement of the theory of the law of larceny appears in the *Mirror*, of which I have [1] already spoken. It contains much which undoubtedly formed for centuries, and indeed still forms, part of the law. It also contains much which, so far as I know, never was the law, and which is indeed directly opposed to it as it now is, and as for many centuries it has been. The variations between these very early authorities are what it is natural to expect under the circumstances. The law was formed by very slow degrees, and rather by controversy than by express authoritative enactment. Hence in early times persons who held different opinions would state it in different ways. The following are the principal passages in the [2] *Mirror* on this subject:—

"Larceny is the treacherously taking away from another "moveable corporeal goods against the will of him to whom "they do belong by evil getting of the possession or the use "of them. It is said a taking, for bailing or delivery is not in "the case; it is said of moveables corporeal, because of goods "not moveables or not corporeal, as of land, rent, advowsons "of churches, there can be no larceny; it is said treacherously, "because that if the taker of them conceive the goods to be "his own, and that he may well take them, in such case it is

[1] Vol. I. p. 52, *note*.
[2] I quote from a seventeenth century translation, pp. 31-36.

"no offence, nor in case where one conceives that it pleases "the owner of the goods that he take them."

This is, as far as it goes, a perfect definition of the offence of theft as it is still understood in this country. It is more explicit than Bracton's, and the [1] adaptation of the words of the Roman law to a new meaning, whilst the words themselves are retained, is worthy of observation, because it shows that, whilst the Roman law was well known in the time of Edward I. in England, it was intentionally deviated from. There are, however, many other things in the *Mirror* which are not, and hardly can have been, law, indeed some of them contradict the definition given. Thus the author says, "Lar-"ceny is committed sometimes by open thieves, sometimes "by treacherous; as it is in divers kinds of merchandises, and "as it is of labourers who steal their labours: and as it is of "bailiffs, receivers, and administrators of others' goods, who "steal them in not giving their accounts." This is directly opposed to the definition given just before. Labour is not a "chattel corporeal," and a man who does not give in his accounts cannot be said to "take." Elsewhere he says, "into "this offence fall all stealers of others' venison, and of fish in "ponds, and of conies, hares, pheasants, partridges being in "warrens, and other fowl, doves and swans, of the eyeries of "all manner of birds." This is directly opposed to some of the best ascertained and most ancient rules of the law. The author of the *Mirror*, however, in many cases seems to write rather as a casuist than as a lawyer. He goes so far as to say, "Into this offence fall all those who take lands, tene-"ments, houses, or other things, and use them beyond the "appointed time for the loan of them . . . and those who "oftener than twice in the year hold sheriff's tourns, or who "oftener than once in the year hold views of frankpledge in "one court . . . counters" (barristers) "who take outrageous "salary or not deserved," &c.

In the absence of any systematic writers on the criminal

[1] *Institutes*:—"Contrectatio . . . vel ipsius rei vel etiam usus ejus posses-"sionisve."

Mirror:—"Larcine est prise d'autre moeble corporelle treacherousement "contre la volunt de celuy à qui il est per male egaigne de la possession ou "del use."

CH. XXVIII. law between Edward I. and Henry VIII. the growth of the law must be traced in the Year-books. I have examined all the cases vouched by the later writers, but I have not examined the whole of the Year-books for myself, and it is possible, though not probable, that they may contain other decisions of importance bearing on this subject than those which later writers have vouched. In order to give an idea of the gradual development of the law, I will notice the more important of these cases in their chronological order.

The first case is 2 Edw. 3, p. 1, No. 3 (A.D. 1328). A man was indicted in the sheriff's tourn, for that he "felonice "abduxit unum equum rubrum price de tant." He had the indictment removed into the King's Bench, when it was held that the indictment was one on which he could not be tried, as it did not say whether he had taken the horse feloniously or whether he had led it away feloniously after it had been delivered to him lawfully. This is a judicial recognition of part of the doctrine of the *Mirror* as to the proper definition of theft.

In the [1] 22nd Edw. 3 (1349) a man was indicted for feloniously cutting down and carrying off trees. "Et fuit "moue" (I suppose moved, argued) "que ceo ne puit estre "dit felonie pour ce que ne puit estre fait sans grand leyser "et auxi felonice succid n'est bon." If this short note is correct, and if it represents a decision of the court, it shows that the question, whether cutting down a tree and carrying it away amounted to larceny, was arguable so late as the middle of the fourteenth century, which would show how slowly the law was formed. The definition in the *Mirror*, which in many respects is so perfect, confines theft to moveable things; but it is silent as to things which are capable of being made moveable. The reason given in FitzHerbert is remarkable,—cutting down a tree "ne puit estre fait sans "grand leyser." It is not put on the ground that the tree is part of the land on which it grows.

Coke [2] refers to several other cases in the Year-books of Edward III.'s reign in support of the proposition that certain

[1] This case is reported in FitzHerbert, *Corone*, p. 256, but is not in the Year-books.

[2] *Third Institute*, p. 109.

kinds of animals are not the subject of larceny, but his references are wrong—at least I have been unable to verify them. He refers also to [1] some cases of a later date which seldom support the proposition for which they are cited.

Some of them, however, throw light upon the view taken as time went on, and, as such questions came to be brought before the courts, as to the nature of the interest of owners of land in the wild animals living on it.

In 3 Hen. 6, p. 55, No. 34, the Archbishop of Canterbury sued W. T. for entering his warren with force and arms, and chasing and taking [2] his hares. The defendant prayed judgment because the writ said "mille lepōr cep̄ et asportavit," without saying "suos." In an action of trespass he argued the writ says "arbores suas vel blada sua." Otherwise it will abate. So here. The court said that "blada sua" was necessary, because the action would lie only if the corn was really the property of the plaintiff, but this did not apply to hares or other beasts of warren, for they are not really the property of the owner of the warren, but they are his by reason of the warren, and as long as they are in the warren, for if they go out of the warren any one may take them, "and I shall have "no action for them, which proves that the true property in "them is not in me the lord of the warren, so the writ is "good" without the word "suos."

This case is quoted by Coke to show that wild animals are not the subject of larceny. It shows, no doubt, that wild animals are not in the fullest sense of the word the property of the owner of the land where they are, but it does not show that they cannot be stolen. A somewhat similar but

[1] For instance, he quotes 5 Hen. 5, s. 1, to prove that felony cannot be committed on a wild animal. The case is that the plaintiff sued several defendants for breaking into his park and killing *ses sauvages*. The jury found that one of the defendants, "vient en le parke le plaintiffe pur chaser "les savages pur les aver occist, mes il ne occist ascun savage," and they gave forty shillings damages, which the court thought too little. The action is said to have been on the statute, and no doubt was brought upon 3 Edw. 1 (the Statute of Westminster the First), c. 20, which provides that if trespassers in parks are attainted at the suit of the party, great and large amends is to be made to the party, and the defendant shall have three years' imprisonment, and make fine at the king's pleasure. In the case referred to the court thought the damages too small, and ordered the defendant to be imprisoned for three years, and to give security not to repeat his offence, or to abjure the realm.

[2] "ā levs," &c., but this is inconsistent with the rest of the report.

less simple case occurred 22 Hen. 6, p. 59, No. 13 (A.D. 1444), but I need not notice it in detail.

In 7 Hen. 6, p. 42, No. 18 (A.D. 1429), a singular case is reported. Two persons were indicted because "Quen- "dam W. Waw felon scienter latronem Dūi Regis apud "B. receptavēr, et quædam bona ipsius W. in custodia sua "existeñ vi et armis ceperunt et asportaverunt." Two questions were raised as to the meaning of the indictment; first, whether "scienter" meant that the prisoners knew Waw to be a felon, or that they knew that they received him; and secondly, whether "in custodia *sua*" meant in Waw's custody or in the prisoner's custody. On the second point, assuming that *sua* referred to the prisoners, the question arose whether a man could steal his own goods. It was ingeniously [1] suggested that each of the prisoners might have had half of the goods, and each might have stolen the half which the other had. The prisoners had judgment in their favour, but "il fuit dit que "si jeo vous bail certeins biens a gard et puis jeo eux reprends "felonisement jeo serai pendu, et uncore le property fuit en "moy." The doctrine that a man can steal his own goods from a special owner has kept its place in our text books, but I doubt if it has ever been acted upon.

During the reign of Edward IV. many points connected with the law of larceny were raised and discussed.

One of the most curious occurred in 1471. It is referred to by Coke as 10 Edw. 4, 14, but is described in the Year-book as 49 Hen. 6, p. 14, No. 9.

William Wody was indicted for stealing six boxes with charters and muniments relating to real property. After much debate this was held, before all the justices in the Exchequer Chamber, not to be felony. The reasons seem to have been, partly because the deeds were not chattels but were of the nature of real property, partly because they had no definite assignable value. As to the boxes, it was argued, and the court seems to have adopted the argument, that the boxes were of the same nature as the deeds contained in them. This appears to me to be one of the most pedantic

[1] "Il peut etre que un deux aura la moity en son gard, et que un prist ceo "que son campagnon duist av' et e contra."

and unmeaning decisions in the whole law. The report ends by recording a dictum of one of the judges that if things are given to a servant to sell or keep, the servant cannot steal them.

Much the most curious case relating to theft in the Year-books is one which was decided in 1474, 13 Edw. 4, p. 9, No. 5. It seems to have excited the greatest attention, and to have been debated both in the Star Chamber and in the Exchequer Chamber. The question was whether a carrier who took elsewhere bales of goods intrusted to him to be carried to Southampton, and broke open the bales and carried off their contents, was guilty of felony or not. At the discussion in the Star Chamber, the chancellor was present and took a leading part. The owner of the goods was an alien merchant who had come with a safe conduct, and the chancellor maintained, amongst other things, that on this account he ought to sue, not according to the law of the land, but "solonq. le ley de nature en le chancery." He also maintained that felony depended on the intention of the party, and that, whether the dishonest person had the goods in his possession or not, his intention was equally felonious. It was finally decided that the act did amount to felony. The principle of the decision was that though a man cannot steal goods bailed to him (in which all the judges except Needham agreed), yet, if the bailee does an act which determines the bailment, he may steal the goods.

In this case the carrier had determined the bailment by taking the goods to the wrong place and breaking open the bales.

This has always appeared an extraordinary decision, as, to all common apprehension, theft of the whole thing bailed must determine the bailment quite as much as a theft of part of it. I think it obvious from the report that the decision was a compromise intended to propitiate the chancellor, and perhaps the king. This required a deviation from the common law, which was accordingly made, but was as slight as the judges could make it. They would have liked to hold that where the original taking was lawful no subsequent dealing with the property could be felonious. The chancellor,

CH. XXVIII. who seems to have had regard rather to the position of the owner of the goods than to the criminality of the carrier, seems to have wished to make the matter turn upon the moral character of the act of misappropriation. The judges resorted to the expedient of treating the breaking bulk as a new taking. They thus preserved the common law definition of theft, but qualified it by an obscure distinction resting on no definite principle.

An opinion was expressed in the course of the arguments in this case that there was a difference between having the possession of a thing, and a mere charge of it, as in the cases of a tavern-keeper lending his guest a cup to drink out of, or a cook or butler who has property belonging to his master, not in order to keep or dispose of it, but to serve his master with it as a servant.

The dictum as to servants was reconsidered in 1488 (3 Hen. 7, p. 12, No. 9). The report is in a very few words, and shows how uncertain the law then was. Hussey "demanda question. Si un shepherd emble les brebis qui sont "en son gard; ou un botler les pieces qui sont en sa gard, ou "servants autres choses qui sont en lour gard, si ceo sera dit "felony, et semble a luy que si. Et rehers un cas qui fuit "comment un botler avoit emble certein stuffe que fuit en sa "gard et fuit pendu pur ceo. *Haugh:* Reherce le cas de "Adam, goldsmith de London, qui avoit emble certein stuffe "qui fuit en sa gard et fuit pendu pur ceo. *Brian:* Il ne "poet estre felony pur ceo que il ne poet prendre ceo vi et "armis quand il avoit le gard de ceo. Et les justices fueront "de même l'opinion et issint nient discusse." This seems to have been a conference between the judges at Serjeants' Inn. The decision here (if such it was) seems to have been that misappropriation by a servant did not amount to theft, though there was authority the other way which had been acted on.

In 1523 (14 Hen. 8, p. 1, No. 1) the Bishop of London sued in trespass N., who had entered the Bishop's close and taken herons and shovelers. N. pleaded that the bishop had let to him on lease land in which the herons made their nests and he took them. The bishop replied that the lease excepted

the wood and underwood, and the herons and shovelers built their nests in trees. There was an argument in the case as to the nature of the bishop's interest in the herons. The court held that the reservation of the trees reserved the herons as a part of the profits arising out of the trees. "De ceux "choses et profits qui viennent ratione fundi, come conils, "partriges, et mines, sils ne sont excepts le lessee les aura. "Mes si ce lessor reserve a lui un pond il aura le poisson "pur ceo que ceo est le causa sine qua non; issint est s'il "except le wear il aura le poisson; car le wear n'est que "staks et autres choses."

The case shows that wild birds, animals, and fish were regarded as, in a sense, part of the land, or at least, of its casual profits. In a [1] later case it was held that peacocks might be stolen, because they were tame creatures like domestic fowls, and so differed from fowls and beasts of warren, "Car le prisel de eux avec felonieus entent n'est felony."

Such are the principal statements of the Year-books as to the law relating to larceny. They are collected and repeated first by [2] Staundford, who in this case, as in the case of homicide, seems to consider that Bracton, whom he quotes verbatim and at length, and the decisions in the Year-books make up the law. Lambard [3] goes over the same ground in a more complete and systematic way than Staundford. [4] Coke and [5] Hale repeat the earlier authorities, but add little to them. Neither treats the subject in what can be regarded as a satisfactory manner. After their time the main outline of the subject may be considered as having been fixed, and its subsequent development consisted partly of decisions by the courts making the old principles more distinct by applying them to an endless variety of combinations of facts, and partly—and to a much greater extent—of statutes intended to patch up the defects of the common law. Its principles have never been varied down to the present day. Before noticing the statutes I will try to state in general

[1] 19 Hen. 8, p. 2, No. 11, 1528.
[2] Cap. 15, fo. 24.
[3] Lambard, pp. 271-293.
[4] *Third Institute*, chap. xlvii. pp. 106-110.
[5] 1 *Pl. Cr.* chap. xliii. pp. 503-516.

CH. XXVIII. terms the result of the different authorities to which I have referred as to the common law.

The natural division of the subject appears to me to be, as I have already said, into three parts. In order that there may be a fraudulent misappropriation of property there must be first a fraudulent intention; secondly, property capable of being misappropriated; thirdly, a misappropriation.

As to what amounts to a fraudulent intention there has never been any difficulty or doubt in English law. The *Mirror* states it as plainly as it ever has been or can be stated. If the alleged offender thinks that he has a right to take the property, either because he believes it to be his own, or because he believes the owner to have consented to his doing so, he does not act feloniously, or, as the author calls it, "treacherously." This principle, accordingly, has no history.

As to the things capable of being stolen, the history of the law as deduced from the authorities I have quoted is very singular and by no means distinct. It is obvious, from the doubtful and sometimes conflicting statements in the Year-books, that the law (if so it could be called) consisted for centuries of vague impressions and floating opinions, which were differently understood at different times and by different people. The only authorities were Bracton, Fleta, Britton, the *Mirror*, and the Year-books, and even they were not and could not be printed till towards the end of the fifteenth century. The real subject for surprise is that legal traditions, such as they were, did not vary more than they seem to have done. On the whole, however, the result is as follows:—

In order that a thing might be the subject of larceny it must fulfil three conditions. It must be the subject of property; it must be moveable personal property; it must have a definite value of its own. These conditions were supposed to exclude several classes of things from the possibility of being stolen, but neither the classes of things nor the ground on which they were incapable of being stolen were at all definitely settled. Three classes of things were in one way or another decided to be incapable of being stolen, namely, things growing out of the earth, deeds, and certain animals.

Things of the first and second class, and many animals of the third class, were regarded as not being moveable chattels, but as either realty or savouring of realty. Deeds were also regarded as having no definite, independent value of their own, and the same was said of some animals. Animals also were regarded as not being in the proper sense of the word property. Each of these three principles thus applied to more than one of three classes of things, and the extracts which I have given from the Year-books show how very ill-defined the old law was down to the time of Henry VIII. The last case I have quoted, for instance, shows that in 1528 it was doubtful whether a peacock could be stolen. It was not quite clear whether it was tame or whether it had real value. The meaning of value seems not to have been the same in earlier times as it is in our own days. We should describe anything which could command a price as valuable, but in earlier times it seems to have been thought that "valuable" implied serious practical importance as opposed to mere fancy or amusement. Thus it was argued in the case of the peacock that mastiffs, hounds, and spaniels, and tame goshawks, are not the subject of larceny, "car ils sont proprement choses de plaisir plus que "de profit. Et auxi le peacock est un oiseau plus pour "plaisir que pur profit." This view was carried to an extreme length by Hales, J., who [1] is said to have "thought it no "felony to take a diamond, rubie, or other such stone (not "set in gold or otherwise), because they be not of price with "all men, howsoever some do hold them both dear and "precious." The common law upon this subject was thus extremely uncertain, both in its principles and in their application. I may conclude my account of it by noticing its further development.

The most irrational case which I have quoted from the Year-books is that of the deeds and the boxes in which they were contained. It depended on two principles: first, that the deeds "savoured" of the realty, and that the boxes were merely appurtenant to the deeds; and secondly, that the

[1] Stanford, p. 275. He says the decision is in "7 Edw. 6." As to Hales's various adventures and his suicide, see 1 *St. Tr.* 713, 714.

CH. XXVIII. deeds had no definite independent value. The Year-books do not refer to *choses* in action other than deeds. There is no decision that a bond, for instance, which did not affect land was incapable of being stolen. Coke, however, who accepted any sort of principle laid down in the Year-books as if it was a law of nature, accepted this principle and applied it to all *choses* in action whatever. In [1] Calye's case he gives an elaborate commentary on the writ in the Register which defines the liability of innkeepers for the goods of their guests. Some of its words, he [2] says, "extend to all "moveable goods, although of them felony cannot be com- "mitted, as of charters, evidences, obligations, deeds, speciali- "ties, &c." The only authorities quoted for this incidental statement are the case in the Year-book, 10 Edw. 4, 14, which has been already noticed, and which says nothing of any documents except title-deeds to land; FitzHerbert, *Indictments*, 19; and Broke, *Corone*, 155 (it should be 154); both of which are mere abridgments of the case in the Year-books. Hence the doctrine that a *chose* in action cannot be stolen, which has for its consequence the absurd conclusion that a bank note cannot be stolen, rests upon no foundation except a wholly unauthorised extension made by Coke, in treating of a different subject, of a case in the Year-books, which was itself apparently an invention of the judges in the fifteenth century, resting, moreover, upon a principle which does not apply to documents not relating to lands. In the present day it would be too late to dispute this doctrine, as it has been implicitly recognised by a great deal of legislation founded upon it.

As regards the manner in which property can be misappropriated, the cases in the Year-books, though indistinct and to some extent contradictory, all depend upon the principle explicitly stated in the *Mirror*, and recognised to a certain extent by Glanville, that a fraudulent taking is essential to larceny, and that a fraudulent conversion subsequent upon an innocent taking is merely a civil wrong. In other words, they did not treat fraudulent breach of trust as

[1] 8 Rep. 32*a* (vol. iv. p. 202, edition of 1826). [2] *Ib.* p. 206.

a crime, though the doctrine that a person who had a mere charge of a thing was guilty of felony if he fraudulently converted it was sometimes affirmed and sometimes denied, and though it had been solemnly determined that a bailee was guilty of felony if he fraudulently converted goods after previously determining the bailment. These doctrines form the foundation of a great mass of subsequent legislation, which is wholly unintelligible to a person unacquainted with them. As to the doctrines themselves, the way in which they have been developed, and the modern applications of them to facts, I must refer to [1] my *Digest*, where also will be found a statement of some minor doctrines connected with the law of theft, which, for the sake of brevity, and because they have not exercised much influence on the general form of the existing law, I have not noticed in this historical account of it.

The elaborate and intricate system which has been built upon the common law doctrines summarised by Coke and Hale is composed principally of statutes which have been passed from time to time for the purpose of supplying the defects of the common law. These statutes may be classified under three heads: 1. Those which excluded from benefit of clergy certain kinds of grand larceny. 2. Those which made it an offence of the nature of larceny to steal certain things which at common law were not the subject-matter of larceny. 3. Those which, in certain cases, treated as crimes breaches of trust which by the common law were regarded as mere civil injuries. The statutes in question were consolidated into a single act (7 & 8 Geo. 4, c. 29) in 1827, for which 24 & 25 Vic. c. 96, was substituted in 1861.

It would be tedious to mention all the statutes which were repealed and reenacted by these acts. A list of them might easily be extracted from the repealing act 7 & 8 Geo. 4, c. 27, which repeals a vast number of the old criminal statutes; but the character of the present law, and so much of its history as is of any interest, will be most conveniently

[1] *Digest*, pp. 206-219, chap. xxxv. articles 295-308.

CH. XXVIII. set forth by some observations on the arrangement and contents of the existing Larceny Act, 24 & 25 Vic. c. 96.

The arrangement of the act is so strange that a person who, with no previous knowledge of the subject, attempted to find out from it what was the English law relating to the punishment of theft, and other similar offences, would be simply bewildered. Though it contains 123 sections, and is nearly as long as the *Strafgesetzbuch* of the German empire, it contains no definition of theft, and throws no sort of light upon any of the doctrines which I have been discussing. The following observations, however, will make part, at all events, of its arrangement intelligible.

Section 2 (which reenacts, needlessly, I should have thought, section 2 of the act of 1827) abolishes, or rather reenacts the abolition of, the distinction between grand and petty larceny. The original distinction between them was that grand larceny was a capital though a clergyable felony, exceptions excepted, whereas the punishment for petty larceny was whipping. As the whole doctrine of benefit of clergy was abolished by an act (7 & 8 Geo. 4,. c. 28), which came into force on the same day as 7 & 8 Geo. 4, c. 29, it was necessary to deal in the act last named with the distinction between grand and petty larceny. Why the memory of the distinction should have been revived thirty-three years afterwards I do not know.

The third section, which punishes larceny by bailees, is put in entirely out of its place. It ought to be placed with the sections (67—87) which relate to criminal breaches of trust.

It is followed by a series of sections (4—9, both inclusive) as to the punishment of larcenies not specially punished in later parts of the act; but the effect of these sections is obscured by the intrusion of two sections (5 and 6) about indictments. The other sections provide in substance that larceny not otherwise provided for shall be punishable by three (afterwards increased to five) years' penal servitude as a maximum on a first conviction, by ten years' penal servitude as a maximum after a previous conviction for felony, and by seven years' penal servitude as a maximum after a previous conviction for certain indictable misdemeanours or after two

summary convictions. These provisions are obscured by the introduction of the expression "simple larceny," which has no definite meaning.

The rest of the act consists mainly of exceptions to common law rules, at least it is arranged with reference to them. The arrangement is shortly as follows:—

Sections 10—26 are principally exceptions from and qualifications of the common law rules about stealing animals. Sections 27—30, exceptions to the common law rules as to stealing documents. Sections 31—39, exceptions to the common law rule that land or things growing out of or fixed to land cannot be stolen. Sections 67—87 are exceptions to the common law rules that fraudulent breach of a common law trust is not a crime, and that a trustee possessed of the whole legal interest in property commits no offence when he defrauds his *cestui que* trust.

I will make some observations on each of these, and on some other parts of the act:—

First, as to the sixteen sections (ss. 10—26, both inclusive) relating to the theft of different kinds of animals, and to offences relating to deer and fish. Section 10, which punishes cattle stealing, is in substitution for a series of enactments [1] already referred to, by which the theft, first of horses and afterwards of sheep and other cattle, was made felony without benefit of clergy. The rest are exceptions to the common law rule according to which certain animals were not capable of being stolen. Thus ss. 18, 19, and 20 contain a series of special provisions about stealing dogs. They are founded mainly on 8 & 9 Vic. c. 47, which repealed and reenacted, with additions, 7 & 8 Geo. 4, c. 29, ss. 31 and 32, which had reenacted, with additions, 10 Geo. 3, c. 18, repealed by 7 & 8 Geo. 4, c. 27. The 10 Geo. 3, c. 18, was the first act which altered the common law by which dogs were not the subject of larceny. To have made dogs the subject of larceny simply would, as the law stood in 1770, have made the stealing of every dog worth more than a shilling a capital crime on the second offence. The offence, accordingly, was made a special one, punishable,

[1] See Vol. I. pp. 464-468, 473.

CH. XXVIII. on summary conviction, with fine and imprisonment. [1] Some of the other sections may be regarded as a supplement to the game laws. They apply to deer stealing, and stealing hares and rabbits in warrens. Each of these has its own separate history. Some of the statutes as to offences against deer, contained in ss. 13—16, may be traced back as far as to the reign of Richard II., and [2] give the effect of many subsequent statutes, including, amongst others, part of the well known Waltham Black Act of 1722.

Sections 27, 28, 29 and 30 practically go a long way towards repealing the monstrous rule that documents constituting evidence of a right of action, or relating to land, cannot be stolen. They do so by specifying all documents or classes of documents falling under the rule which either occurred to the draftsmen of the act, or had been excepted from the common law rule by earlier legislation. The earliest statute of this class was 8 Hen. 6, c. 12, s. 3 (1429), which punishes the stealing of records.

Sections 31—39 repeal in the same cumbrous way the common law rule that things fixed to, growing out of, or (like minerals) forming part of, the soil cannot be stolen. These eight sections enumerate everything of the kind which can be stolen, and provide special punishments for stealing them. Many sections represent many earlier enactments passed at different times, to which I need not refer. The result is that twenty-eight sections of the Larceny Act are employed in repealing in detail three general common law rules, two of which (the rule about written instruments, and the rule about things savouring of the realty) are essentially absurd, whilst the third (the rule as to stealing animals) was encumbered with needless difficulties by the extravagant severity of the common law relating to theft. It is right and necessary to have a rule distinguishing clearly between the theft of an

[1] See the effect of them collected in my *Digest*, art. 386, p. 314.

[2] The old acts as to deer stealing were 13 Rich. 2, st. 1. c. 11; 19 Hen. 7, c. 11; 5 Eliz. c. 21: 3 Jas. 1, c. 13; 7 Jas. 1, c. 13; 13 Chas. 2, st. 1, c. 10; 22 & 23 Chas. 2, c. 15 and c. 25; 3 & 4 Will. & Mary, c. 10; 5 Geo. 1, c. 15 and c. 28; 9 Geo. 1, c. 22, ss. 1 and 13. Some of these were repealed and consolidated by 16 Geo. 3, c. 30, 42 Geo. 3, c. 107; 51 Geo. 3, c. 120. These added to, repealed, and modified each other, and were themselves repealed by 7 & 8 Geo. 4, c. 27.

animal which is either tame or in confinement, and the unlawful pursuit and capture of a wild animal; but it is absurd to put in different classes the stealing of a dog worth many pounds, and which is a sort of friend to his owner, and the stealing of the dog's collar which is worth a few shillings and has no special interest.

The next series of sections (40—49) relate to robbery and cognate offences. [1] They are somewhat intricate. Robbery was originally a clergyable felony; but highway robbery was excluded from clergy by 23 Hen. 8, c. 1, and all robbery by 3 & 4 Will. & Mary, c. 9. When benefit of clergy was abolished, all robbery was made a capital crime by 7 & 8 Geo. 4, c. 29, s. 6. By 7 Will. 4 and 1 Vic. c. 87, s. 2, capital punishment in such cases was abolished, except in cases of robbery with wounding. The act of 1861 makes the maximum punishment of the robberies which were capital till 1861 more severe than that of other robberies. In 1863 flogging was added as a punishment for some forms of robbery by 26 & 27 Vic. c. 44, s. 1, an act so capriciously worded that, if a man beats a woman about the head with intent to rob her, he may be flogged, but not if his object is to ravish or murder her.

The crime of extorting money by threatening to accuse the person threatened of crimes, and particularly of specially infamous crimes, is associated with robbery, and has a somewhat peculiar history. By [2] several statutes passed in the course of the reigns of George I. and George II. an attempt to extort money by letters threatening to accuse persons of crimes was made punishable by transportation for seven years, or, if the threat was to murder, by death. These statutes did not, however, include verbal threats. In 1776 the actual extortion of money by verbal threat to accuse a man of unnatural practices was [3] held to be robbery. By 4 Geo. 4, c. 54, the offence of threatening with intent to extort was made punishable by transportation for life, and by later acts, which are collected

[1] Their effect is given in my *Digest of the Criminal Law*, chap. xxxix. arts. 313, 314, pp. 227, 228.

[2] 9 Geo. 1, c. 22 (the Waltham Black Act); 27 Geo. 2, c. 15; 30 Geo. 2, c. 24.

[3] R. *v.* Jones, 1 Leach, 139.

CH. XXVIII. in and [1] represented by 24 & 25 Vic. c. 96, ss. 44, 46, 47, 48, 49 and 50, the whole subject is elaborated in a way shown by experience to be necessary. These statutes have practically superseded the principles laid down in R. *v.* Jones, and subsequent cases.

Sections 50—59, both inclusive, deal with burglary and house-breaking. Burglary was a crime at common law derived from the ancient [2] "Ham-socn, Ham-fare, domus invasio." Its definition involved several intricacies which I need not notice here. The most characteristic element of the offence is that it must be committed at night, *i.e.* between 9 P.M. and 6 A.M., and its history closely resembles that of robbery. It was originally a clergyable felony. By 18 Eliz. c. 7 (extended to accessories by 3 & 4 Will. & Mary, c. 9), it was excluded from clergy. By 7 & 8 Geo. 4, c. 29, s. 11, it was subjected to capital punishment. This was altered by 7 Will. 4 and 1 Vic. c. 86, s. 3, which repealed capital punishment for this offence unless it was attended with certain aggravations, and this provision was repealed by 24 & 25 Vic. c. 96, s. 52, which subjected burglary in all cases to secondary punishment. The cognate offence of housebreaking has been made the subject of a surprising number of minute distinctions, the nature and history of which are not worth the trouble of relating or stating.

Several sections which follow (60—66) punish special forms of larceny, such as stealing in shops and from ships, which were formerly felonies without benefit of clergy, and which, having been originally capital, are still punished more severely than common larcenies.

The next division of the act contains twenty sections (67—87, both inclusive), which, taken together, represent the exceptions which have been made to the general rule of the common law that a fraudulent breach of a common law trust is only a civil injury and not a crime.

The way in which the law was developed seems to me to have some general interest, marking, as it does, a gradual change in the national manners and habits of life.

[1] See my *Digest of the Criminal Law*, art. 314.
[2] *Leges Henrici Primi*, lxxx. 10, 1.

The doctrine of the common law was that fraudulent breach of trust is not a crime, or, if the same thing is more technically stated, that a felonious taking is an essential part of the definition of theft. I have given the early history of this state of the law. It may have been based on the sentiment that against open violence people ought to be protected by law, but that they could protect themselves against breaches of trust by not trusting people,—a much easier matter in simple times, when commerce was in its infancy, than in the present day. However this may have been, the inconvenient and indeed absurd consequences of the doctrine gradually revealed themselves practically, and as they did so attempts were made to obviate them as they arose by a series of statutory exceptions. In the first place, the authors of the common law themselves, as appears from the cases in the Year-books already referred to, shrank from carrying the doctrine out to its extreme consequences. The doctrine appears to have been that the taking must be a taking out of the possession of some person entitled to it. The distinction between a charge and possession readily suggested itself. A man who tells his servant to hold his horse for him, or who allows his guest to drink out of his cup in his presence, was felt to retain his control over the horse or the cup as much as if he held the bridle or the cup in his own hand, and it was accordingly asserted that if the servant in the one case, or the guest in the other, made away with the thing in his charge, he was guilty of theft. It was, however, as I have shown, a moot point how far this went, and whether a servant who had property in his possession for his master, as distinguished from having a mere charge of it, was guilty of theft or not. [1] This doctrine was thoroughly established and acted on in many cases all through the eighteenth century, and a similar series of cases decided that, if a man intending to steal fraudulently induces the owner of goods to intrust him with the possession of the goods and then steals them, it is felony.

The doubts felt as to the case of servants led to the statute

[1] Cases collected in 1 Hawk. *P. C.* 144, 145.

CH. XXVIII. 21 Hen. 8, c. 7, passed in 1529, which recited the doubt, and made it felony in any servant, not being an apprentice or under eighteen years of age, to embezzle any money or chattel intrusted to him by his master to be kept for his use. At a much later date[1] a doubt whether a lodger had a special property in the furniture of his lodging having been decided in favour of a person who had stolen such furniture, an act was passed making such thefts felonies for the future. Some special acts were also passed having reference to [2] servants of the Post Office and [3] Bank stealing things committed to their charge; and a number of statutes were passed inflicting punishments, generally upon a summary conviction, upon servants in particular branches of trade, tailors, weavers, &c., who embezzled, or as it was generally called, "purloined," the property of their masters.

The first general enactment, however, which altered the old common law rule extensively was 39 Geo. 3, c. 85, which was passed in consequence of the decision of [4] Bazeley's case. Bazeley was a clerk in Esdaile's bank. He received as such a note for £100, which it was his duty to put to the credit of a customer who paid it in. Instead of doing so, he applied it to his own purposes. The case, strange as it appears, seems to have been considered as a new one. There is a most elaborate report of the argument, but hardly any cases or authorities upon it were referred to, and the judges decided that it was not within either the common law or any of the statutes then in force. I cannot understand how the question whether such a transaction was or was not criminal can have remained undecided so long. Possibly the excessive severity with which a mere debtor could be treated, then and long afterwards, may have had something to do with it. Bazeley, for instance, clearly owed Esdaile's bank £100, and if his masters wished to punish him they could arrest him on mesne process, in which case he would not have found it easy to get bail. When they got judgment they could imprison him on a *ca sa* for an indefinite time or till payment. However this

[1] R. v. Meers, 1 Shaw, p. 50; 1 Hawk. *P. C.* p. 146; 3 & 4 Will. & Mary, c. 9.
[2] 9 Anne, c. 10; 5 Geo. 3, c. 25; 7 Geo. 3, c. 50.
[3] 15 Geo. 2, c. 13.
[4] Leach's *Crown Law*, p. 835.

may have been, the case was the occasion of 39 Geo. 3, c. 85, which was repealed by 7 & 8 Geo. 4, c. 27, and reenacted by 7 & 8 Geo. 4, c. 29, s. 47. These statutes enacted that if any clerk or servant, or person employed in the capacity of a clerk or servant, should, *by virtue of his employment*, receive or take into his possession any chattel, money, or valuable security for, or in the name of, or on account of, his master, and should fraudulently embezzle the same, he should be deemed to have feloniously stolen the same from his master, although such chattel, money, or security, was not received into the possession of the master otherwise than by the actual possession of the offender. The offence was punishable by fourteen years' transportation. This provision is reenacted with the omission of the words italicised by 24 & 25 Vic. c. 96, s. 66.

This enactment introduced much intricacy into the law. In the first place, though the statute expressly says that the offender is to be deemed to have stolen the property embezzled, it has been held that a person accused must be indicted for embezzlement and not for theft. This was, of course, necessary when the punishments for the two offences were different; but now that the punishment is the same there is no reason whatever for it. The distinction between the two offences is this. If the clerk first reduces the bank note into his master's possession, as by putting it in his master's till, and then takes it out and carries it away, he commits theft. If he misappropriates it before putting it into his master's till, he commits embezzlement. In many cases it is extremely difficult to say beforehand whether on the evidence the offence charged will turn out to be larceny or embezzlement.

This distinction caused failures of justice till it was enacted in 1857 that if upon a trial for embezzlement or theft the accused appeared to have committed theft or embezzlement he should not be entitled to an acquittal. This was repealed and reenacted with some additions by 24 & 25 Vic. c. 96, s. 72. The useless distinction, however, is still kept up, for the offender must be convicted of the offence which he is proved to have committed, and if it was wholly uncertain which of the two he committed, he might have to be acquitted of both.

CH. XXVIII.

The distinction has led to a long series of cases which elaborately distinguish between embezzlement and theft. They turn upon discussions as to the nature of possession, which are as technical and unsatisfactory as all attempts to affix a precise meaning to a word which has no precise meaning must necessarily be.

The words "clerk or servant" have led to an equal or greater number of cases, the difficulty in this case being to distinguish between a servant and an agent, a difficulty analogous to, and hardly less than, that of attaching a perfectly precise meaning to the word "possession."

Lastly, the words "in virtue of his employment" introduced an element of uncertainty into the law which has been removed by their omission.

Twelve years after Bazeley's case occurred the case of [1] R. *v.* Walsh. Walsh was a stockbroker, who acted for Sir T. Plumer. Sir T. Plumer gave Walsh a cheque for £22,200, to be invested in Exchequer Bills. Walsh paid the cheque into the bank on which it was drawn, and drew out the proceeds in bank notes, a large part of which he applied to his own purposes. He was indicted for stealing the bank notes and certain other securities representing other parts of Sir T. Plumer's cheque. It could not be suggested that this was embezzlement, because Walsh was neither a clerk nor a servant, and because he had received the money to be invested for Sir T. Plumer, not to be paid to him, and the question whether it was larceny was [2] argued with extreme elaboration. No judgment was given, but the prisoner was released, no doubt upon the ground that the property in the specific bank notes received by Walsh never was in Sir T. Plumer, but passed to Walsh, subject to a contract to invest them in Exchequer Bills for his employer, which contract might or might not make him a trustee of them for Sir Thomas in such a sense that if he had suddenly died his executor would be restrained from parting with them, or that if he retained them his creditors would not be allowed to take them otherwise than as trustees.

[1] 4 Taunton, p. 258.

[2] By Scarlett, afterwards Lord Abinger, for the prisoner; and Gurney, afterwards Baron Gurney, for the Crown.

This case led to the passing of the act 52 Geo. 3, c. 63 ([1] introduced by Mr. Drummond), which applied specifically to bankers, merchants, brokers, attornies, and "agents of any "description whatever." It punished with fourteen years' transportation every such person who should (1) sell or otherwise apply to his own use any security deposited with him for safe custody, or for any special purpose; (2) apply to his own use any sum of money or security deposited with him, with an order in writing signed by the depositor to invest such money in any particular way, or for any other purpose specified in the order.

The two definitions do not appear to be altogether distinct. If a bank note for £100 were deposited with a solicitor to settle an action, and he were to misappropriate it, s. 1 would apply if there were no written direction as to its application, and s. 2 if there were such a direction. I suppose the first section applies to special purposes, similar to safe custody, and the other to special purposes, similar to investment; but I hardly see what special purpose similar to safe custody there can be. An agent may be intrusted with a thing either to keep it for the owner or to dispose of it for the owner; what third purpose there can be for which a thing can be deposited with an agent I do not understand. If the agent is to keep the money or security safely for a certain time, or till a particular event happens, and is then to dispose of it, it appears to me that till the time comes, or the event happens, he is intrusted for safe custody and afterwards for disposal.

These provisions were reenacted, with a little condensation in language, but substantially in the same words, by 7 & 8 Geo. 4, c. 29, s. 49, which, however, for some reason, inverts their order; section 2 of the act of George III. forming the first part, and s. 1 the second part, of s. 49 of the act of George IV. A section was added in this act (s. 51), which contained provisions relating to the fraudulent pledging by factors and agents, intrusted for the purposes of sale with goods or documents, of title to goods.

It is important to observe that these enactments did not

[1] See Sir R. Bethell's speech, May 21, 1857, 145 Hansard, 680.

CH. XXVIII.

deal with the principles of the common law. They only put fraudulent breaches of trust by agents, and in particular by merchants, bankers, brokers, attorneys, and factors, on the same footing as embezzlement by servants. The old common law principle still protected all other fraudulent breaches of trust, as, for instance, larceny by a bailee. If a carrier stole a parcel of jewellery intrusted to him to carry, he committed no crime under these acts unless he broke bulk.

Still less did the acts deal with misconduct by trustees in whom was vested the whole legal interest in property misappropriated. If a trustee under a marriage settlement applied to his own purposes the whole of the settlement fund, he could not be punished under these acts.

This state of the law was to some extent remedied by the enactment, in the year 1857, of 20 & 21 Vic. c. 54. This act was occasioned by a variety of frauds committed by trustees properly so called, some of which had come to light in connection with the trial of the directors of the British Bank. In asking leave to bring it in, Sir Richard Bethell, then Attorney-General, gave an account of the principles on which it proceeded, in which he observed, amongst other things, that the best remedy for the defects of the law would be to redefine theft, but that he did not feel equal to such an undertaking. The speech seems to me to show an absence of any due appreciation of the importance of the distinction between trusts which do, and trusts which do not, vest in the trustee the whole legal title to the subject matter of the trust. It would have been no great effort for such a man as Sir Richard Bethell, if he had cared to acquaint himself with the subject, to frame a definition of theft which would include all cases of theft by persons intrusted with property as trustees at common law. Such a definition would be arrived at by making a fraudulent conversion the essence of the offence, instead of a fraudulent taking. The case of trustees regarded by the common law as absolute proprietors of the property intrusted to them might have been specially provided for.

[1] This act in its final form provided, by ss. 1 and 17, for

[1] I have traced the bill in Hansard through its various stages. It is surprising how little is to be learnt about it from reading the various discussions

the punishment of trustees on express trust, created by a deed, will, or instrument in writing, their heirs and personal representatives, executors, and administrators, liquidators, and assignees, who, with intent to defraud, should convert or appropriate to their own use the subject-matter of their respective trusts.

Section 2 provided for the punishment of agents misappropriating property intrusted to them for safe custody; section 3 for the punishment of persons making a fraudulent use of powers of attorney; and section 4 provided that a fraudulent conversion by a bailee of property bailed to him should be larceny though he might not break bulk. The rest of the act related to offences committed by the directors of public companies, which I shall consider under a different head.

Four years afterwards this act was repealed and its provisions [1] were reenacted in 24 & 25 Vic. c. 96, the act under consideration. In this act the sections taken from the act of 1857 are mixed up in a most confusing way with the sections taken from the act of 1827. The result is that two of the sections of the act of 1861 practically reproduce each other, as appears from the comparison made in the footnote.[2]

which took place. No single member appears to me to have fully studied it in all its bearings. In particular, its relation to the act 7 & 8 Geo. 4, c. 29, is not discussed at all, though one member hinted at the importance of comparing the two.

[1] The correspondence between the sections of the two acts is as follows :—

Act of 1857 (20 & 21 Vic. c. 54).	Act of 1861 (24 & 25 Vic. c. 96).
S. 1 (fraudulent trustees)	= S. 80.
S. 2 (fraudulent agents)	= S. 76.
S. 3 (fraudulent use of powers of attorney)	= S. 77.
S. 4 (larceny by bailee)	= S. 3.
Ss. 5, 6, 7 (frauds by directors, &c., of companies)	= Ss. 81, 82, 83, 84.

[2] The two sections are as follows (I omit from s. 75 words relating to the fraudulent use of powers of attorney) :—

S. 75.

"And whosoever, having been intrusted, either solely, or jointly with any other person, as a banker, merchant, broker, attorney, or other agent, with any chattel or valuable security . . for safe custody, or for any special purpose, without any

S. 76.

"Whosoever, being a merchant, broker, attorney, or agent, and being intrusted, either solely, or jointly with any other person, with the property of any other person for safe custody, shall, with intent to defraud, sell, &c., or in any manner

Section 75 is taken from the act of 1827, and section 76 from the act of 1857, but why the equivalent of section 76 was inserted in the act of 1857, or what cases it can apply to which are not provided for by section 75 I cannot suggest. The matter was much discussed in the very recent case of R. *v.* Newman, *L. R.* 8 Q. B. D. 706, but I for one was unable to see any substantial difference between the two enactments.

These provisions contain the present law as to criminal breaches of trust. They constitute a series of exceptions to the old common law so wholly inconsistent with its principle as to make it at once unintelligible and, so far as it still exists, a mere incumbrance and source of intricacy and confusion. The law as it now stands may be thus summarised.

The fraudulent misappropriation of property is not a criminal offence, if the possession of it was originally honestly acquired, except in the case of

S. 75.	S. 76.
"authority to sell, &c., shall, in violation of good faith, and contrary to the object or purpose for which such chattel, &c., shall have been intrusted to him, sell, &c., or in any manner convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted, such chattel or security, shall, &c." (seven years' penal servitude as a maximum).	"convert or appropriate the same, or any part thereof, to and for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, shall, &c." (seven years' penal servitude as a maximum).

The points in which these sections differ are minute and unimportant. S. 75 applies to an intrusting "for safe custody, or for any special purpose." S. 76 is confined to an intrusting "for safe custody." S. 75 applies to "chattels and valuable securities" only. S. 76 to "property," which includes (see s. 1) real property, and "and also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise." So far, s. 76 is wider than s. 75, but s. 75 includes "valuable security," which words do not occur in s. 76; and "valuable security" is elaborately defined in s. 1, and includes, for one thing, "any document of title to lands," which again includes every sort of document relating to any interest in realty. As land itself could not be "intrusted for safe custody" to any one, the effect of this is to make the "chattel and valuable security" of s. 75 almost exactly coincident with "property" in s. 76, except that "property" includes the proceeds of property and the proceeds of the proceeds. S. 75 applies to misappropriations "in violation of good faith." S. 76 to misappropriations with "an intent to defraud." expressions which are obviously synonymous, as neither could exist without the other. In short I think it is almost impossible to put a case which would fall under the one section and would not fall under the other. At all events, no well-marked class of cases can be specified to each of which one section applies.

(1) Servants embezzling their masters' property, who were first excepted in 1799.

(2) Brokers, merchants, bankers, attorneys, and other agents, misappropriating property intrusted to them, who were first excepted in 1812.

(3) Factors fraudulently pledging goods intrusted to them for sale, who were first excepted in 1827.

(4) Trustees under express trusts fraudulently disposing of trust funds, who were first excepted in 1857.

(5) Bailees stealing the goods bailed to them, who also were first excepted in 1857.

The original rule is tacitly assumed, and all the exceptions to it are expressly reenacted in a wider form in the Larceny Act of 1861.

These exceptions to the rule cover, no doubt, all the most important cases to which it applied; but classes of cases to which it applies, and which are of considerable importance, still remain. There are various ways in which a man may come innocently into the possession of his neighbour's goods without being either a servant, a broker, merchant, banker, attorney or other agent, a factor, a bailee or a trustee. [1] For instance, the acting treasurer of a missionary society, having moneys which it was his duty to deposit or invest, converted them to his own use. As he was not a bailee of the specific coins received this was held to be no offence. [2] The intricacies of the law as to the cases in which a person who finds goods and keeps them is and is not guilty of theft is a remarkable instance of the way in which a bad principle injures the law, notwithstanding the exceptions made to it.

One further alteration in the law closely connected with this subject has been made. At common law a co-owner could not steal property from his other co-owners. This was altered in 1867 by 31 & 32 Vic. c. 116, commonly called Mr. Russell Gurney's Act. It was passed in consequence of cases occurring in which trade unions had been robbed with impunity by persons in their employment, who were also members of the body, and so co-owners of its funds.

[1] R. v. Hassall, L. and C. 58, and see many other illustrations in my *Digest*, art. 304, p. 216.

[2] *Digest*, pp. 214, 215, art. 302.

CH. XXVIII.

These are the principal enactments by which the different forms of the crime of theft are now defined and punished. Most of, though not quite all, the sections of the Larceny Act which I have left unnoticed relate to procedure; the rest relate to offences of which it is unnecessary to say anything in this place.

Upon the whole, the existing law of theft may be said to be made up of two principal parts. First, a large number of enactments providing intricate and jealously limited exceptions to the different common law principles of which I have traced the history. The exceptions have nearly, but not quite, blotted out every one of the rules. Secondly, there are a number of other provisions punishing special aggravations of the offence of theft. Most of these were originally felonies without benefit of clergy, but by degrees they have been reduced to cases in which a somewhat more severe maximum punishment may be awarded than is lawful in other cases of theft.

One more offence connected with theft is punished by the Larceny Act. This is the obtaining of property by false pretences. In order to explain its nature and place in the general theory of the crime it is necessary to return for a moment to one of the common law rules which I have already noticed. It was held at a very early period in the history of the law that, though a wrongful taking is essential to theft, it is nevertheless theft to obtain the possession of a thing by fraud and then to appropriate it. A asks B to allow him to try B's horse, and having got leave to mount for that purpose rides off with the horse. Here the taking is permitted by B, and is so far lawful, but, inasmuch as the leave of B is obtained by a fraud, the taking under the fraud is regarded as wrongful, and the subsequent conversion as theft. If, however, A obtained from B by a false pretence the property in the horse, and not merely the possession of him, the act of taking was not regarded as theft. There obviously is a distinction, though it is by no means a broad or a clear one, between the two offences; but the common law doctrine drew the line in the wrong place. If it had said to misappropriate the property of another is theft, whether at the time of

the misappropriation the property is or is not in the owner's possession; but to persuade the owner by fraud to transfer his property is obtaining property by false pretences and not theft, the distinction would have been just and plain. The distinction between the fraudulent conversion of property the possession of which was obtained by fraud, and the fraudulent acquisition of property as distinguished from possession, is hard both to understand and to apply to particular states of fact. [1] Cheating was, and still is, an offence at common law. Its essence is defrauding by means which are or may be injurious to the public generally, as *e.g.* by the use of a false weight or measure. This did not apply to false representations of facts made to individuals. Hence the obtaining of goods by false pretences was, in 1757, made a misdemeanour by 30 Geo. 2, c. 24, s. 1.

In 1827 this act was repealed by 7 & 8 Geo. 4, c. 27, and re-enacted by 7 & 8 Geo. 4, c. 29, s. 53. This enactment, with some additions intended to supply defects in the law which had been discovered by experience, are now represented by [2] sections 88, 89, and 90 of the Larceny Act of 1861. Many decisions on their meaning have been found necessary. The words, "whosoever shall by any false pretence obtain "from any other person any chattel, money or valuable "security with intent to defraud," seem simple enough, but they are obviously open to an interpretation which would make any dishonest breach of contract criminal. A man who buys goods which he does not intend to pay for may be said to obtain them by a false pretence of his ability and intention to pay. The courts, however, soon held that this was not the meaning of the statute, and that in order to come within it a false pretence must relate to some existing fact. This is closely analogous to the element of public harm involved in the definition of cheating. A mere lie told with an intent to defraud, and having reference to the future, is not treated as a crime. A lie alleging the existence of some fact which does not exist is regarded as a crime if property is obtained by it. A variety of questions have

[1] For the definition of the offence and illustrations, see my *Digest*, Art. 338, p. 254.

[2] See my *Digest*, Articles 329-332, pp. 246-250.

CH. XXVIII.

been raised upon the meaning of the different words in the section, for a statement of which I refer to my *Digest*. The oddest of them is that the terms, "chattel, money, or "valuable security," do not include things which at common law were not the subject of larceny, and that therefore it is not an offence to obtain two pointers worth £5 each by a false pretence.

One point which deserves notice as to the offence of obtaining goods by false pretences is the difficulty of distinguishing it from that form of larceny in which goods are misappropriated after the possession as distinguished from the property has been fraudulently obtained. If A by a false pretence gets B to let him try a horse and rides off with the horse, the offence is theft. If he, by the same false pretence, gets B to sell him the horse on credit and goes off without paying for him, this is obtaining goods by false pretences. On an indictment for the one offence and proof of the other, an acquittal followed. So many failures of justice arose from this, that it was enacted in 1827, and re-enacted in 1861, that a person indicted for obtaining goods by false pretences should not be acquitted if his offence turned out to have been theft; but a man who is indicted for theft must be acquitted if his offence turns out to be obtaining goods by false pretences. This is a curious little defect in the law, and I am unable to understand why such an obviously one-sided reform was made.

Such is the English law upon the subject of theft and cognate offences. The Criminal Code Commissioners of 1879 proposed to simplify it greatly. In the first place, they proposed to remove all the old common law rules as to things which are not the subject of larceny by enacting as follows: All inanimate things being the property of any person, and either being moveable or which might be made moveable, except things growing out of the earth under a shilling in value, were to be capable of being stolen. This would have superseded the common law rules as to fixtures, things growing, minerals, and documents valuable only as evidence of rights of action. The reason why things growing under the value of a shilling were excepted was the harshness of

exposing every person to be treated as a thief who picked a flower or cut a stick from a hedge. The law as to summary convictions for stealing fruit, flowers, &c., under the value of a shilling, was left unaltered.

As to animals there is a difficulty in the nature of things which the Commissioners proposed to deal with as follows:— All tame living creatures were to be capable of being stolen except tame pigeons which were to be capable of being stolen only so long as they were in a dovecote or on their owner's land. To shoot a pigeon when trespassing and to take its body was, it was thought, at the very worst, an act to be treated as a civil trespass.

As for wild animals it was proposed that such as are not commonly found at liberty in England should be the subjects of larceny, whether in confinement or not; but that such as are commonly found at liberty in England should be the subjects of larceny so long only as they were kept in captivity. If a valuable wild beast, say a giraffe, escaped from a menagerie, or from a dealer in wild beasts [1] it would be absurd to say that he had regained his natural freedom, and might be taken by any one who could catch him. If on the other hand a hare or a badger got away from some person who had kept it in confinement it would be equally absurd to deny that it had ceased to be property. It was considered that these enactments would make the law correspond with what would be regarded as the natural anticipations of mankind.

Theft itself was defined as "the act of fraudulently and "without colour of right taking, or fraudulently and without "colour of right converting to the use of any person anything "capable of being stolen, with intent to deprive the owner "permanently thereof, or to deprive any person having any "special property or interest therein permanently of such

[1] One of the police magistrates not long ago had a man summoned before him for being unlawfully in possession of a crocodile. It had been imported and had escaped, and the possessor of it said he had caught it swimming in the Thames. In strictness of law I suppose it was the second captor's property, but the magistrate sensibly advised the captor to give it up to its owner on receiving a fair compensation for his trouble. Some curious questions might have been raised if the man had been committed for trial.

CH. XXVIII. "property or interest." This would have cut away all the technical distinctions which I have explained at so much length as to the necessity for a felonious taking, and have substituted a distinct and simple principle, requiring little explanation or illustration, and reasonable in itself, for a principle so unreasonable in itself as to have been practically eaten up by exceptions inconsistent with it.

The long series of provisions as to fraudulent breaches of common law trusts was proposed to be dealt with on the following principles. The difficulties which were the source of so many exceptions and so much intricacy at common law were twofold. First, the difficulty arising from the fact that the original taking in the case of agents was not felonious; secondly, the difficulty that in many cases the agent holds no specific coin or property for his principal, but only the proceeds of such property, or the produce of such proceeds. The extension of commerce since the common law took its present shape has been so enormous, that personal property has, to a considerable extent, lost its identity, and become mutable to the highest degree in its form. A man may frequently be entrusted with money which he has a right to deal with in a variety of ways, as, for instance, by changing it for other money, by paying it into a bank, by investing it in the funds, &c., but which he is not entitled to treat as a mere debt due to his principal. For instance, A. pays his solicitor B. money, with a direction to invest it for him when a suitable occasion occurs. A. does not by this mean to prevent B. from paying it into a bank, from investing it in Exchequer bills, or even from putting it into the funds, but he does mean that that money, or its equivalent, shall be forthcoming for the purpose of investment when required, and shall not be treated by B. as a mere debt due to A. If B. appropriates the money to his own purposes and deceives A. by paying the interest, pretending to have invested it, B. would usually and properly be regarded as a thief. Even now, as I have shown, the law punishes such conduct, though incompletely and indistinctly.

The following were the provisions which the Criminal Code Commissioners proposed on the subject. I think they would

have met every case which might be said to amount to theft morally, and yet to have applied to no cases of debt.

"SECTION 249.—THEFT BY AGENT.—Every one commits a theft who, having received any money valuable security " or other thing whatsoever on terms requiring him to ac- " count for or pay the same or the proceeds thereof or any " part of such proceeds to any other person, though not " requiring him to deliver over in specie the identical money " valuable security or other thing received, fraudulently con- " verts to his own use or fraudulently omits to account for " the same or to account for or pay any part of the proceeds " which he was required to account for or pay as aforesaid.

" Provided that if it be part of the said terms that the " money or other things received or the proceeds thereof shall " form an item in a debtor and creditor account between the " person receiving the same and the person to whom he is to " account for or pay the same, and that such last-mentioned " person shall rely only on the personal liability of the other " as his debtor in respect thereof, the proper entry of any part " of such proceeds in such account shall be deemed a suffi- " cient accounting for the part of the proceeds so entered.

"SECTION 250.—THEFT BY PERSON HOLDING POWER OF " ATTORNEY.—Every one commits a theft who, being entrusted " either solely or jointly with any other person with any power " of attorney for the sale mortgage pledge or other disposition " of any property real or personal, whether capable of being " stolen or not, fraudulently sells mortgages pledges or other- " wise disposes of the same or any part thereof, or fraudulently " converts the proceeds of any sale mortgage pledge or other " disposition of such property or any part of such proceeds, to " some purpose other than that for which he was entrusted " with such power of attorney.

" SECTION 251.—THEFT BY MISAPPROPRIATING PROCEEDS " HELD UNDER DIRECTION.—Every one commits theft who, " having received either solely or jointly with any other " person any money or valuable security or any power of " attorney for the sale of any stock or shares whatever, " with a direction that such money or any part thereof or " the proceeds or any part of the proceeds of such security

CH. XXVIII. " or such stock or shares shall be applied to any purpose or " paid to any person specified in such direction, in violation " of good faith and contrary to such direction, fraudulently " applies to any other purpose or pays to any other person " such proceeds or any part thereof:

" Provided that where the person receiving such money " security or power of attorney and the person from whom he " receives it deal with each other on such terms that all " money paid to the former would in the absence of any such " direction be properly treated as an item in a debtor and " creditor account between them, this section shall not apply " unless such direction is in writing."

These were the main alterations which the Commissioners proposed in the law. Shortly, the effect of them would have been to include under the definition of theft all thefts at common law, and all criminal breaches of common law trusts now punished under the several statutes relating to larceny by bailees, embezzlement, frauds by agents, and frauds by factors. The definition would also have covered all the fraudulent breaches of common law trusts which at present escape punishment under the old principle, which is still law notwithstanding the numerous exceptions which have been made to it. The offence of criminal breach of trust by trustees, who at common law are full legal owners, and the offence of obtaining goods by false pretences were provided for by separate sections re-enacting the existing law. These alterations would have greatly shortened the law, and freed it from all avoidable technicality. They would have made it intelligible, and brought it into harmony with the moral sentiments of the community. The rest of the law of theft the Commissioners would have re-enacted with some few alterations and additions. The Draft Code contained separate special provisions for stealing wills, post letters, &c., stealing by servants of the bank, by servants generally, stealing from the person, stealing cattle, stealing goods in process of manufacture, stealing from ships, stealing on railways, and stealing by picklocks or other instruments. All these offences, except the two last, are special offences under the present law, for one or other of the reasons already given. The two last are

new, and were suggested by article 384 of the *Code Pénal*, and article 243 (4) of the *Strafgesetzbuch* of the German empire.

This part of the Commissioners' draft appears to me to be needlessly minute, and to show an undue anxiety to avoid changes in the existing law which might greatly simplify it. Historically, the numerous special provisions as to stealing particular things represent the numerous statutory exceptions which from time to time were made to the common law rules which declared that certain classes of things should not be the subject of larceny at all, and to the common law rule that grand larceny was a clergyable offence. When it was thought right that people should be hung or be liable to be hung for sheepstealing on their first offence, it was necessary to pass a special act for the punishment of sheepstealing. When it was thought right that the stealing of dogs should be punishable, notwithstanding the common law rule which practically treated as theft only the theft of animals used for food or labour, a special statute had to be passed about dogs; but all these special provisions seem to become needless when rational general rules are laid down as to things which can be stolen and as to the way in which theft is to be punished. When I drew the Draft Code of 1878, I thought that the law might be not only simplified but greatly improved by taking the value of the things stolen as the guide to the maximum punishment of theft, when theft was not accompanied by violence or extortion, so as to make it robbery, or by housebreaking, nocturnal or otherwise. I suggested that the maximum punishment for stealing things under the value of £100 should be seven years' penal servitude, under the value of £500 fourteen years' penal servitude, and above that value penal servitude for life. My colleagues did not share this view; they thought that the value of the thing stolen was no test of the moral guilt or public danger of the theft, and that it was better to take the law as it stood. Though overruled I was not convinced. The existing law appears to me so capricious, that if it were not very carefully administered, and if the system of minimum punishments had not fortunately been removed, it would produce gross injustice. The following

CH. XXVIII.

are a few instances:—A., by an artful conspiracy in which several people take part, and which is carefully prepared for months beforehand, steals from a railway luggage van gold worth several thousand pounds. The utmost punishment which can be awarded for this offence is five years' penal servitude. B. steals an old coat from a barge in a canal. He is liable to fourteen years' penal servitude. C. steals a post letter containing half a sovereign. He is liable to penal servitude for life. Practically A. would be sentenced to five years' penal servitude; his sentence ought to be heavier, for his crime presents every element of aggravation. B. would be sentenced probably to three months' imprisonment if there was nothing else against his character. C. would be sentenced to penal servitude if he was a clerk in the Post Office. If not, he would probably be imprisoned for a longer or shorter time according to circumstances. A law which admits of such anomalies is to say the least entitled to no particular respect. The alteration which I proposed does represent a principle, indeed it represents several principles. It is true that the value of a stolen article is no test of the moral guilt of the theft, but this is not the only matter to be considered in fixing maximum punishments. The temptation to steal is usually proportional to the amount to be gained by stealing. This temptation ought as far as possible to be counteracted by a corresponding increase in the punishment. When the property is specially valuable, it is usually guarded with special care, and the attempt to steal it is made by specially experienced and ingenious thieves, who usually conspire for the purpose. This, again, is a reason why such offences should be liable to be punished with special severity. The reduction of a great number of intricate sections to one section, supplying a scale of maximum punishments easily understood and remembered, would be another reason for such a provision. I do not think, however, that the question is of much practical importance. It is only in very exceptional cases that the present maximum punishments are not sufficiently severe.

I now propose to compare the English law upon theft with the laws of France and Germany.

The provisions of the French *Code Pénal* with respect to theft resemble those of our own law closely, though they differ from them by the absence of the rules as to the classes of things which are not regarded as capable of being stolen. The following short summary of the French law [1] by M. Hélie might serve as a summary of our own :—"Les jurisconsultes "Romains avaient fixé les caractères élémentaires de ce délit, "[2] '*fur est qui dolo malo rem alienam contrectat*' (Art. 379), "traduit fidèlement cette definition. 'Quiconque a soustrait "frauduleusement une chose qui ne lui appartient pas est cou- "pable de vol.' Trois conditions sont donc nécessaires pour "qu'il y ait vol ; il faut qu'il y ait eu soustraction d'une "chose quelconque, que cette soustraction soit frauduleuse, "enfin que la chose soustraite appartienne à autrui. Nous "allons examiner ces trois éléments du délit.

"*Soustraction.* Le premier élément du délit est la sous- "traction, c'est-à-dire l'enlèvement de la chose. Jusqu'à cet "enlèvement l'agent lors même qu'il a mis la main sur cette "chose peut se désister, mais le délit est accompli aussitôt "qu'elle est enlevée. Les arrêts décident en conséquence, que "pour soustraire, il faut prendre, enlever, ravir, et que la "soustraction n'existe que lorsque la chose a été appréhendée. "Ainsi il n'y a pas de soustraction lorsque la chose a été volon- "tairement remise à l'agent, soit sous la condition implicite "d'une restitution immédiate, soit même par erreur, et que "celui-ci en a profité pour s'en emparer frauduleusement, "puisque la remise volontaire de la chose quelque soient son "motive et sa durée exclut l'appréhension, l'enlèvement, la "soustraction. [4] Mais si la remise a été surprise, si elle n'est

[1] *Pratique Criminelle*, ii. p. 428. This is an abridgement of the longer work, *Théorie du Code Pénal*, in which the subject is treated at great length.

[2] Of this passage it is said in the larger of the two works above referred to, that "Cette règle qui établit fidèlement les trois éléments essentiels du vol "rejetée par Justinien demeura longtemps sans autorité ; la définition des "Pandectes" (also of the Institutes) "longuement développée par les docteurs "était devenue un principe de notre ancien droit."—*Théorie du Code Pénal*, v. 30.

[3] The English law differs from this as to cases in which the offender has a mere charge or custody as distinguished from a possession, and as to mistakes. The case of a charge was referred to above, p. 151 ; as to mistakes see R. *v.* Middleton, L. R. 2 C. C. R. 58.

[4] This is exactly the same as the rule of English law that where custody or possession of a thing is obtained by fraud, the subsequent conversion of the

CH. XXVIII.

" qu'une manœuvre frauduleuse qui prépare et facilite sa sous-
" traction, elle se confond avec celle-ci, et loin de l'exclure,
" elle en devient un élément.

" Du principe qu'il n'y a pas de vol sans une soustraction,
" sans une appréhension et un enlèvement de la chose, il
" résulte : 1. Que le vol ne peut atteindre que les choses
" mobilières. 2. Qu'il ne peut avoir pour objet une chose
" incorporelle un droit. 3. Que toutes les fraudes qui tendent
" à s'emparer des choses d'autrui par d'autres modes que la
" soustraction ne rentrent pas dans la classe des vols, tels sont
" le créancier qui à l'insu du débiteur applique à son usage
" personelle l'objet qu'il a reçu en nantissement, le dépositaire
" qui se sert des choses reçues en dépôt, le commanditaire ou
" l'emprunteur qui vendent des objets prêtés ou loués.

[1] " Faut-il considérer comme une soustraction le fait de
" retenir frauduleusement un objet trouvé par hasard ? Il y
" a lieu de distinguer si l'intention de s'approprier l'objet est
" née au moment même où il était trouvé, ou si cette inten-
" tion n'est survenue que postérieurement à cette main mise.
" Dans la première hypothèse la jurisprudence décide qu'il y a
" soustraction, puisque l'agent s'est emparé avec le dessein
" immédiat de se l'approprier d'une chose qu'il sait apparte-
" nir à autrui. Il importe peu que l'objet eut été appréhende
" dans tel ou tel lieu, et que l'agent n'eut pas connu le nom
" de son propriétaire, le fait matériel de la soustraction résulte
" du seul enlèvement de cet objet. Mais dans la deuxième
" hypothèse, lorsque l'objet a été ramassé sans aucune inten-
" tion d'appropriation, lorsque cette intention n'est née, et ne
" s'est manifestée qu'ultérieurement, la solution n'est pas la
" même car s'il n'y a pas eu fraude au moment de l'appré-
" hension il n'y a pas eu de soustraction, et si plus tard l'inten-
" tion frauduleuse est survenue chez l'agent, il ne pouvait
" soustraire un objet qui était en sa possession.

" Le deuxième élément du vol est l'intention frauduleuse.
" Il n'y a pas de délit lors même qu'il y aurait eu soustraction

thing is theft, as in the case of a man riding off with a horse after getting leave to mount in order to try him.

[1] This is exactly the same as the law of England ; see my *Digest*, Art. 302, p. 14.

" si cette soustraction a porté sur une chose que l'agent " croyait lui appartenir, ou en croyant agir avec l'assentiment " du propriétaire.

" Il faut, en troisième lieu, pour constituer le vol que la " chose frauduleusement soustraite soit la propriété d'autrui. [1] " Celui qui soustrait sa propre chose ne commet pas un vol. " La soustraction même frauduleuse ne constitue point un " vol, si la chose soustraite n'est pas la propriété d'un tiers. " On distingue les choses qui n'ont encore appartenu à per- " sonne, celles qui sont abandonnées, et celles qui ont été " perdues."

These fundamental principles of the French law of theft correspond with singular exactness to the English common law. Each is founded upon an adaptation of the Roman law, and each rejected the same parts of the Roman law, namely, the *lucri causâ*, and the *usus ejus possessionisve*, though the French law appears to have retained them longer than the English. Each makes theft depend upon a wrongful taking, and not upon a wrongful appropriation of the stolen article. Each draws the same inferences from this principle, the most striking illustration of which is to be found in the identity of their provisions as to the case of appropriating goods accidentally found.

The French have adhered to this principle more closely than the English, and each I think is in error. I see no difference either in the moral guilt or the public danger of the dishonest misappropriation of a thing which the misappropriator becomes possessed of honestly, and the misappropriation of one which he misappropriated by a fraudulent taking. The English law, as I have already shown, has made so many exceptions to the old rule as to show to demonstration, that in this country at least, it has been found to be in the highest degree inconvenient.

Both the French and the English law agree in the doctrine that moveable things only can be stolen, and that rights cannot be stolen. The French lawyers, however, do not appear to have drawn from these doctrines the absurd inference that

[1] This is probably not the law of England.

CH. XXVIII. things severed from the soil, and documents which are valuable only as evidence of rights cannot be stolen.

According to English law, the offence of fraudulent misappropriation of property falls, as I have shown, into three principal divisions, theft, obtaining goods by false pretences, and criminal breach of trust, the last being a common name for many offences made punishable by modern statutes, and not provided for by the common law. This division of the subject is also adopted in the French law. The names of the three crimes being *vol*, *escroquerie*, and *abus de confiance*. The differences between them are thus described:—

[1] "Elle" (la soustraction) "ne peut être remplacée par aucune "circonstance équivalente. Si l'agent a reçu du détenteur "lui même à quelque titre que ce soit l'objet qu'il a dissipé, il "commet un abus de confiance: s'il a détourné la chose qui "lui avait été, confiée il se rend coupable d'une violation de "dépôt; s'il s'est fait remettre des valeurs quelconques par ses "manœuvres, il exécute une escroquerie; dans ces divers cas "la fraude est la même, le mode d'exécution de la spoliation "diffère seul; c'est donc ce mode qui imprime au délit sa "qualification."

The articles of the code which relate to these subjects are 405 and 408. Article 405 has a considerable degree of resemblance to the English statute which punishes the obtaining of goods by false pretences, and the cases decided upon it, and both the courts and the legislature appear to have experienced difficulties in dealing with the subject similar to those which have been experienced in this country, and which are, indeed, inherent in the nature of the subject. The two forms of the article were as follows:—

1791.	1810.
"Ceux qui par dol, ou à l'aide de "faux noms ou de fausses entreprises, "ou d'un crédit imaginaire, ou d'espérances, ou de crainte chimérique, auraient abusé de la crédulité "de quelques personnes et escroqué	"Quiconque, soit en faisant usage "de faux noms ou de fausses qualités, "soit en employant des manœuvres "frauduleuses pour persuader l'existence de fausses entreprises d'un "pouvoir ou d'un crédit imaginaire,

[1] *Théorie du Code Pénal*, v. p. 47.

" la totalité ou partie de leur fortune " seront," &c.

" ou pour faire naître l'espérance ou " la crainte d'un succès d'un accident, " ou de tout autre événement chimér- " ique, se sera fait remettre ou délivrer " des fonds, des meubles, ou des obliga- " tions, dispositions, billets, promesses, " quittances, ou décharges, et aura par " un de ces moyens escroqué ou tenté " d'escroquer la totalité ou partie de la " fortune d'autrui, sera," &c.

The article of 1791, which made the obtaining of property by "dol" an offence, may be compared to that interpretation of the statute of George II. which would have made every fraudulent breach of contract a crime. The more elaborate language of 1810 (still in force as article 405 of the *Code Pénal*), is by no means unlike the interpretation put upon the statute of George II. and the later acts by the numerous cases which have been decided upon them.

The expression, "manœuvres frauduleuses" in article 406, has, as interpreted by French writers, considerable resemblance to the English doctrine, that a false pretence must relate to an existing fact. [1] "Les manœuvres . . . supposent " une certaine combinaison de faits ; une machination préparée " avec plus on moins d'adresse. Les paroles, les allégations " mensongères, les promesses, ne sont point isolées de tout fait " extérieur, des manœuvres ; il faut qu'elle soient accompagnées " d'un acte quelconque destiné à les appuyer et à leur donner " crédit. Cette distinction a été consacrée par de nombreux " arrêts qui ont reconnu que la jactance d'un pouvoir imagi- " naire, les fausses assurances d'une fortune chimérique, et " en général les simples mensonges lorsqu'ils ne portent, ni sur " le nom ni sur la qualité, ne peuvent être considerées comme " des manœuvres. Mais lorsqu'il se joint aux paroles fraudu- " leuses, un fait extérieur quelconque, l'intervention d'un tiers " la production d'une lettre, une démarche ostensible, une " voyage, tout acte matériel propre à les fortifier, les manœuvres " peuvent résulter de cette combinaison."

This might almost stand for a statement of the English law as to the difference between an indictable false pretence and a fraudulent representation or breach of contract.

[1] Hélie, *Pratique Criminelle*, li. 481.

CH. XXVIII.

The offence known in French law as *abus de confiance* has many forms, but the one which approaches most nearly to what we should describe as embezzlement or larceny by a bailee is contained in Article 408. "Quiconque aura dé-"tourné ou dissipé, au préjudice des propriétaires, possesseurs, "ou détenteurs, des effets, denrées, marchandises, billets, "quittances, ou tous autres écrits contenant ou opérant obli-"gation ou décharge, qui ne lui auraient été remis qu'à titre "de louage, de dépôt, de mandat, de nantissement, de prêt à "usage, ou pour un travail, salarié ou non salarié, à la charge "de les rendre ou représenter, ou d'en faire un usage ou un "emploi déterminé, sera," &c. It is remarkable that this definition does not contain the word *frauduleusement*, but the courts [1] appear to have introduced it. The article would punish most of the crimes which have been created by our modern legislation as to criminal breaches of trust. I am not sure, however, that the article would cover all the cases to which our acts as to the frauds of agents would apply.

The circumstances recognised by the French law as aggravations of theft, as changing *vols simples* into *vols qualifiés* are shortly summed up in the following [2] passage: "Les vols sont "qualifiés à raison de la qualité de leur auteur, du temps où "ils ont été commis, du lieu de leur perpétration, enfin des "circonstances qui ont accompagné leur exécution.

"Les vols sont qualifiés à raison de la qualité de leur auteur, "quand ils sont commis (1) par les domestiques, hommes "de service à gages, ouvriers, compagnons et apprentis, (2) par "les aubergistes et hôteliers, (3) par les voituriers et bateliers. "Ils sont qualifiés à raison du temps où ils sont commis quand "ils sont exécutés pendant la nuit.

"Ils sont qualifiés à raison du lieu de leur perpétration "quand ils sont commis (1) dans les maisons habitées et leur "dépendances, (2) dans les édifices consacrés aux cultes, (3) dans "les champs, (4) sur les chemins publics.

"Enfin ils sont qualifiés à raison des circonstances qui ont "accompagné leur exécution quand ils ont été commis (1) de "complicité, (2) avec effraction, (3) avec escalade, (4) avec

[1] *Pratique Criminelle*, ii. pp. 495-496.
[2] *Théorie du Code Pénal*, v. p. 128.

" fausses clefs, (5) avec port d'armes, (6) avec menaces ou " violences, (7) avec usurpation de titres, ou de costumes, ou " supposition d'ordre de l'autorité."

What I have already said will enable any one to see how far these aggravating circumstances differ from or correspond to those of our own legislation; but it would be wearisome and of little interest to carry out the comparison in detail.

The German *Strafgesetzbuch* recognises the same general division of the subject as the English law and the French *Code Pénal*. Its leading definitions are extremely brief and comprehensive, and are as follows:—

"242. Whoever takes away from another any moveable " thing which does not belong to the taker with intent to " appropriate it illegally to himself is liable to be imprisoned " for theft."

"246. Whoever illegally appropriates to himself any " moveable thing which does not belong to him but is in " his possession or is intrusted to him is punishable for " embezzlement (*Unterschlagung*) with imprisonment up to " three years, or if the thing was intrusted to him up to " five years."

"263. Whoever with intent to procure for himself or for a " third person an illegal gain of property, injures the property " of another by leading him into or confirming him in error, " by deceiving him by false allegations of fact or by keeping " back or suppressing the truth, is liable to be imprisoned for " fraud (*Betrug*)."[1]

Here again we have the three cases of theft, embezzlement, and false pretences separately provided for, the definition of theft being almost a translation of the definition of *vol* in the

[1] "242. Wer eine fremde bewegliche Sache einem andern in der Absicht " wegnimmt dieselbe sich rechtswidrig zuzueignen, wird wegen Diebstahls mit " Gefängniss bestraft."

" 246. Wer eine fremde bewegliche Sache die er in Besitz oder gewahrsam " hat sich rechtswidrig zueignet wird wegen Unterschlagung mit Gefängniss, " bis zu drei Jahren, und wenn die Sache ihm anvertraut ist mit Gefängniss " bis zu fünf Jahren bestraft."

" 263. Wer in der Absicht sich oder einem dritten einen rechtswidrigen " Vermögens-Vortheil zu verschaffen das Vermögen eines anderen dadurch " beschädigt das er durch Vorspiegelung falscher oder durch Enstellung oder " Unterdrückung wahrer Thatsachen einen Irrthum erregt oder unterhält, " wird wegen Betruges mit Gefängniss bestraft."

CH. XXVIII.

Code Pénal, and being, no doubt, derived from the same origin. How far the definition of *Unterschlagung* (embezzlement) and *Betrug* (fraud, false pretences) would extend in practice, I am not aware. How far, for instance, a fraudulent agent, like Walsh, could be said to have in his possession or custody the bank notes which he ought to have invested for Sir Thomas Plumer, and whether a man who sells an unsound horse at a sound price by falsely stating that he is sound can be said to injure the property of another by making him err by the representation of a false fact, with a view to his own unlawful gain, I do not venture to conjecture.

The circumstances of aggravation recognised by the German law in regard to theft are in general similar to those given in the *Code Pénal*, and were probably to some extent suggested by them. They are simpler and less elaborate.

CHAPTER XXIX.

COINAGE OFFENCES—FORGERY—MALICIOUS INJURIES TO PROPERTY.

Two classes of frauds by which property may be fraudulently misappropriated are of so much importance as to have been the subject of elaborate special legislation, the results of which are two of the Consolidation Acts passed in 1861. These are coining and forgery. The history of the law upon these subjects possesses some features of interest, though none attaches to its details. The subject may accordingly be disposed of very shortly.

The allusions to these offences in the Anglo-Saxon laws are [1] few, and such as there are, apply apparently to the crime of coining. Glanville gives a full definition of the "crimen falsi," as follows: [2] "Generale crimen falsi plura "sub se continet crimina specialia. Quemadmodum de "falsis cartis, de falsis mensuris, de falsâ monetâ, et alia "similia quæ talem falsitatem continent super quam aliquis "accusari debeat et convictus condemnari . . . . notandum "quod si quis convictus fuerit de cartâ falsâ distinguendum "est utrum carta regia an privata; quia si carta regia tunc "is qui super hoc convincitur condemnandus est tanquam de "crimine lœsæ majestatis. Si vero fuerit carta privata tunc "cum convicto mitius agendum est sicut in cæteris minoribus "criminibus falsi." Glanville thus classes forgery and coining under one head. He is followed in this in substance by

[1] Cnut, Secular Laws, 8 (Thorpe i. p. 381), is the most important law. "Falsarii monetæ suæ" is one of the pleas of the crown specified in Hen. 1, x. p. 1; Thorpe, i. p. 519.

[2] Glanville, lib. xix. c. 7.

CH. XXIX.

Bracton, [1] who thus describes the offence: "Continet etiam "sub se crimen læsæ majestatis crimen falsi quod quidem "multiplex est: ut siquis falsaverit sigillum domini regis, vel "monetam reprobam fabricaverit, et hujusmodi." [2] Elsewhere he says: "Est et aliud genus criminis læsæ majestatis, "quod inter graviora numeratur quia ultimum inducit suppli-"cium et mortis occasionem, sc. crimen falsi, in quâdam sui "specie, et quod tangit coronam ipsius domini regis, ut si ali-"quis accusatus fuerit vel convictus quod sigillum domini regis "falsaverit, consignando inde chartas vel brevia, vel si chartas "confecerit et brevia et signa apposuerit adulterina quo casu "si quis inde inveniatur culpabilis vel seysitus si warrantum "non habuerit pro voluntate regis judicium sustinebit" . . . "Est et aliud genus criminis quod sub nomine falsi continetur "et tangit coronam domini regis et ultimum inducit suppli-"cium sicut de ills qui falsam fabricant monetam, et qui "de re non reproba faciunt reprobam sicut sunt retonsores "denariorum."

The law as to treason was declared in the statute of treasons in accordance with these views. In the 25 Edw. 3, st. 5, c. 2, the following provision follows the definition of treason by imagining the king's death and by levying war: "Et si "homme contreface les grant ou prive sealx le Roi ou sa monoie "et si home apport faus monoie en ceste roialme contrefaite "a la monoie d'Engleterre sicome la monaye apelle Lucynburgh, "ou autre semblable a la dite monoie d'Engleterre sachant la "monoie d'être faus pur marchander ou paiement faire en "deceit nostre dit seignur le roi et son poeple." [3] In 1415 this was extended to "ceux qi tondent, lavent, et filent la "moneie de la terre," by 3 Hen. 5, c. 6, and in 1553 (1 Mary, sess. 2, c. 6), to the counterfeiting of coin not the proper coin of the realm, but current in it by the queen's consent. The same statute made it treason to forge or counterfeit the queen's sign manual, privy signet, or privy seal. By 1 Mary, sess. 1, c. 1, the 3 Hen. 5, c. 6, was repealed, but it was re-enacted in 1562 by 5 Eliz. c. 11, and in 1576 a similar enact-

[1] Bracton, ii. 258, fo. 118*b*.
[2] *Ib.* p. 266, fo. 119*b*.
[3] There are similar passages in Fleta, i. chap. 22, and Britton, and see the *Mirror*, p. 28.

ment (18 Eliz. c. 1) was passed, extending the provisions of the act of 1562.

Many other statutes were passed at various times punishing some offences connected with the coin as treason and others as felony or misdemeanour. There would be no interest in enumerating them. They were consolidated for the first time in 1832, by 2 Will. 4, s. 34, which repealed the statutes just referred to, together with many others, and thus put an end to that head of the law which used to be described as treasons relating to the coin. This statute continued to be in force till 1861, when it was repealed and re-enacted in substance by 24 & 25 Vic. c. 99, which contains the present law upon the subject. It consists of forty-three sections, of which twenty-five define the various offences which, as experience has shown, may be committed by clippers and coiners. The remainder relate to matters of administration and procedure. The defining actions are to the last degree explicit and minute. They are elaborated to the utmost in order to make it practically impossible to suggest any quibble or evasion by which their operation could be evaded. They comprehend not merely coining and uttering bad money, but making any sort of preparation for that operation, and even being in possession of the materials necessary for carrying it out. I know of no better illustration of one of the most striking points of difference between English criminal legislation on the one hand, and the criminal legislation of France and Germany on the other, than is afforded by a comparison of their provisions on this subject.

The existing French Penal Code punishes the following offences only:—

Art. 132. "Quiconque aura contrefait ou altéré les monnaies "d'or et d'argent ayant cours légal en France, ou participé "à l'émission ou exposition des dites monnaies contrefaites ou "altérées, ou à leur introduction sur le territoire Français, "sera," &c.

The second part of the article substitutes "de billon ou de "cuivre" for "d'or et d'argent."

Art. 133. The same as to all foreign money of whatever material.

CH. XXIX.

Art. 134. "Quiconque aura coloré les monnaies ayant "cours légal en France, ou les monnaies étrangères, dans le "but de tromper sur la nature du métal, ou les aura émises "ou introduites sur le territoire Français, sera," &c.

The English law punishes counterfeiting gold and silver coin; [1] colouring coin or metal; clipping, and other modes of lightening the coin; the unlawful possession of filings and clippings; selling counterfeit coin below its value; importing or [2] exporting counterfeit coin; simple uttering; uttering accompanied by possession of other counterfeit coins; possession of three or more pieces of counterfeit coin with intent to utter, and many other offences.

The German *Strafgesetzbuch* (articles 146-182) is even more concise than the *Code Pénal*.

The law relating to forgery has a somewhat more interesting history than the law relating to offences against the coin.

I have already referred to the statutes by which the forgery of certain seals was high treason. All other forgeries were misdemeanours at common law. In 1413 a statute (1 Hen. 5, c. 3) was passed, which recited that many persons had been deprived of their property by false deeds, wherefore it was enacted, "that the party so grieved shall have his suit in "that case, and recover his damages; and the party convict

[1] Compare the words of s. 3 of 24 & 25 Vic. c. 99, s. 3, with the words of the *Code Pénal*, art. 134, given in the text—"Whosoever shall gild or silver, "or shall, with any wash or materials capable of producing the colour or "appearance of gold or silver, or by any means whatsoever wash, case over, "or colour any coin whatsoever resembling, or apparently intended to re-"semble, or pass for any of the queen's current gold or silver coins; or shall "gild or silver, or shall, with any wash or materials capable of producing "the colour or appearance of gold or of silver, or by any means whatsoever "wash, case over, or colour any piece of silver or copper, or of coarse gold, or "of coarse silver, or of any metal or mixture of metals respectively, being of "a fit size and figure to be coined, and with intent that the same shall be "coined into false and counterfeit coin resembling, or apparently intended to "resemble or pass for any of the queen's current gold or silver coin; or" (the same thing over again, except that it relates to the colouring of genuine coin so as to make it pass for coin of a higher denomination). The French draftsman expects those who administer the law to give to it a scope as wide as would be given say to the language of a common letter by a reader who wished to understand his correspondent. The English draftsman aims at using language which no one, if he takes proper pains to study it, shall be able to pretend to misunderstand, however earnestly desirous to do so.

[2] This does not seem to be provided for by the words of the *Code Pénal*, unless an exporter "participe à émission," which would to an English lawyer appear a somewhat strained construction.

"shall make fine and ransom at the king's pleasure." This method of treating a misdemeanour as a private wrong for which a public penalty was also to be imposed, is very characteristic of our ancient law, and many instances of it might be referred to. The statute can hardly be said to have altered the law, as forgery was always a misdemeanour. The effect of it rather was that when a forgery was brought to light in a civil action the result was a fine to the king as well as damages to the party.

Apart from any statute forgery appears to have been punished from very ancient times by the Court of Star Chamber. [1] "Infinite," says Hudson, "are the examples of "punishments inflicted upon forgeries of all sorts before the "statute of 5 Eliz., and then the falsifying of any deed or "writing which could be given in evidence was here examined "and punished." In 1562 was passed the statute 5 Eliz. c. 14, referred to in the above extract. It is entitled, "An act "against forgeries of false deeds and writings." It recites the evil consequences which had resulted from the "small, mild "and easy" punishments hitherto inflicted for forgery, and enacts that any person who forges "any false deed, charter, or "writing sealed, court roll, or the will of any person in "writing" with intent to defeat, recover, or change the interest of any person in any real property, or who shall give any such deed or writing in evidence knowing it to be forged, shall be liable upon conviction to pay double costs and damages, "and also shall be set upon the pillory in some open "market town, or other open place; and there to have both "his ears cut off, and also his nostrils to be slit and cut, and "seared with a hot iron so as they may remain for a perpetual "note or mark of his falsehood." The offender was also to forfeit to the queen the issues and profits of his land for life, and to "suffer perpetual imprisonment for his life."

If the forged document related to chattels real, or was "any obligation, or bill obligatory, or any acquittance, release, "or other discharge of any debt or action, or other things "personal," the offender was to lose one of his ears and to be imprisoned for a year. Upon a second conviction these offences

[1] *Star Chamber*, p. 65.

CH. XXIX.

were felony without benefit of clergy. This act was afterwards superseded by others which made many forgeries capital; but it remained nominally in force till 1830, when it was repealed by 11 Geo. 4, and 1 Will. 4, c. 66, s. 31. The law as to forgery was not, I think, altered by statute in the seventeenth century; but all through the eighteenth century the great increase in trade, which then occurred, was accompanied by a corresponding increase in the severity of the laws relating to forgery. It would be tedious to mention them at any length, but I will notice one or two. In 1729, one Hales, a goldsmith or banker, was tried on several indictments for forging endorsements on promissory notes, an offence to which the statute of Elizabeth did not extend. [1] He was sentenced to be thrice pilloried, to pay a fine of fifty marks, and to be imprisoned for five years. He died "in the Press Yard in "Newgate" three days after standing in the pillory for the second time, probably in consequence of the treatment he received. The forgery of deeds, wills, bonds, bills of exchange and promissory notes, or endorsements on them, was soon after made felony without benefit of clergy, by 2 Geo. 2, c. 25, which was afterwards amended and extended by 7 Geo. 2, c. 22, and 18 Geo. 3, c. 18. Besides these general acts many others were passed, making it felony, without benefit of clergy, to forge a great variety of particular documents. In particular as the paper currency developed itself, provisions of extreme elaboration and minuteness were passed, punishing not only the forgery of bank notes and everything of the nature of a bank note; and the uttering of forged bank notes; but the making or possession of paper suitable for forgery, and of instruments suitable for its manufacture. No part of the criminal law of the latter part of the eighteenth century was more severe in itself, or was executed with greater severity than this. The following were some of the statutes on this subject: 15 Geo. 2, c. 13; 13 Geo. 3, c. 79; 41 Geo. 3, c. 49. This last mentioned act punished with fourteen years' transportation the making of Bank of England paper or the possession of instruments for making it, and many other offences of the same sort.

[1] 17 *State Trials*, 296.

The numerous enactments relating to forgery were first consolidated in 1830 by 11 Geo. 4, and 1 Will. 4, c. 66. This act first provided generally that no forgery should be punished capitally except those for which capital punishment was reserved by the express words of that act. It then enacted (ss. 2-6) that forgery should still be capital in the following cases: forgery of the Great Seal, Privy Seal, Sign Manual, &c. (which was to be high treason), forgery of exchequer bills, and some other public securities; forgery of banknotes, wills, bills of exchange, promissory notes, or warrants, or orders for the payment of money; making false entries in books relating to the public funds, forging transfers of stock, and powers of attorney for the receipt of dividends, &c. Most of the other acts relating to forgery were repealed and re-enacted by the other parts of the act. The repealing clause (s. 30) is itself a compendious history of the law of forgery. It repeals an enactment of Edward III. (the section of the statute of treasons as to forging the great and privy seal), one of Mary, one of Elizabeth (5 Eliz. c. 14, above mentioned), one of James I., one of William and Mary, one of William III., one of Anne, two of George I., four of George II., thirteen of George III., and one of George IV. (4 Geo. 4, c. 76, s. 29, which punished the forgery of entries in marriage registers), in all twenty-six enactments.

The punishment of death was imposed upon the forgery of documents connected with certain life annuities by 2 & 3 Will. 4, c. 59, s. 19; on the forgery of certificates of certain commissioners to administer a fund voted for the relief of Jamaica, Barbadoes, St. Vincent and St. Lucie, by 2 & 3 Will. 4, c. 125, s. 65 (which was extended by 5 & 6 Will. 4, c. 51), and on the forgery of certain receipts connected with the twenty millions raised for compensation to slave-owners by 5 & 6 Will. 4, c. 45, s. 12. These were the last acts by which forgery was punished with death. In 1837 by 7 Will. 4, and 1 Vic. c. 84, the punishment of death for forgery was abolished in all the cases of forgery which had been declared to be capital by the act of 1830 (11 Geo. 4, and 1 Will. 4, c. 66) except only the case of forging the Great Seal and other public seals. This offence continued to

CH. XXIX. be high treason punishable with death down to 1861, when it became a felony punishable with penal servitude for life as a maximum. Capital punishment was also abolished in all the cases in which it had been imposed by the other acts passed after 1830.

The Consolidation Act of 1861 (24 & 25 Vic. c. 98) was intended to replace all the then existing legislation on the subject. This act punishes the forgery of public seals, the forgery of documents connected with the public funds, the making of false entries in books connected with them, and the personation of persons entitled to stock or dividends. This is followed by a series of provisions relating to the imitation of paper used for bank notes, whether of the Bank of England or any other bank, and to the construction or possession of instruments suitable for forgery. Next come provisions as to private documents, deeds, wills, bills of exchange, receipts and debentures, and finally provisions as to judicial and administrative papers, books, and registers.

The act, in short, punishes the crime of forgery by an enumeration of the documents which are not to be forged, and in respect of some of the most important kinds of forgeries it punishes preparations for forgery and the very possession of the instruments by which it may be carried out.

The law might in my opinion be greatly improved and simplified by being made much more general and much simpler in its terms. As it stands it is at once long, intricate, hard to understand, and necessarily incomplete. Its faults of style speak for themselves. As to the necessary incompleteness of legislation proceeding on this plan it is shown by a comparison between the act of 1830 and the act of 1861; and more particularly by comparing the repealing act of 1861 (24 & 25 Vic. c. 95) with the repealing clause of the act of 1830 (11 Geo. 4, and 1 Will. 4, c. 66, s. 30). It appears from this comparison that the act of 1830 was incomplete, having omitted some cases of forgery (*e.g.* 2 & 3 Anne, c. 4, 6 Anne, c. 35). On the other hand the repealing act of 1861 was not absolutely correct, for it repeals for a second time some of the acts (*e.g.* 12 Geo. 1, c. 32, s. 9) repealed

by the act of 1830. A remarkable illustration of the inconvenience of proceeding in this manner is supplied by s. 48 of the act. It provides in general terms a punishment for all forgeries which were capital before the act of 1830, and which are not otherwise punishable under the act of 1861. This provision obviously shows a consciousness on the part of the authors of the act that forgeries punishable with death, of which they were not aware, might still lurk in some corner of the statute book. This may well have been the case, for there are a considerable number of forgeries which are not included in either act, having been created by acts of which some passed before and others after the act of 1861. A collection of them is to be seen in the last edition of *Russell on Crimes*, vol. ii., pp. 783-818. The most elaborate provisions on the subject are perhaps those which relate to the forgery of stamps. They are contained in 33 & 34 Vic. c. 98 (the Stamp Duties Management Act, 1870). Of the administrative acts I may mention a few by way of illustration. By 5 & 6 Will. 4, c. 24, s. 3, it is a misdemeanour to forge a certificate of service in the navy. By 2 & 3 Vic. c. 51, s. 9, it is felony to forge minutes relating to pensions for service in the navy, and there are similar provisions in the Merchant Shipping Acts. There are many documents which it is not a statutory offence to forge, and as to which the extreme vagueness of the common law makes it difficult to say whether their forgery is an offence at common law. If, for instance, a man forged letters to prove the existence of a contract the case would not be met by any statute, or if he forged a libel in order that the person libelled might prosecute the supposed libeller. A provision punishing the forgery, with intent to defraud or injure, of any document whatever with a maximum punishment, say, of five years' penal servitude, would supersede an immense number of enactments of this kind, and would involve no real risk of any abuse.

Several of the provisions to which I have referred punish the personation of persons entitled to stocks, dividends, &c., but no general provision against personation as a means of acquiring property was passed, nor was it recognised as an

CH. XXIX. offence at common law till after the trial of the notorious Orton for perjury in asserting that he was Sir Roger Tichborne. The crime, however, was made a felony punishable by penal servitude for life as a maximum by 37 & 38 Vic. c. 36, passed in 1874. [1] There are some special acts as to particular cases of personation.

There are also a few special provisions as to the falsification of particular books of accounts, such as those relating to the public funds, but till very lately there was no general provision on the subject. In 1875, [2] an act (introduced by Sir John Lubbock) was passed which made it a specific offence, punishable with seven years' penal servitude, for any clerk, officer, or servant, wilfully to falsify any account or to omit to make any entry in any account. This enactment was obviously much wanted, as appears from the occasion which led to it. A clerk in charge of a branch of a country bank overpaid his own account to the extent of £1,500. When the inspector came round, the clerk transferred £2,000 from the account of one of the customers to his own, the result being that he appeared to have a credit balance. He was prosecuted, and was held to have committed no legal offence. His overpayment of his own account was only an unauthorised loan to himself. His transfer of the £2,000 was effected without forging the customer's cheque, and by a mere entry in the bank books. The facts that the public got on well enough with no law to punish embezzlement till the end of the eighteenth century, with no law to punish criminal breaches of trust till the beginning of the nineteenth century, with no law to punish fraudulent trustees proper till 1857, and with no law to punish the falsification of accounts, except in a few special cases, till 1875, certainly show that it is possible to exaggerate the importance of the criminal law.

There is no statutory definition of forgery. The accepted common law definition is "making a false document with "intent to defraud." Much discussion has taken place as to the meaning of the expression "making a false document";

[1] See my *Digest*, articles 367, 368; 28 & 29 Vic. c. 124, ss. 6 and 8, ought to be added to the statutes referred to in note 2.

[2] 38 & 39 Vic. c. 24. I owe the information in the text to Sir J. Lubbock.

as to the meaning of "an intent to defraud"; and as to the nature of the evidence by which such an intent must be proved, and as to the cases in which it is to be assumed. I do not think that the history of these discussions has much interest. The result of them and the special forms which they have assumed are given in my [1] *Digest*. I may, however, make one observation on the "intent to defraud."

The meaning of the phrase would be more exactly though less neatly expressed if it was "with intent to deceive in such "a manner as to expose any person to loss or the risk of loss." The object of a forger is nearly always his own advantage, and he thinks that in many cases he will be able to gain his own object without ultimate loss to any person, and it is not at once obvious that such an intention is fraudulent. The Draft Penal Code proposed (p. 316) to define forgery as "the "making of a false document, knowing it to be false, with "the intention that it shall in any way be used or acted upon "as genuine." This would have avoided all questions about intent to defraud, though it would have been hardly possible to forge any document referred to in the Code without an intent to defraud. In my own personal opinion, the provisions of the Draft Code on this subject were too minute, and might advantageously have been replaced by a few provisions of greater generality.

There is the same kind of contrast between the law of England and the provisions of the French and German codes on forgery as there is between their respective laws as to coinage offences. Without going into details as to the various offences which are provided for I may observe that the classes of documents which may be forged mentioned in the *Code Pénal* are not more specially described than by the words "actes," "écriture authentique et publique," "écriture de "commerce ou de banque," "écriture privée" (see articles 145-152). The corresponding expressions in the *Strafgesetzbuch* are "inländische oder ausländische offentliche Urkunde," "eine solche privat Urkunde, welche zum Beweise von rechten "oder rechtsverhältnissen von Erheblichkeit ist" (Art. 267, &c.). This extreme conciseness contrasts strongly with the

[1] Articles 355, 356, 357, pp. 266-273.

CH. XXIX. extraordinary minuteness of the English law. The French "écriture de banque" would no doubt include our "note or "bill of exchange of the governor and company of the Bank "of England, or of the governor and company of the Bank "of Ireland, or of any other body corporate, company, or "person carrying on the business of bankers, commonly called "a bank note, a bank bill of exchange, or a bank post bill, or "any indorsement on or assignment of any bank note, bank "bill of exchange, or bank post bill." It would also, however, include many other things, it is difficult to say precisely what. As to the German "private document important to "the proof of rights or legal relations" it would cover anything from an order to a tradesman for a quire of paper up to the title-deeds of a great estate, and I suppose it would include all bank notes and all commercial paper.

I now come to malicious injuries to property. The law on this subject is contained in 24 & 25 Vic. c. 97, which re-enacts with variations and additions an earlier act on the same subject, 7 & 8 Geo. 4, c. 30, passed in 1827.

The only offence of the kind known to the common law was arson, called in the ancient laws "*bernet*." The common law offence, however, has long since merged in wider statutory enactments. All the law on the subject for centuries past has consisted of a [1] number of statutes passed from time to time for the punishment of particular kinds of mischief which happened to attract attention. The earliest act of the kind was the Statute of Westminster, 13 Edw. 1, st. 1, c. 46, which related to the throwing down of enclosures rightfully made by a person entitled to approve a common. Arson was [2] deprived of benefit of clergy under the Tudors, and one or two statutes were passed for the punishment of injuries to trees in the reigns of Henry VIII. and Charles II., and as to the destruction of ships in the reigns of [3] Charles II. and [4] Anne, but singularly little legislation of this kind took place till before the beginning of the reign of George I. I may, how-

[1] They are stated in detail in East, *Pl. Cr.* pp. 1015-1017.

[2] There was a strange intricate question as to this, owing probably to a slip in the drafting of 1 Edw. 6, c. 12, s. 10, which was considered to have been remedied by a forced construction put upon a statute of Philip and Mary. See East, *Pl. Cr.* pp. 1016-1017.

[3] 22 & 23 Chas. 2, c. 11. s. 12.

[4] 1 Anne, st. 2, c. 9.

ever, notice one of the earlier acts because of its quaintness, and also because it has a family resemblance to a famous act of a much later date and much greater severity. In 1545 was passed an act (37 Hen. 8, c. 6) which began with the following preamble: "Where divers and sundry malicious and "curious persons being men of evil and perverse dispositions, "and seduced by the instigation of the devil, and minding "the hurt, undoing and impoverishment of divers of the "king's true and faithful subjects, as enemies to the common-"wealth of this realm and as no true and obedient subjects "unto the king's majesty, of their malicious and wicked "minds have of late invented and practised a new damnable "kind of vice, displeasure, and damnifying of the king's true "subjects, and the commonwealth of this realm, as in secret "burning of frames of timber prepared and made by the "owners thereof ready to be set up and edified for houses, "cutting out of heads and dams, of pools, motes stews and "several waters; cutting off conduit heads or conduit pipes; "burning of wains and carts loaded with coals or other goods; "burning of heaps of wood cut, felled, and prepared for "making of coals; cutting out of beasts' tongues: cutting "off the ears of the king's subjects: barking of apple-trees, "pear-trees, and other fruit trees, and divers other like kinds "of miserable offences." The burning of frames was made felony, but with benefit of clergy; the other offences named were subjected to a fine of £10, a very inadequate punishment for cutting off a man's ear, or burning his wood, even if we have regard to the change in the value of money.

I have given the substance of this act fully in order to contrast it with the provisions of the Black Act of 1722 which was the next act which dealt with so large a number of cases of malicious mischief. It punished not only offences relating to deer and the offence of maliciously shooting at any person, but it also punished as a felon, without benefit of clergy, every person who should "unlawfully and maliciously "knock down the head or mound of any fishpond whereby "the fish should be lost or destroyed; or shall unlawfully or "maliciously kill, maim, or wound any cattle, or cut down "or otherwise destroy any trees planted in any avenue or

CH. XXIX.

" growing in any garden, orchard, or plantation, for ornament, " shelter, or profit; or shall set fire to any hovel, cock, moor, " or stack of corn, straw, hay, or wood." These are almost identical with the offences punished by the statute of Henry VIII. with a fine of £10.

All through the reigns of George II. and George III. acts were passed punishing different instances of the crime of malicious mischief. Provisions to this effect were often introduced apparently by accident or caprice into acts which had totally different objects. For instance, the title of 9 Geo. 3, c. 41 (1769) is as follows: "For regulating the fees of " officers of his majesty's customs in the provinces of Sene- " gambia in Africa, for allowing to the receivers general of " the duties on offices and employments in Scotland a proper " compensation for their troubles and expenses, for the better " preservation of holms, thorns and quicksets in forests, chases, " and private grounds, and of trees and underwoods in forests " and chases; and for authorising the exportation of a limited " quantity of an inferior sort of barley called bigg from the " port of Kirkwall in the islands of Orkney." [1]

In the Repealing Act of 1827 (7 & 8 Geo. 4, c. 27) the number of statutes repealed which relate to acts of malicious mischief to property are as follows: one of Edward I., two of Henry VIII., two of Charles I., one of William and Mary, two of Anne, three of George I., five of George II., eleven of George III., and one of George IV., which had modified the punishments inflicted on frame-breakers by several acts of George II. and George III. The law was consolidated by 7 & 8 Geo. 4, c. 30, which was repealed and re-enacted by 24 & 25 Vic. c. 97, which is now in force.

The provisions of the present statute on the subject embody not only those of the act of George IV. but several later enactments, and like the other acts which I have mentioned show traces, when closely examined, of the effect

[1] One of the oddest instances of this style of legislation which I have met with is the following bit of the Repealing Act (7 & 8 Geo. 4, c. 27): " It " repeals the whole of an act" (19 Geo. 3, c. 74) " intituled 'an act to " 'explain and amend the laws relating to the transportation, imprisonment, " 'and other punishment of certain offenders, except so much thereof as " 'relates to the judges' lodgings.'" This is certainly calculated to imply that the judges' lodgings were places of imprisonment for offenders.

of the gradual abolition of the punishment of death with regard to mischievous arsons.

The following are the classes of subjects to which it relates. Arson and other injuries to property by fire or by explosive substances; injuries to buildings; injuries to different kinds of growing crops and animals; injuries to mines; injuries to river banks and other works connected with water; injuries to railways and telegraphs; offences by which ships are injured or endangered.

There would be no interest in discussing the details of these enactments. I will give one as a specimen. The Waltham Black Act, 9 Geo. 1, c. 22 (1722) was originally to continue in force for three years only; but it was continued by 12 Geo. 1, c. 20, and again by 6 Geo. 2, c. 27, which also enacted that any one who, whilst the Black Act continued in force, should maliciously cut any hopbinds growing on poles in any plantation of hops should suffer death as a felon without benefit of clergy. After other re-enactments and changes which I need not mention, the enactment as to hopbinds found its way into 7 & 8 Geo. 4, c. 30, s. 18, the capital punishment being reduced to a maximum of fourteen years' transportation, and from this act it was taken into 24 & 25 Vic. c. 97, where it forms s. 19.

There is not so marked a contrast between the English law on the one hand and the French and German codes on the other on this subject as I have remarked in reference to the offences of forgery and coining.

The provisions of the *Code Pénal* upon this matter will be found in articles 434-463 under the general title of "destruc-"tion, degradation, dommages." The German law is to be found in articles 303-330 under the heads of "Sachsbeschä-"digung" and "gemeingefährliche Verbrechen und Ver-"gehen."